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Rethinking Lawyer Ethics to Allow the Rules of Evidence, Rules of Civil Procedure, and Private Agreements to Control Ethical Obligations Involving Inadvertent Disclosures

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**RETHINKING LAWYER ETHICS TO ALLOW THE RULES OF
EVIDENCE, RULES OF CIVIL PROCEDURE, AND PRIVATE
AGREEMENTS TO CONTROL ETHICAL OBLIGATIONS
INVOLVING INADVERTENT DISCLOSURES**

TORY L. LUCAS*

ABSTRACT

This Article seeks to align the rules of ethics with the rules of evidence, rules of civil procedure, and private agreements in confronting the vexing issue of inadvertent disclosures. It proposes a clear-eyed modification of Model Rule of Professional Conduct 4.4(b) to require a lawyer to use an inadvertent disclosure of confidential or privileged information unless prohibited by the rules of evidence, rules of civil procedure, or private agreement. This inadvertent-disclosure proposal fairly balances the interests of the justice system, civility in the legal profession, and protection of clients.

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INTRODUCTION

The ethics rules that regulate inadvertent disclosures of confidential or privileged information are a mess.¹ When dealing with inadvertent disclosures, American lawyers currently face unclear, ill-defined, and non-uniform ethics rules.² This Article seeks to clarify the vexing issue of inadvertent disclosures by aligning the rules of ethics with the rules of evidence, rules of civil procedure, and private agreements. Instead of addressing state rules of ethics on a piecemeal basis, this Article focuses on the Model Rules of Professional Conduct to propose a clear-eyed modification of Model Rule 4.4(b) that requires a receiving lawyer to use an inadvertent disclosure of confidential or privileged information unless prohibited by the rules of evidence, rules of civil procedure, or private agreement.³ This inadvertent-disclosure proposal fairly balances the interests of the justice system, civility in the legal profession, and protection of clients.⁴

1. “Even though inadvertent disclosures of this sort are becoming increasingly common . . . the law governing the subject is still unsettled. Courts, rules drafters, and ethics opinions have offered conflicting advice about what receiving lawyers must do under these circumstances.” Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 768–69 (2005). See also Ill. State Bar Ass’n, Comm. on Prof’l Conduct, Advisory Op. 98-04, 1999 WL 35561, at *2 (Jan. 1999) (recognizing that although rules of professional conduct “provide a framework for the analysis, neither the Rules, prior ISBA advisory opinions, ethics opinions from other jurisdictions or case law provide satisfactory answers to [inadvertent disclosure] questions”); *id.* (lamenting that “[o]ther committees concerned with professional conduct have also reached quite different conclusions on these issues”).

2. See, e.g., James M. Fischer, *Ethically Handling the Receipt of Possibly Privileged Information*, 1 ST. MARY’S J. LEGAL MAL. & ETHICS 200, 205 (2011) (attempting “to provide a clear, clean set of rules that lawyers may apply in lieu of the incomplete and uncertain guidelines and balancing tests that currently exist” in the areas of inadvertent and unauthorized disclosures); Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 196 (2010) (“In most jurisdictions, professional conduct rules provide limited guidance in addressing these questions.”); *id.* at 242 (“Professional conduct rules should say what they mean and mean what they say, particularly in addressing an increasingly common dilemma [of inadvertent disclosures]. The bar’s expectation should not be a moving target.”); N.Y. Bar Ass’n Comm. on Prof’l and Judicial Ethics, *Formal Opinion 2003-04: Obligations Upon Receiving A Communication Containing Confidences or Secrets Not Intended for The Recipient*, 59 THE RECORD 420, 422 (2004) (Dec. 2003) (“Ethics opinions and rules have been far from uniform in answering [inadvertent disclosure] questions. . .”).

3. This Article is not the first to explore the intertwined purposes of the rules of ethics, rules of evidence, and rules of civil procedure when analyzing the proper response to inadvertent disclosures. See, e.g., John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 FORDHAM L. REV. 1589 (2013).

4. This Article addresses these values, which admittedly are not the only values implicated by inadvertent disclosure law. One scholar has argued 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

Currently, Model Rule 4.4(b) lightly governs inadvertent disclosures through a simple notification obligation that requires a receiving lawyer to notify the opposing lawyer. But then the Comments arm a receiving lawyer with a false sense of ethics that allows him to serve the client to whom the confidential or privileged information belongs over his own client. The Comments actually foist a two-tiered system of ethics upon unsuspecting clients of receiving lawyers—some clients reap the legal benefits that allow for the use of inadvertent disclosures while less fortunate clients receive none of those benefits. What is worse is that the client to whom no benefits flow remains blissfully ignorant that his lawyer chose to serve the opposing lawyer's client without so much as a courtesy letter to that effect.

This Article explores a simple and straightforward option that liberates a receiving lawyer from a conflicting choice on how to respond to an inadvertent disclosure. Perhaps surprisingly, this Article suggests that the ethical obligation of a receiving lawyer does not—and should not—reside in the rules of ethics themselves. Instead, a receiving lawyer's choice on the proper ethical response to inadvertent disclosures should be guided by the rules of evidence, rules of civil procedure, and private agreements.

Part I of this Article gives an overview of where the law governing inadvertent disclosures currently stands. Part II provides the historical development of the law of inadvertent disclosures and how it has been interpreted. Part III proposes an amendment to Model Rule 4.4(b) to provide clarity to the murky issue of inadvertent disclosures. Part IV explores the practical impact of this proposal. Finally, Part V cautions that legal ethics should not supersede societal values; they should reflect them.

I. WHERE ARE WE NOW: MODEL RULE OF PROFESSIONAL CONDUCT 4.4(B)

The appropriate place to begin assessing any issue is its current state. The issue of inadvertent disclosures touches every jurisdiction that regulates the legal profession through rules of ethics, though these rules are far from uniform.⁵ For ease of analysis and reference, however, this Article focuses on the Model Rules of Professional Conduct. Currently, Model Rule 4.4(b) takes a hands-off approach when regulating lawyers who receive inadvertent disclosures by creating a simple notification obligation:

considerations that go into lawmaking more generally, such as the reduction of contracting costs.” Perlman, *supra* note 1, at 770.

5. See generally Ill. State Bar Ass'n, *supra* note 1 (explaining that various ethics rules and opinions generally ranged from requiring the receiving lawyer to notify and return upon request to notify only to retain and potentially use).

A lawyer who receives a document or electronically stored information⁶ relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent⁷ shall *promptly notify* the sender.⁸

The purpose of this notification obligation is to permit the person who inadvertently disclosed the information "to take protective measures."⁹ This Article wholeheartedly supports this ethical notification obligation as a professional courtesy.¹⁰ Frustratingly, however, the Comments to Model Rule 4.4(b) cover this clear-eyed notification obligation with an opaque veneer that simultaneously thrusts a problematic choice upon receiving lawyers and exposes unwitting clients to a loss of available legal benefits.¹¹

Although the Comments properly avoid having the rules of ethics determine "whether the privileged status of a document or electronically stored information has been waived"¹² as a "matter of law beyond the scope of these Rules,"¹³ a

6. "[A] document or electronically stored information" means "paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as 'metadata'), that is subject to being read or put into readable form." MODEL RULES OF PROF'L CONDUCT r. 4.4(b) cmt. 2 (AM. BAR. ASS'N 2016) [hereinafter MRPC].

7. "A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted." *Id.*

8. MRPC 4.4(b) (italics added).

9. *Id.* at cmt. 2.

10. This Article does not dispute that there exists "a professional consensus that the lawyer should notify opposing counsel when the lawyer receives material that is apparently privileged." Fischer, *supra* note 2, at 240.

11. One author employed Greek mythology to describe the conundrum a lawyer faces when receiving inadvertent disclosures. Invoking the horrific choice between two awful options—being between Scylla and Charybdis—the author opined that "human traits—the desire not to oppress those who are weaker and the desire to champion those who are dependent on one's care—pull lawyers in two directions" such that lawyers "feel bound to use our skills and knowledge for the clients who have committed their welfare to our keeping, but we are simultaneously uneasy about using all the strength we have as Goliaths of expertise when our adversary lacks even David's sling and stones." Lizabeth L. Burrell, *Between Scylla and Charybdis: The Importance of Internal Calibration in Balancing Zeal for One's Client with Duties to the Legal System When Your Adversary is Incompetent*, 23 U.S.F. MAR. L.J. 265, 267 (2011). Disagreeing with that analogy, this Article contends that a lawyer who receives inadvertent disclosures does not stand between Scylla and Charybdis, because there are not two equally opposing, equally bad choices laid before him. The receiving lawyer simply must choose the superior of two conflicting choices.

12. MRPC 4.4(b) cmt. 2.

13. *Id.* One law professor has recognized that "the ABA has been steadfast in its assertion that inadvertent disclosure raises a legal, rather than a professional conduct, issue." Schaefer, *supra* note 2, at 232. This Article proposes that the Model Rules fully confront and answer the question of whether an attorney who receives inadvertent disclosures has an ethical obligation to use those materials to the fullest extent of the law.

follow-up Comment creates a dual-tiered set of ethical possibilities. On the one hand, the Comments recognize that a receiving lawyer might choose to read—and perhaps use—inadvertent disclosures for the benefit of his client.¹⁴ On the other hand, the Comments entice a lawyer to avoid the slightest urge to see if the law allows the use of inadvertent disclosures to aid the lawyer’s client.¹⁵ In opposition to the interests of the receiving lawyer’s client, the Comments authorize the receiving lawyer to “choose to return a document or delete electronically stored information unread . . . when the lawyer learns before receiving it that it was inadvertently sent.”¹⁶ This unilateral choice to protect someone else’s client who falls victim to inadvertent disclosures over considering whether the receiving lawyer’s own client has the lawful right to use that material is perplexing.¹⁷ What is more perplexing is the “ethical guidance” that directly follows: “Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer.”¹⁸ Why does this guidance focus on what is not required under applicable law as opposed to focusing on what is allowed under applicable law? This guidance seemingly turns traditional ethical obligations to a client’s cause on their head. Such an approach is precisely backward and drives this proposal to ensure that a receiving lawyer properly serves his client. Before unveiling the proposed modification, it is wise to explore how we arrived at the present state of affairs.

II. HOW DID WE GET HERE: AN HISTORICAL LOOK AT HOW THE INADVERTENT DISCLOSURE JOURNEY STARTED ON THE WRONG ETHICAL COURSE BUT HAS BEEN HEADING TOWARD THE CORRECT DESTINATION

The path to the proper ethical response to inadvertent disclosures has been traversed for decades. Although ethics rules have not followed an ideal path to where we find ourselves today, we nevertheless stand at the door to the proper solution. This Article recounts—and simultaneously criticizes—the history of inadvertent disclosures and contends that this long journey naturally leads to this Article’s proposal.

14. MRPC 4.4(b) cmt. 3.

15. *See id.*

16. *Id.*

17. One article that addresses erroneous disclosures of confidential information contends that the “purported justifications for covering up for an adversary lawyer, to the prejudice of one’s own client, are simply excuses for what George Bernard Shaw would call a conspiracy of professionals against the laity.” Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179 (2006) (citing GEORGE BERNARD SHAW, *THE DOCTOR’S DILEMMA* act I (1908), reprinted in 1 COMPLETE PLAYS WITH PREFACES, 110 (Dodd, Mead & Company 1963).

18. MRPC 4.4(b) cmt. 3 (citing Rules 1.2 and 1.4).

A. *ABA Formal Opinion 92-368*

To get a fair understanding of the historical ethical developments on inadvertent disclosures, our journey begins in 1992. An entire decade before the Model Rules of Professional Conduct explicitly regulated the ethical obligations of a lawyer who receives inadvertent disclosures, the American Bar Association (the “ABA”) Committee on Ethics and Professional Responsibility (the “Committee”) first confronted inadvertent disclosures in ABA Formal Opinion 92-368.¹⁹ Unfortunately, the Committee charted the wrong course on the proper ethical response to inadvertent disclosures.²⁰ Placing ethical obligations squarely on the lawyer who receives privileged or confidential materials not intended for him, the Committee opined that the receiving lawyer ethically must refrain from looking at the materials, notify the lawyer who sent them, and abide by that lawyer’s instructions.²¹ What was the precise ethical rule that counseled this conclusion that essentially forced the receiving lawyer to work for the opposing lawyer’s client? There was no rule.

In considering the ethical obligations of the receiving lawyer, the Committee admitted that it could not answer this straightforward ethical question “from a narrow, literalistic reading of the black letter of the Model Rules.”²² Instead of defining and applying an ethics rule, the Committee placed significant weight on “the thoughts in the Preamble” that revealed how “difficult issues of professional discretion” often can only “be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”²³ Insisting that the receiving lawyer protect the confidences of the opposing lawyer’s client, the Committee placed tremendous weight on “the precepts underlying the Model Rules.”²⁴ Recognizing that the entirety of the black-letter ethics rules cannot “exhaust the moral and ethical considerations that should inform a lawyer,”²⁵ the Committee departed from a rules-based analysis. Instead, it sought shelter in a “larger, and more fundamental, framework” that included “(i) the importance the Model Rules

19. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 92-368 (1992) [hereinafter Formal Op. 92-368].

20. Ill. State Bar Ass’n, *supra* note 1 (“ABA Formal Opinion 92-368 . . . places the burden on the wrong party, asking the receiving lawyer to act contrary to the interests of that lawyer’s client in order to protect the interests of the careless lawyer and that lawyer’s client.”).

21. Formal Op. 92-368, *supra* note 19. This is akin to creating a rule in a competitive card game that if you show your cards to an opponent, you have a legitimate expectation that your opponent will not look. At least in the first instance, such a rule places responsibility in the wrong person. See Mass. Bar Ass’n, Comm. on Prof’l Ethics, Op. 1999-4 (1999) (opining that a duty of zealous representation for one’s own client forbids a receiving lawyer from returning a privileged letter).

22. Formal Op. 92-368, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Id.*

give to maintaining client confidentiality, (ii) the law governing waiver of the attorney-client privilege, (iii) the law governing misstated property, (iv) the similarity between the circumstances here addressed and other conduct the profession universally condemns, and (v) the receiving lawyer's obligations to his client."²⁶

This "larger, and more fundamental, framework" for considering ethical obligations—with hardly any analysis of the ethics rules—freed the Committee to trek an odd analytical path that placed significant ethical restraints on the receiving lawyer. The Committee first explored how "confidentiality is a fundamental aspect of the right to the effective assistance of counsel."²⁷ Curiously, the Committee analyzed only two ethics rules in concluding that the receiving lawyer must bow to the wishes of the sending lawyer when it comes to inadvertent disclosures. First, the Committee recognized that "Model Rule 1.6 codifies a lawyer's obligation to keep the confidences of his client."²⁸ In breathtaking fashion, the Committee used ethereal policy arguments to identify a "strong policy in favor of confidentiality" that allowed it to openly dissemble Rule 1.6 to place its duty on the shoulders of the receiving lawyer rather than the sending lawyer.²⁹ Second, the Committee gave a slight and fleeting nod to the notion that ethics rules actually might require a receiving lawyer to use inadvertent materials for the benefit of his client. Reservedly acknowledging a long history of ethics rules requiring a lawyer to zealously advocate for his client,³⁰ the Committee quickly dismissed this line of analysis by explaining that "there are many limitations on the extent to which a lawyer may go 'all out' for the client" that restrain "uncontrolled advocacy."³¹

The Committee hardly sought to balance the obligations that sending and receiving lawyers owed to their respective clients.³² Instead of a fair analysis of

26. *Id.*

27. Formal Op. 92-368, *supra* note 19.

28. *Id.*

29. *Id.* To be fair, inadvertent "disclosures create a dilemma for both sending and receiving attorneys: The sender wants to mitigate the damage, while the recipient wants to use the information to the extent doing so does not violate any legal or professional conduct obligations." Schaefer, *supra* note 2, at 195.

30. Formal Op. 92-368, *supra* note 19. On the possibility that ethics rules might require a receiving lawyer to use inadvertent disclosures for his client's benefit, the Committee cited "the 'zealous' representation of Canon 7 of the Model Code of Professional Responsibility" and the requirement "that a lawyer's 'commitment and dedication to the interests of the client' referred to in the Comment to Model Rule 1.3" might obligate the receiving lawyer "to capitalize on an error of this sort on the part of opposing counsel." *Id.*

31. *Id.*

32. The Committee's lack of desire to scour the Model Rules to analyze the ethical responsibilities of both the sending lawyer and receiving lawyer is disappointing. Because the Committee did not conduct a rules-based analysis of the proper ethical response to inadvertent disclosures, this Article will forego doing so, because such an analysis is unnecessary to support

the rights of each client, the Committee myopically focused on the strawman harms caused by the receiving lawyer's use of inadvertent disclosures while heaping utopian protections on the opposing lawyer's client.³³ This Article's proposal more fairly balances the interests of both clients while acknowledging that the rules of evidence, rules of procedure, and private agreements provide far better protections than a perverse reading of various penumbras of ethics rules.

As to the rules of evidence, the Committee wrote that courts tend to show, "with few exceptions, an unwillingness to permit mere inadvertence to constitute a waiver" of the attorney-client privilege when a lawyer inadvertently discloses client materials.³⁴ The Committee recognized that early in the evolution of the issue, the majority of courts created a negligence test to decide when inadvertent disclosures waived the privilege.³⁵ With a wink to analytical balance, the Committee recognized "the minority view" that "any unforced disclosure of attorney-client privileged communications destroys confidentiality and

this Article's proposal. Suffice it to say that a number of Model Rules are relevant when considering inadvertent disclosures. *See* MRPC 1.1 (mandating that a lawyer "provide competent representation to a client," which arguably applies to the sending lawyer's obligation to protect privileged information and the receiving lawyer's obligation to use inadvertent disclosures if permitted under the governing substantive law); MRPC 1.2 (obligating a lawyer to "consult with the client as to the means by which [the objectives of representation] are to be pursued," which arguably requires a lawyer to advise a client and get informed consent before the lawyer waives the legal right to use inadvertent disclosures); MRPC 1.3 (requiring that a lawyer "act with reasonable diligence and promptness in representing a client" could support either use or nonuse of inadvertent disclosures depending on how one interprets Comment 1; favoring use if one must zealously advocate for a client's interest; favoring nonuse if one avoids trying to "press for every advantage" by exercising restraint through "professional discretion in determining the means by which a matter should be pursued"); MRPC 1.4 (requiring that a lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished" probably requires informing the client if the lawyer wishes to forego pursuing the legal benefits available to a client through the use of inadvertent disclosures); MRPC 1.6(a) (placing the duty to protect confidential information directly and only on the lawyer who represents that client); *Id.* at (c) (mandating that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," which clearly and unmistakably does not place the ethical obligation on inadvertent disclosures on the receiving lawyer); MRPC 1.7 (obligating a lawyer to avoid conflicts of interest arguably prohibits a lawyer who receives inadvertent disclosures of privileged or confidential information to serve an opposing client over a current client if substantive rules authorize the use of that information unless the lawyer gets the informed consent of the client to forego such use). *See also* Ill. State Bar Ass'n, *supra* note 1 (hypothesizing that a receiving lawyer may violate his ethical obligations by *not* using inadvertent disclosures because that would create a conflict of interest in that the receiving lawyer would serve the sending lawyer's client at the expense of his own).

33. For example, it seems hardly debatable to readily recognize that receiving lawyers "as fiduciaries are necessarily—and rightly—influenced by the interests of their own clients." Schaefer, *supra* note 2, at 246.

34. Formal Op. 92-368, *supra* note 19.

35. *Id.*

terminates the privilege.”³⁶ Dismissing these courts as being hostile to the attorney-client privilege, the Committee preened that “the Model Rules *certainly* reflect a far more positive view toward the importance of maintaining the confidentiality of attorney-client communications.”³⁷

Before moving so quickly to the Committee’s next specious argument, it is important to ask whether it was prudent for the Committee to interpret various penumbras of the rules of ethics without properly analyzing the importance of the rules of evidence. The intersection of the rules of ethics and the rules of evidence requires one to stop and pause. Indeed, the approach to this tricky intersection determines whether the law takes the proper path toward the proper conclusion. The Committee’s early decision to ignore the legal rights that clients might enjoy from the rules of evidence was the precise moment that ethics rules veered off the proper course. If the rules of evidence allow the use of inadvertent disclosures to support a client’s case, why would the rules of ethics interfere with such use? That question lies at the heart of this criticism toward the current state of ethics. But instead of pontificating on an abstract preamble, suffice it to say for now that the rules of ethics should look to the rules of evidence for guidance on how to resolve the issue of inadvertent disclosures.

After the Committee completed its shallow analysis of the ethics rules and displayed a lack of curiosity of how the rules of evidence might elucidate the proper response to inadvertent disclosures, the Committee analyzed the law of bailments.³⁸ Yes, the Committee employed the theory of bailments to bolster its conclusion that a receiving lawyer’s ethical obligations run toward the opposing lawyer’s client.³⁹ Even though the Committee freed itself from the strictures of black-letter ethics rules,⁴⁰ it was content to rely on the “black letter of the law of bailment” under property law. This reliance on the law of property is a mistaken

36. *Id.*

37. *Id.*

38. *Id.*

39. See Peter C. Scott & Valerie C. Raudonis, *Practical Ethics: Inadvertent Disclosure of Confidential Materials*, 5 NEW HAMPSHIRE BAR NEWS (n.s.) 6, 6 (Sept. 7, 1994) (agreeing that ABA Formal Opinion 92-368’s bailment analogy “stretches the Opinion’s analysis to its limits”).

40. To be fair, it is a misguided belief that a black-letter rule can be created for every situation. Indeed, the Model Rules “are rules of reason;” their interpretation should serve “the purposes of legal representation” and “the law itself.” MRPC preamble [14]. Preamble 15 underscores how legal ethics simply are part of the larger fabric of the law itself:

The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

Id. at preamble [15]. Buttressing this Article’s proposal, reason dictates that the rules of ethics indeed should look to “the larger fabric of the law” to clothe itself on the proper response to inadvertent disclosures. Any other response leaves the receiving lawyer’s client naked in stark contrast to the protective clothing draped on the opposing lawyer’s client.

diversion because the rules of evidence, rules of civil procedure, and private agreements should govern a receiving lawyer's ethical response to inadvertent disclosures. In applying the law of bailment, the Committee concluded that a receiving lawyer must not use inadvertent disclosures.⁴¹ Strikingly, the Committee admitted that the black-letter law of property was not entirely clear by recognizing that a bailee's right to use bailed property "is governed by the intention of the parties to the bailment."⁴² Bailment law gives the parties the option to rely on express agreements to govern the use of bailed property.⁴³ Ultimately, the Committee awkwardly admitted that there really is "no rule of universal application" and confessed that every "case must be governed by its own circumstances."⁴⁴ One circumstance that would impact the ability of a bailee to use bailed property would be a case in which "the consent of the owner to the use may be fairly presumed."⁴⁵ This reluctant acknowledgement forms a primary consideration in crafting a proposed amendment to the rules of ethics. As yet another tease, this Article's proposed rule of ethics would authorize lawyers to enter private agreements on the use of inadvertent disclosures, which would entirely remove any consideration of how general rules of bailment would govern the issue.

The Committee then oddly diverted to discuss the proper ethical response when parties agree to a key term in a contract that is then inadvertently omitted from the final written contract.⁴⁶ The Committee explained that an older ethics opinion relied on Model Rules 1.2(d) and 4.1(b) to announce that a lawyer could not engage in fraud by capitalizing on a clerical error.⁴⁷ Admitting that the fraud opinion was "not on all fours with the instant situation," the Committee nonetheless was persuaded by "its charitable view toward inadvertence, its unwillingness to permit parties to capitalize on errors, its recognition of a limitation on client decision-making authority and its respect for the role of counsel all support the position advanced in this opinion as to counsel's proper conduct upon the inadvertent receipt of confidential information."⁴⁸ Building on its "dim view" of lawyers' trying to "take advantage" of confidential information, the Committee felt that its conclusion was bolstered by this analysis.⁴⁹ Because this analogy is removed from common sense, this Article will continue without a response.

41. Formal Op. 92-368, *supra* note 19.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Formal Op. 92-368, *supra* note 19.

47. *Id.*

48. *Id.*

49. *Id.*

Finally, in a section entitled “Good Sense and Reciprocity,” the Committee gave a nod to imprecise notions of reciprocity and courtesy among lawyers to bolster its conclusion that a receiving lawyer’s obligations run less toward his client and more toward the opposing lawyer’s client.⁵⁰ In a flurry of unconstrained anecdotes and undocumented claims, the Committee suggested that “[t]he credibility and professionalism inherent in *doing the right thing* can, in some significant ways, enhance the strength of one’s case, one’s standing with the other party and opposing counsel, and one’s stature before the court.”⁵¹ This list of virtues are mere conclusions rather than reasons.⁵² Finding no benefit to a receiving lawyer’s use of inadvertent disclosures, the Committee concluded that the opposing lawyer controls all confidential, privileged information and materials after disclosure.⁵³ This control even extends to the receiving lawyer’s ethical obligations.⁵⁴ This Article’s proposal also seeks to “do the right thing” while applying good sense and reciprocity, yet it does so without forcing a receiving lawyer to labor under a conflict of interest.

The Committee made a good-faith effort in its first impression to resolve the ever-increasing problem of inadvertent disclosures.⁵⁵ The Committee should be applauded for recognizing the “increasingly important” question of how to handle inadvertent disclosures and for having the foresight to predict that it would become “ever more likely that through inadvertence, privileged or

50. *Id.* But see Freedman, *supra* note 17, at 180 (“The traditional ethic of zeal is another casualty of this insistence on an overriding obligation of ‘professional courtesy,’ or of taking care of each other to our clients’ detriment.”).

51. Formal Op. 92-368, *supra* note 19 (italics added).

52. Nevertheless, this Article will demonstrate that these virtues actually are best served by a rule of ethics that looks to rules of evidence, rules of civil procedure, and private agreements on inadvertent disclosures.

53. Formal Op. 92-368, *supra* note 19.

54. *Id.*

55. One scholar implicitly supported the Committee’s analytical approach to inadvertent disclosures:

Because rules are inherently limited, when they fail to afford adequate direction, lawyers should not automatically do what appears to be in the immediate best interests of their clients. Rather, it is precisely in the moment of convergence created by unclear or inapplicable rules and potentially conflicting legal values and obligations that an attorney has a heightened duty to exercise professional judgment and discretion. This discretion need not be arbitrary and ungrounded. To guide it, lawyers should bring to ethical decision making the same processes and modes of analysis they apply to other legal puzzles. Thus, when addressing ethical questions, the text of the rules is the obvious starting point. However, if that text does not provide clear guidance, then lawyers ought next to consult the purposes behind the rules and the principles upon which they rest.

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, 1295–96 (1999).

confidential materials will be produced to opposing counsel.”⁵⁶ The Committee’s most critical error was its failure to explore how rules of legal ethics properly intersect with the rules of evidence, rules of civil procedure, and private agreements. Simply put, the Committee looked in the wrong direction, even if for the right reasons. The Committee seemed obsessed with placing obligations on the receiving lawyer that ran toward the opposing client while spending little time pondering whether the receiving lawyer’s client had any substantive rights. A glancing read of the Committee’s opinion leaves one with the notion that the Committee had formed its conclusion and then reasoned toward it. In the process, the Committee deployed a paternalistic approach toward the opposing lawyer’s client and ignored options available to the receiving lawyer’s client.

In analyzing toward a pre-calculated conclusion to protect the confidences of an opposing lawyer’s client, the Committee missed an opportunity to serve the clients of both the receiving lawyer and opposing lawyer. This Article’s proposal seeks to balance the interests of both clients without tipping the scales in one direction. If a lawyer wants to protect the inadvertent disclosures of privileged information belonging to another lawyer’s client, then that lawyer has two voluntary choices. First, the lawyer may—after full disclosure and informed consent—enter a private agreement with his client that prohibits that lawyer from reviewing or attempting to use inadvertent disclosures. This option creates a unilateral disarming of a client’s ability to use inadvertently disclosed materials even if the rules of evidence and rules of civil procedure would allow such use. Second, the lawyer may enter a private agreement with another lawyer that precludes both lawyers from using inadvertent disclosures. This second option offers a bilateral agreement in which neither client receives the benefits that the law might afford for the use of inadvertent disclosures while ensuring that neither client suffers the burdens either.

Even though private agreements are appropriate methods to address inadvertent disclosures, this Article contends that a set of default rules on how to respond to inadvertent disclosures should reside in the rules of evidence and rules of civil procedure. If in the interest of justice, the rules of evidence and rules of civil procedure authorize the use of inadvertent disclosures, only a perverse sense of justice would instigate that the rules of ethics should preempt such use.

There remains one more criticism of ABA Formal Opinion 92-368. By disregarding the black-letter ethics rules in favor of a “larger, and more fundamental, framework” that relied on “the thoughts in the Preamble,”⁵⁷ the Committee handcuffed the receiving lawyer’s ability to use inadvertent disclosures for the benefit of his client. If the Preamble’s thoughts indeed

56. Formal Op. 92-368, *supra* note 19.

57. *Id.*

established a larger, and more fundamental, framework for considering ethical obligations, there are other parts of the Preamble that favor the receiving lawyer's use of inadvertent disclosures to aid his client and not the opposing lawyer's client.

Preamble 2 recognizes that lawyers perform a myriad of functions with differing responsibilities.⁵⁸ When serving as a trusted advisor, a lawyer must provide his "client with an informed understanding of the client's legal rights and obligations" while explaining "their practical implications."⁵⁹ When serving in an advocate role, the lawyer must "zealously assert[] the client's position under the rules of the adversary system."⁶⁰ When serving as a negotiator, a lawyer must seek results "advantageous to the client but consistent with requirements of honest dealings with others."⁶¹ When serving as an evaluator, a lawyer must examine "a client's legal affairs" and report "about them to the client or to others."⁶² Every one of these roles intimates how a lawyer should respond to inadvertent disclosures. The first and most pressing obligation is to explain to the client his rights when the lawyer receives inadvertent disclosures of privileged or confidential information belonging to an opposing client. If the rules of evidence and rules of civil procedure authorize a lawyer to use inadvertent disclosures to aid his client, it would be odd that the rules of ethics would prohibit such use if properly serving the various functions recognized by Preamble 2.⁶³

Preamble 9 identifies a basic principle underlying the rules of ethics: a lawyer has an obligation to "zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."⁶⁴ The proposal in this Article fully balances and addresses the contentions of the Committee's opinion as well as the aspirations of Preamble 9. The rules of evidence and rules of civil procedure are "the bounds of the law" that direct lawyers on how to conduct themselves in "the justice system."⁶⁵ If these substantive laws authorize the use of inadvertent disclosures, then the only legitimate response by the rules of ethics would be to authorize—indeed, to

58. MRPC, preamble [2].

59. *Id.*

60. *Id.*; Fischer, *supra* note 2, at 248 ("Our legal system remains, however, an adversarial process and it is unrealistic to expect lawyers to behave like angels rather than advocates.").

61. MRPC, preamble [2].

62. *Id.*

63. Preamble 5 also supports the receiving lawyer's use of inadvertent disclosures if the rules of evidence and procedure allow: "A lawyer's conduct should conform to the requirements of the law . . . [including] in professional service to clients . . . A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system. . ." MRPC preamble [5].

64. MRPC, preamble [9].

65. *Id.*

encourage—a lawyer to zealously use those laws for his client’s benefit rather than to forego the law’s blessings in favor of an opposing client.

Preambles 1 and 8 readily support this Article’s inadvertent-disclosure proposal, which balances the interests of the justice system, civility in the legal profession, and protection of clients. Preamble 1 reminds every lawyer that being “a member of the legal profession” provides duties as “a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁶⁶ Preamble 8 recognizes that although these duties might seemingly conflict, they usually act in harmony.⁶⁷ When all of a lawyer’s duties align in harmony and when the opposing client is well-represented, a lawyer is not shackled by obligations to the opposing lawyer’s client.⁶⁸ In that instance, a lawyer is freed to serve as “a zealous advocate on behalf of a client and at the same time assume that justice is being done.”⁶⁹ That is precisely why the rules of ethics should not shackle a receiving lawyer from using inadvertent disclosures; instead, the rules of ethics should free the receiving lawyer who receives inadvertent disclosures to carry out his ethical obligations by zealously advocating for his client consistent with the rules of evidence, rules of civil procedure, and private agreements.⁷⁰

B. *Aerojet-General Corp. v. Transport Indemnity Insurance*

To this point, this Article has focused somewhat on the law’s theoretical response to inadvertent disclosures. As with all legal issues, however, facts—and not law—should be the focus of the analysis. All legal analysis boils down to people and the facts. Don’t misunderstand—law and facts are both important. Because they enjoy a symbiotic relationship, law and facts are worthless on their

66. MRPC, preamble [1].

67. MRPC, preamble [8]. (“A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.”).

68. *Id.*

69. *Id.*

70. Preamble 9 supports this Article’s proposal more than the Committee’s conclusion:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. . . . [M]any difficult issues of professional discretion . . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

MRPC, preamble [9]. This Article’s proposal more fairly balances these competing interests by forcing the rules of ethics to yield to the rules of evidence, rules of procedure, and private agreements.

own; they look for and rely on each other.⁷¹ Law and facts “go together like a lock and key” in that “[t]he application of the law to the facts unlocks the proper legal conclusion.”⁷² The point here is that as the law explores the proper ethical response to inadvertent disclosures, the starting point should not be the law; it should be the types of factual scenarios that demand a response from the law. That seems curious because this Article is being published in a law review as opposed to a fact review. Be that as it may, the focal point should be the facts that give rise to the legal issue. What types of facts drive this inadvertent-disclosure proposal?

Even though it is a quarter-century old, the case of *Aerojet-General Corp. v. Transport Indemnity Insurance*⁷³ guides proper thinking on inadvertent disclosures more so than Formal Opinion 92-368.⁷⁴ Indeed, it is not inconsequential that *Aerojet* wholly dismissed the reasoning and significance of the Committee’s opinion on how legal ethics should respond to inadvertent disclosures.⁷⁵ In *Aerojet*, the California Court of Appeals faced a lawyer’s “innocent [receipt] of privileged documents prepared by [opposing] counsel” in a complex commercial case.⁷⁶ The receiving lawyer did not receive the privileged information directly from opposing counsel, but instead “received a packet of documents” regarding the litigation from his client’s employee who received it from the client’s insurance broker who apparently received it from opposing counsel.⁷⁷ In that packet, the receiving lawyer discovered a memo by opposing counsel concerning litigation strategy that revealed an undisclosed-yet-material witness.⁷⁸ The receiving lawyer used the privileged information to depose the material witness.⁷⁹ When opposing counsel discovered that the receiving lawyer had used privileged information without notifying them, they moved for sanctions against the receiving lawyer.⁸⁰ The receiving lawyer

71. Tory L. Lucas, *Henry J. Friendly: Designed to Be A Great Federal Judge*, 65 DRAKE L. REV. 421, 480 (2017) (“The law is worthless without facts and facts are worthless without the law.”).

72. *Id.* Carl Sandburg had a markedly different approach that held a more robust rhetorical flourish: “If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell.” CARL SANDBURG, *THE PEOPLE, YES* 181 (1936).

73. *Aerojet-General Corporation v. Transport Indemnity Insurance*, 18 Cal. App. 4th 996 (Cal. Ct. App. 1993).

74. The case actually dealt with intentional disclosures vice inadvertent disclosures, but the distinction is hardly critical when analyzing the proper response from the vantage of legal ethics. Fischer, *supra* note 2.

75. *See Aerojet-General*, 18 Cal. App. 4th at 1003.

76. *Id.* at 999.

77. *Id.* at 997.

78. *Id.*

79. *Id.* at 1000.

80. *Aerojet-General*, 18 Cal. App. 4th at 1001.

“acknowledged that he had no reason to believe that [opposing counsel or their] clients had consented to the disclosure of the documents,” that “he reviewed them,” and that he “did not immediately notify any opposing counsel, the special discovery master, or the trial court that he had received them.”⁸¹

The trial court sanctioned the receiving lawyer’s firm for failing to timely advise opposing counsel that the receiving lawyer had received the “undeniably . . . privileged communication between opposing counsel and his client detailing pretrial and trial strategies” without the consent of opposing counsel.⁸² The trial court explained that the receiving lawyer’s conduct was “unethical and in bad faith,” because he “failed to contact opposing counsel” when he received the materials, “failed to investigate how his client obtained the documents,” “failed to tell his partners he had received the documents from” his client, “looked at the documents,” “used the information” in the documents “to his own advantage,” and “destroyed the documents.”⁸³ The trial court sanctioned the receiving lawyer’s firm for \$22,499.74 to cover expenses incurred to litigate the motion for sanctions.⁸⁴ The trial court also ordered that the witness who was discovered in the privileged materials was “precluded from testifying during any phase of the trial.”⁸⁵

The Court of Appeals framed the legal issue in a different way: what is the duty of a lawyer “who, without misconduct or fault, obtains or learns of a confidential communication among opposing counsel, or between opposing counsel and opposing counsel’s client[?]”⁸⁶ Even assuming that some type of duty existed, the court acknowledged the difficulty “when the confidential communication reveals a relevant and potentially helpful witness.”⁸⁷ The court explicitly recognized that discovery was a key consideration when addressing inadvertent disclosures, which implicitly invoked rules of evidence and rules of procedure over rules of ethics: “There is no State Bar rule of professional

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1002.

85. *Aerojet-General*, 18 Cal. App. 4th at 1002.

86. *Id.* In addition to defining the precise issue, the court emphasized what was not at issue: [The receiving lawyer] did not violate any laws, statutory or decisional, or any rules of court or rules of professional conduct in the manner by which he obtained the subject information. It is undisputed that [the receiving lawyer] is free of any wrongdoing in his initial receipt of the documents.

Id. This sentiment intuitively supports this Article’s proposal that the rules of evidence, rules of civil procedure, and private agreements should govern the issue of inadvertent disclosure; not the rules of ethics. Over time, the opposite occurred. It is time to correct this inadvertent divergence from the proper path on the ethical response to inadvertent disclosures.

87. *Id.*

conduct, no rule of court nor any statute specifically addressing this situation and mandating or defining any duty under such circumstances.”⁸⁸

Addressing head-on the issue of whether the receiving lawyer’s conduct required sanctions, the court refused to fault the receiving lawyer for examining the privileged information for the benefit of his client.⁸⁹ Rejecting opposing counsel’s argument that the receiving lawyer “should not even have read the documents,” the court recognized that in complex litigation involving large amounts of data, parties, lawyers, and documents, swamped lawyers who receive loads of materials cannot be expected to work for someone other than the client when reviewing the materials.⁹⁰

Turning to the rules of evidence in the absence of a rule of ethics, the court cautioned that the “attorney-client privilege is a shield against deliberate intrusion” and “not an insurer against inadvertent disclosure.”⁹¹ The court explained that “not all information that passes privately between attorney and client is entitled to remain confidential in the literal sense,” citing discovery and the identification of witnesses as obvious examples.⁹² In a blockbuster conclusion that freed the receiving lawyer to work on behalf of his client and not the client of opposing counsel, the court held that “whether the existence and identity of a witness or *other nonprivileged information* is revealed through formal discovery or *inadvertence*, the end result is the same: the [receiving lawyer] is entitled to the use of that witness or information.”⁹³ Even though this conclusion arms this Article’s proposal, the court did not stop there.

The court was not distracted by some mysterious metaphysical duty that a receiving lawyer might owe to the clients of opposing counsel or “his adversaries in the litigation.”⁹⁴ In contrast, the court elucidated the receiving lawyer’s primary duty “to protect the interests of his own clients.”⁹⁵ The court made sure to place in context its holding that whenever privileged or confidential information is received by a lawyer “through no fault or misconduct of his own,” then the receiving lawyer is entitled to use the information.⁹⁶ Revealing its commitment to the rules of evidence and sensitivity to the use of privileged information, the court clarified that the receiving lawyer’s use is not unlimited

88. *Id.* Unfortunately, the temptation to craft an ethical rule was too strong for ethics professionals to bear, so they began work to regulate inadvertent disclosures under the rules of ethics.

89. *Aerojet-General*, 18. Cal. App. 4th at 1005–06.

90. *Id.*

91. *Id.* at 1004.

92. *Id.*

93. *Id.* (italics added).

94. *Aerojet-General*, 18. Cal. App. 4th at 1005.

95. *Id.*

96. *Id.*

but is *always* “subject to the usual rules of evidence.”⁹⁷ This recognition underlies a major premise behind this Article’s proposal—the rules of evidence should inform the rules of ethics on inadvertent disclosures and not the other way around.

The court drove home the principle that the receiving lawyer innocently received, reviewed, and tried to use the information that was sent to him. Most acutely, the court decided that the receiving lawyer was *required* to use the information for his client’s cause.⁹⁸ The court was unmoved by any distinction as to “the manner in which [the receiving lawyer] obtained the information,” including inadvertent disclosure “or if it had been mistakenly sent to him through the mail or by facsimile transmission.”⁹⁹ The court reiterated that any evidentiary “question of waiver” would be a separate issue. As for the direct issue of what duty a receiving lawyer has once he acquires “information in a manner that was not due to his own fault or wrongdoing,” the court held that the receiving lawyer’s “professional obligation demands that he utilize his knowledge about the case on his client’s behalf.”¹⁰⁰ Signaling the court’s discomfort to decide a case without much guidance from existing law, however, the court hedged that “[i]n the absence of any clear statutory, regulatory or decisional authority imposing a duty of immediate disclosure of the inadvertent receipt of privileged information, we conclude the sanction order cannot stand.”¹⁰¹

The court’s reasoning supports this Article’s proposed modification of the rules of legal ethics. It demonstrates the willingness of a court, early in the discussion about inadvertent disclosures, to recognize two important principles that should mark the boundaries of inadvertent disclosures. First, a receiving lawyer’s duty runs primarily to his client; not the opposing counsel’s client. Second, the rules of evidence and rules of procedure are strong enough to protect privileged information and regulate the law of inadvertent disclosures without a preemptive rerouting of the issue through a disoriented set of ethics rules.

97. *Id.* at 1006.

98. *Id.*

99. *Aerojet-General*, 18 Cal. App. 4th at 1006. This recognition tracks the sentiment expressed earlier that there is no ethical distinction when it comes to inadvertent or intentional disclosures of confidential or privileged information. The receiving lawyer’s ethical obligations should remain the same in either scenario if guided by the rules of evidence, rules of procedure, or private agreements. One law review article proposed “a new ‘inadvertent disclosure’ professional conduct rule that purposely, but perhaps ironically, contains no reference to the term ‘inadvertent.’” Schaefer, *supra* note 2, at 197; *see also* Fischer, *supra* note 2, at 204 (“[T]he distinction between inadvertent and unauthorized disclosure is artificial and should be rejected in favor of a unified term—unintended disclosure.”).

100. *Aerojet-General*, 18 Cal. App. 4th at 1006.

101. *Id.* at 1006–07.

C. ABA Formal Opinion 94-382

A year after *Aerojet*, the Committee confronted the related topic of intentional disclosures of confidential information. The Committee used this opportunity to pivot slightly toward a better course than it took in its 1992 opinion on inadvertent disclosures. The Committee formulated the following rule, which was less restrictive on the receiving lawyer's ethical obligations toward intentional disclosures:

A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, *either refrain* from reviewing such materials *or review* them only to the extent required to determine how appropriately to proceed; she should *notify* her adversary's lawyer that she has such materials and should *either follow* instructions of the adversary's lawyer with respect to the disposition of the materials, *or refrain* from using the materials *until* a definitive resolution of the proper disposition of the materials is obtained from a court.¹⁰²

This subtle shift away from placing the receiving lawyer under the control of the opposing lawyer was a step in the right direction. A mere two years earlier, the Committee had declared that a lawyer who received inadvertently disclosed privileged or confidential materials shall *refrain* from looking at the materials, *notify* the lawyer who sent them, and *abide* by that lawyer's instructions.¹⁰³ By 1994, the Committee started an about-face by taking the critical step in the opposite direction to recognize that there are some situations in which a receiving lawyer might have the legal right to use confidential or privileged information.¹⁰⁴

In arriving at this more lenient conclusion, the Committee recognized opinions from state bar ethics committees that the Committee had wholly ignored two years earlier.¹⁰⁵ The gist of these ethics opinions was that a receiving lawyer had little-or-no ethical obligations to the adverse party and may use privileged or confidential materials to benefit his client. Feeling constrained by its earlier opinion and unwilling to move as far as some state ethics committees, the Committee was uncomfortable that a receiving lawyer could make "unlimited use of such materials" or place "an adversary at the mercy" of those who had confidential information.¹⁰⁶ The Committee moved a few steps from its earlier ruling when it confessed that there should not be "an absolute rule that would prohibit a receiving lawyer from reviewing or using such materials under

102. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 94-382 (1994) [hereinafter Formal Op. 94-382].

103. Formal Op. 92-368, *supra* note 19. (italics added).

104. Formal Op. 94-382, *supra* note 102.

105. *Id.*

106. *Id.*

all circumstances.”¹⁰⁷ The Committee further declared, “An absolute rule, couched in terms of professional responsibilities, that required a receiving lawyer to return such materials could prejudice the legitimate rights of the receiving lawyer’s client to employ such materials in the prosecution or defense of a legal action.”¹⁰⁸ Finding a more proper balance between the receiving lawyer and the opposing lawyer, the Committee moved to its more just rule by affording “the adverse party a reasonable and timely opportunity to resort to judicial remedies to determine legal rights and allow the receiving lawyer, under appropriate circumstances, to use relevant materials in the prosecution or defense of an action on behalf of her client.”¹⁰⁹ Like the court in *Aerojet*, the Committee recognized that the law outside of legal ethics might provide legal rights to a receiving lawyer’s client.

In just two short years, the receiving lawyer’s ethical obligations were diminishing. The trend was moving away from an absolutist restriction of the receiving lawyer’s ethical options to use another client’s confidential or privileged information after it was revealed (inadvertently or intentionally). Instead of requiring the receiving lawyer to obey the opposing lawyer’s demands, the only crystal-clear ethics rule that was now coming into view was that the receiving lawyer must notify the opposing lawyer that the receiving lawyer possessed privileged or confidential information of the opposing lawyer’s client.

D. Model Rule 4.4(b)

An analysis of Model Rule 4.4(b) showcases where the rules of ethics currently fit in the broader context of the proper response to inadvertent disclosures. It is important to realize what Model Rule 4.4(b) governs and what it does not. Within the rule, there exists an underlying, yet implicit supposition that inadvertent disclosures should be governed, for the most part, by the rules of evidence and rules of civil procedure. This Article will provide the impetus to complete the transition fully by explicitly placing issues of inadvertent disclosure under the rules of evidence, rules of civil procedure, and private agreements so that all lawyers, clients, and courts see the issue more clearly and uniformly.

Until 2002, the Model Rules of Professional Conduct stood silent on inadvertent disclosures. Various state ethics opinions had reached widely varied conclusions on a receiving lawyer’s ethical obligations, while the ABA had issued two formal ethics opinions that placed ethical obligations on the receiving lawyer. When Model Rule 4.4(b) was promulgated, it undoubtedly moved away from the notion that the receiving lawyer stands under the direction of the

107. *Id.*

108. *Id.*

109. Formal Op. 94-382, *supra* note 102.

sending lawyer. As quoted above, Model Rule 4.4(b) loosely regulated inadvertent disclosures by imparting a simple notification obligation on the receiving lawyer¹¹⁰ so that opposing counsel could “take protective measures.”¹¹¹ All other conduct implicitly became subject to conscience or rules of court.¹¹²

Somewhat perplexingly, Model Rule 4.4(b) avoids the pressing issue of whether the receiving lawyer should use inadvertently disclosed materials for the benefit of the lawyer’s client, even though the nucleus of the Model Rules requires that a lawyer should zealously use that evidence for his client’s benefit. The Comments to Model Rule 4.4(b) quizzically avoid two questions: (1) “[w]hether the [receiving] lawyer is required to take additional steps, such as returning the document or electronically stored information” and (2) “whether the privileged status of a document or electronically stored information has been waived.”¹¹³ The Comments surmise that these questions are “matter[s] of law beyond the scope of these Rules.”¹¹⁴ This approach misses the issue. The answers to how the rules of evidence and rules of civil procedure address inadvertent disclosures are not beside the point; they *are* the point. Knowing how those rules govern inadvertent disclosures should be the central focus in meting out ethical duties.

No sooner do the Comments avoid these critical issues that impact the quality of a lawyer’s representation of his client than a follow-up Comment unleashes a wishy-washy murk by suggesting an ethical restriction outside the scope of the expressed duty.¹¹⁵ If a receiving lawyer looks to the Comments on how to proceed after satisfying his notification obligation, he is met with nearly coin-flip guidance. A potentially dual-tiered system emerges out of view of unsuspecting clients in which some clients could receive the legal benefits of inadvertent disclosures while other not-so-lucky clients are kept in the dark as their lawyers choose to forego the rightful use of such disclosures. On one hand, the Comments recognize that a receiving lawyer might choose to read—and perhaps use—inadvertent disclosures for the benefit of his client. On the other end of the spectrum of ethical choices, the Comments entice a lawyer to avoid

110. MRPC 4.4(b) (italics added).

111. *Id.*

112. Beyond a simple notification obligation, “the Commission decided against trying to sort out a lawyer’s possible legal obligations in connection with examining and using confidential documents that come into her possession through the inadvertence or wrongful act of another.” Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 469 (2002).

113. MRPC 4.4(b) cmt. 2.

114. *Id.* This Article proposes that the Model Rules fully confront and answer the question of whether an attorney who receives inadvertently disclosed materials has an ethical obligation to use those materials to the fullest extent of the law.

115. *Id.* at cmt. 3.

even the slightest urge to see if the law allows the use of inadvertent disclosures to aid the lawyer's client. The Comments authorize the receiving lawyer to "choose to return a document or delete electronically stored information unread . . . when the lawyer learns before receiving it that it was inadvertently sent."¹¹⁶ It is perplexing to ponder why a receiving lawyer would unilaterally choose to ignore the question of whether he has the lawful right to use inadvertent disclosures for his client's benefit. Even more perplexing is the "ethical guidance" that directly follows: "Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer."¹¹⁷ This guidance turns traditional ethical obligations to a client's cause on their head and is precisely backward.

Crying "enough already," this Article seeks to clarify that a receiving lawyer's ethical obligation runs to his client when receiving inadvertent disclosures. Instead of creating a moral and ethical dilemma between serving (1) the client of an opposing lawyer or (2) the receiving lawyer's client to the fullest extent under the law, this Article proposes a bright-line rule that unmistakably shines in favor of having each lawyer serve his own client's interests. This Article encourages the adoption of an ethical rule that requires a lawyer to use inadvertent disclosures unless prohibited by the rules of evidence, the rules of civil procedure, or private agreement. This inadvertent-disclosure proposal fairly balances the interests of the justice system, civility in the legal profession, and protection of clients.

E. ABA Formal Opinion 05-437

In 2005, the path to this Article's proposal came more clearly into view. In response to the adoption of Model Rule 4.4(b), the ABA officially withdrew Formal Opinion 92-368 that had severely restricted a receiving lawyer's options when confronted with inadvertent disclosures.¹¹⁸ The Committee recognized that Model Rule 4.4(b) had rejected its 1992 opinion and "narrowed the obligations of the receiving lawyer."¹¹⁹ The Committee confessed that Model Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly" and "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."¹²⁰

116. *Id.*

117. *Id.* (citing Rules 1.2 and 1.4).

118. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 05-437 (2005) [hereinafter Formal Op. 05-437].

119. *Id.*

120. *Id.*

Even though Model Rule 4.4(b) started moving toward the destination that this Article proposes, the Committee tried to cement receiving lawyers from using inadvertent disclosures within the bounds of substantive law. Clinging to its earlier strictures, the Committee continued its tradition of ignoring rules in favor of a “larger, and more fundamental, framework.”¹²¹ Formal Opinion 05-437 invoked the Comments to Model Rule 4.4(b) in a less-than-subtle attempt to stifle a lawyer’s use of inadvertent disclosures. It reminded lawyers that Comment 2 placed outside of ethics rules the issue of whether the receiving lawyer must return inadvertent disclosures or “whether the privileged status of a document has been waived.”¹²² Notwithstanding Model Rule 4.4(b)’s liberation from ethical constraints outside of a notification obligation, the Committee stressed that a lawyer unilaterally might reapply those shackles.¹²³ Uninterested in whether the law would allow for the use of inadvertent disclosures to benefit a client’s case, the Committee encouraged a receiving lawyer to return inadvertent disclosures unread without so much as a courtesy call to the lawyer’s client.¹²⁴ This Article’s proposal ends this intoxicating option to forego knowing how the rules of evidence and rules of civil procedure address inadvertent disclosures before deciding how to respond ethically, all out of view from the client.

F. ABA Formal Opinion 06-440

One year later in 2006, the Committee continued to dissemble its earlier work by issuing Formal Opinion 06-440 that withdrew Formal Opinion 94-382 on intentional disclosures.¹²⁵ It recognized that its earlier opinion “found no basis in the Rules for requiring the lawyer to return the materials to their rightful owner or even to forbid their use.”¹²⁶ In a display of contrition, the Committee confessed that its 1992 and 1994 opinions were influenced less by ethics rules and more “by principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity, and professional courtesy.”¹²⁷ The Committee confirmed that because Model Rule 4.4(b) was promulgated, it was improper to rely on law other than ethics rules to determine ethical obligations.¹²⁸ Strictly adhering to the ethics rules, the Committee recognized that Model Rule 4.4(b) applies only to inadvertent

121. *Id.*

122. *Id.*

123. Formal Op. 05-437, *supra* note 118.

124. *Id.*

125. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) [hereinafter Formal Op. 06-440].

126. *Id.*

127. *Id.*

128. *Id.*

disclosures; not intentional disclosures.¹²⁹ Given this plain language, the Committee opined that a receiving lawyer has no ethical notification obligation when it comes to intentional disclosures of confidential or privileged materials.¹³⁰

G. ABA Formal Opinion 06-442

Later in 2006, the ABA took another significant step toward placing ethical obligations on the sending lawyer rather than the receiving lawyer. In Formal Opinion 06-442, the Committee recognized that a sending lawyer was obligated to protect confidential or privileged information included in metadata.¹³¹ The ABA thus displayed an updated understanding that ethical duties focused more on the lawyer who controls confidential or privileged information rather than the receiving lawyer. Moving further into the age of technological communications, Formal Opinion 06-442 addressed metadata, which is “embedded information in electronic documents” that is not visible without active effort to reveal it.¹³² Following the trend of lifting burdens from the receiving lawyer and placing them on the sending lawyer, the Committee opined that the sending lawyer is required to scrub metadata from documents before sending them.¹³³

Far from its opinions in the 1990s, the Committee asked nothing of the receiving lawyer who receives embedded information.¹³⁴ Instead, it freed the receiving lawyer to review and use “embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party.”¹³⁵ Supporting the premise of this Article’s proposal, the Committee remarked that Model Rule 4.4(b) should be read as “evidence of the intention to set no other specific restrictions on the receiving lawyer’s conduct found in other Rules.”¹³⁶ Logically, a receiving lawyer who has no ethical obligations beyond what is required in the rules of ethics should be free to pursue all lawful means to aid his client, which would allow a lawyer to use the rules of evidence or rules of civil procedure to guide his decision on how to use inadvertent disclosures. But unfortunately, that is not as clear as one would hope. There still exists an inherently paradoxical message in (1) requiring a receiving lawyer to notify opposing counsel of an inadvertent disclosure while suggesting that the lawyer may—or even should—feel obligated to self-administer additional ethical restraints with (2) supposedly “set[ting] no other

129. *Id.*

130. Formal Op. 06-440, *supra* note 125.

131. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006) [hereinafter Formal Op. 06-442].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Formal Op. 06-442, *supra* note 131.

specific restrictions.”¹³⁷ Despite the lack of clarity of the next ethical step beyond a simple notification obligation, baby step after baby step has brought the rules of ethics to the point where the receiving lawyer’s ethical obligations relating to inadvertent disclosures are minimal. The next step is for the rules of ethics to yield at the intersection of the rules of evidence, rules of civil procedure, and private agreements.

H. Federal Rule of Civil Procedure 26(b)(5)(B)

The last critical step of 2006 in the journey to address inadvertent disclosures was an amendment to the Federal Rules of Civil Procedure. A new rule regulated the discovery phase of federal litigation and placed obligations on a lawyer who receives inadvertent disclosures:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.¹³⁸

As discussed below, Rule 26(b)(5)(B) plays a central role in this Article’s proposal. Even after Model Rule 4.4(b) and Rule 26(b)(5)(B) were adopted, however, “litigants continued to seek uniformity in the law in the case of inadvertent production.”¹³⁹ Federal Rule of Evidence 502 sought to fill that void of uncertainty.

I. Federal Rule of Evidence 502(b)

In 2008, a significant stride was made that supports this Article’s proposal to tether the rules of ethics to the rules of evidence. After a decades-long discussion of the proper response to growing problems of inadvertent disclosures and following the path charted two years earlier by Rule 26(b)(5)(B), Federal Rule of Evidence 502(b) was enacted:

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took

137. *Id.*

138. FED. R. CIV. P. 26(b)(5)(B).

139. Barkett, *supra* note 3, at 1594.

reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).¹⁴⁰

How these federal rules should interact with Model Rule 4.4(b) will be discussed below, but suffice it to say for now that, despite the amount of attention inadvertent disclosures has received in the last two decades, the precise duties of a lawyer who is caught in this type of situation remain less than clear. With the rules of ethics, rules of evidence, and rules of civil procedure now converging on a single analytical path, however, the road is paved for this Article's proposal on how best to traverse inadvertent disclosures.

J. ABA Formal Opinion 11-460

Before explaining how the rules of civil procedure and rules of evidence drive this Article's proposal, one must understand how the rules of ethics have continued to clear the way for this new analytical path for inadvertent disclosures. In 2011, the ABA issued Formal Opinion 11-460 that again limited the ethical obligations of a receiving lawyer.¹⁴¹ Although not dealing with inadvertent disclosures, the opinion is significant because it expressly invoked law outside the rules of ethics to guide lawyer conduct:

When an employer's lawyer receives copies of an employee's private communications with counsel[,], . . . neither Rule 4.4(b) nor any other Rule requires the employer's lawyer to notify opposing counsel of the receipt of the communications. However, court decisions, civil procedure rules, or other law may impose such a notification duty¹⁴²

Two pieces of this opinion are relevant to this Article's proposal. First, Formal Opinion 11-460 recognized that ethics rules do not have to govern every issue.¹⁴³ Other law like controlling case law and rules of civil procedure could govern certain issues that would, in turn, guide a lawyer's ethical obligations.¹⁴⁴

The second relevant piece lies embedded in a statement about who makes decisions in the lawyer-client relationship. According to Formal Opinion 11-460, when existing law does not provide a clear notification obligation on a lawyer, a lawyer should leave the decision to the client rather than allow the lawyer to unilaterally choose how to proceed.¹⁴⁵ The Committee provided the following instruction:

If no law can reasonably be read as establishing a notification obligation, however, then the decision whether to give notice must be made by the

140. FED. R. EVID. 502(b).

141. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 11-460 (2011) [hereinafter Formal Op. 11-460].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

employer-client, and the employer's lawyer must explain the implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.¹⁴⁶

This spirit contradicts the Comments to Model Rule 4.4(b) that equip a receiving lawyer to bypass a client's wishes and avoid considering whether the law authorizes the use of an inadvertent disclosure of confidential or privileged information. This conclusion is a driving principle that guides this Article's proposal since the client's interest should inform—and not supersede—a receiving lawyer's moral and ethical conviction.

K. Model Rule 1.6(c)

In 2012, Model Rule 1.6(c) was amended to require that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”¹⁴⁷ As time marched on, the ethical responsibilities relating to inadvertent disclosures began to form more properly. The juxtaposition of conflicting obligations began to ameliorate. The obligations of a lawyer to protect his client's confidential or privileged information became more focused while a receiving lawyer's ethical obligations to protect the opposing lawyer's client began to wane.

L. ABA Formal Opinion 17-477

Well over two decades after the ABA first tried to place the burden to protect confidential and privileged information on the lawyer who receives inadvertent disclosures, Formal Opinion 17-477 squarely and expressly placed that ethical burden on the lawyer who controls that information.¹⁴⁸ In taking another step to unshackle a receiving lawyer from stiff and inflexible ethical restraints, the ABA acknowledged that it is every lawyer's job to protect his client's sensitive information as opposed to making it anyone or everyone else's job.¹⁴⁹ Going to great lengths to discuss a lawyer's ethical requirements when dealing with client matters electronically (which likely entails the entire legal profession), the Committee burdened *those* lawyers—as opposed to a receiving lawyer—to, “on a case-by-case basis, constantly analyze how they communicate about client matters.”¹⁵⁰

146. Formal Op. 11-460, *supra* note 141.

147. MRPC 1.6(c).

148. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 17-477R (2017) [hereinafter Formal Op. 17-477R].

149. *See id.* This trend simply tracks the path forged in 2012 when Model Rule 1.6(c) was amended to require that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” MRPC 1.6(c).

150. Formal Op. 17-477R, *supra* note 148 (citing MRPC 1.6(c) com. 18).

Recognizing increasing cyber threats and other risks to confidential or privileged information, Formal Opinion 17-477 cautioned lawyers who transmit client information over the internet to take “reasonable efforts to prevent inadvertent or unauthorized access.”¹⁵¹ It also explained that a lawyer “may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.”¹⁵² One such reasonable effort is to appropriately label privileged and confidential information.¹⁵³ In turn, these labeling efforts impact and trigger Model Rule 4.4(b)’s notification obligation on the receiving lawyer.¹⁵⁴

This opinion buttresses this Article’s contention that the obvious trend is to place the burden to protect confidential and privileged information on the sending lawyer and not on the receiving lawyer. Accounting for the ever-increasing risks of inadvertent disclosure of a client’s confidential or privileged information, the ABA has been moving toward placing clearer and heavier burdens on the sending lawyer to safeguard such information and away from placing clumsy and strict ethical duties on the receiving lawyer. This movement is entirely consistent with this Article’s proposed amendment to Model Rule 4.4(b).

M. Time to Complete the Journey on Ethical Obligations on Inadvertent Disclosures

This Article suggests that the Model Rules should stop pulling lawyers in conflicting directions that force receiving lawyers to travel a path filled with innuendo and subtle head nods. Instead of insinuating that receiving lawyers should refrain from using information that might lawfully be used to benefit their clients, ethics rules should allow a receiving lawyer—once he meets the basic notification obligation—to pursue his client’s interest by using inadvertent disclosures unless prohibited by the rules of evidence, rules of civil procedure, or private agreement. Trying to control inadvertent disclosure issues through ethical constraints on the receiving lawyer is like pounding a square peg into a round hole. If private agreements, the rules of civil procedure, and the rules of evidence authorize the use of inadvertent disclosures (or, on the other hand, prohibit such use), then it would be odd for the rules of ethics to attempt to fit into the analysis in a way that would misshape the pursuit of truth in the justice system. To that end and without further ado, it is time to present the proposal and explore why the rules of evidence, rules of civil procedure, and private

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

agreements provide adequate and independent grounds to govern the appropriate ethical response to inadvertent disclosure issues.

III. WHERE ARE WE GOING: PROPOSED AMENDMENT TO MODEL RULE 4.4(B)

This Article proposes the following clear-eyed modification to Model Rule 4.4(b):

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender. *The receiving lawyer shall use inadvertently disclosed documents or information unless prohibited by rules of evidence, rules of civil procedure, or private agreement.*¹⁵⁵

The simple purpose of this amendment is to redirect a receiving lawyer's ethical decision on how to respond to inadvertent disclosures from the rules of ethics to rules of evidence, rules of civil procedure, and private agreements.¹⁵⁶ In addition to amending Model Rule 4.4(b), Comment 3 should be amended as follows:

~~[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.~~

[3] As the risk of inadvertent disclosures has grown exponentially and the costs associated with discovery have ballooned, lawyers have been inundated with unclear ethical guidance on inadvertent disclosures. Rule 4.4(b) clarifies that a lawyer who receives inadvertent disclosures has a notification obligation *only*. Once a lawyer satisfies his or her notification obligation, the receiving lawyer's subsequent ethical obligations are governed by (a) private agreement between

155. Now is as good a time as any to point out that this proposed rule could be interpreted in a way that applies only to litigation. That would be an unfortunate interpretation, because this proposal governs all inadvertent disclosures, whether in transactional matters or in litigation. When it comes to litigation, the ethical obligations of lawyers would be driven by rules of evidence, rules of civil procedure, or private agreement. When addressing inadvertent disclosures outside of litigation—in various transactions or negotiations, for example—then the rules of evidence and rules of civil procedure are not as readily available unless and until litigation results. In these scenarios, inadvertent disclosures could be governed by private agreement.

156. One must not separate the purpose behind a rule from the rule itself. Lucas, *supra* note 71, at 441–42 (“Legal principles are not independent islands that we visit for resolution of disputes. Instead, they form the fabric of our society, and they are only as good as the purposes they serve.”). If a rule serves no purpose, then why have a rule? That philosophy drives this proposal; a rule of ethics is only as good as the purpose it serves. When it comes to inadvertent disclosures, the purposes behind the rules of civil procedure and rules of evidence undergird the purposes behind any rule of ethics. Thus, they should align properly.

lawyer and client, (b) private agreement between opposing lawyers, (c) the governing rules of civil procedure, or (d) the governing rules of evidence.¹⁵⁷

Under the modified rule and comment, ethics rules will no longer be burdened to find the single most appropriate solution to inadvertent disclosures. Instead, ethics rules will liberate a receiving lawyer to think through inadvertent disclosure issues by asking whether other law authorizes—or prohibits—such use.

Here is the basic approach. First, a lawyer may enter a private agreement with his client to forego any use of inadvertent disclosures. This agreement would follow strict ethical constraints that protect privileged and confidential information. Perhaps characterized as the “there but by the grace of God go I option,” a private agreement unilaterally disarms the receiving lawyer from using inadvertent disclosures for his client’s benefit regardless of whether the rules of evidence and rules of civil procedure would authorize such use. To select this option, a lawyer must get the informed consent of his client.¹⁵⁸

157. Although it does not form the basis of this proposal, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics issued a helpful opinion in late 2003 that sought the proper balance among competing interests when confronting inadvertent disclosures. N.Y. Bar Ass’n Comm. on Prof’l and Judicial Ethics, *supra* note 2. It sought a rule that “best harmonizes the Code’s concerns for the administration of justice, client confidences and secrets, and zealous representation.” *Id.* In a nutshell, its approach required the receiving lawyer to “promptly notify the sender and refrain from further reading or listening to the communication” and generally follow the sending lawyer’s instructions. *Id.* But the Committee was unwilling to allow the sending lawyer to control the potential use of the information by creating a safety-valve exception to a bright-line rule prohibiting the receiving lawyer from using the inadvertent disclosure: “if there is a legal dispute before a tribunal and the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may submit the communication for in camera consideration by the tribunal as to its disposition.” *Id.* The Committee took great pains to stress that “it is essential—as an ethical matter—that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.” *Id.* This approach provides far more useful guidance than the current Comments to Model Rule 4.4(b). Finally, the opinion recognized what is hiding in plain sight: “Although ethical rules may not preclude use, governing law, rules of evidence, or other principles may limit or preclude use.” N.Y. Bar Ass’n Comm. on Prof’l and Judicial Ethics, *supra* note 2.

158. Employing one-part humor and one-part sarcasm, a legal ethics scholar suggested that lawyers could use the following language in these types of private agreements with their clients:

In the course of representing you, I might realize that the lawyer representing your adversary has made a mistake that might help you to achieve your lawful goal. If that should happen, I might decide to correct or not to take advantage of the adversary lawyer’s mistake. I will do that even if (a) it would be lawful for me to take advantage of the mistake; (b) it would materially prejudice your interests if I correct the mistake; and (c) you told me that I should take advantage of the mistake. I might also decide simply to keep you in ignorance of the other lawyer’s mistake.

Freedman, *supra* note 17, at 180.

Second, and along the lines of the first option, opposing lawyers have the option to enter a private agreement that requires that both lawyers forego any use of inadvertent disclosures. This approach balances the burdens and benefits associated with inadvertent disclosures. On the one hand, a lawyer is contracting away the possible benefits to his client to use inadvertent disclosures while on the other hand, the possible burdens of his own inadvertent disclosures will not harm the client. To select this option, both lawyers would need the informed consent of their respective clients.

Third, if lawyers do not address the issue of inadvertent disclosures through private agreement, then they must look to the rules of evidence and rules of civil procedure to determine the appropriate ethical response. To adequately understand what this will look like practically, one must have an understanding of how these default rules govern inadvertent disclosures.

IV. HOW DO WE GET THERE: AN ANALYSIS OF HOW ETHICAL OBLIGATIONS ON INADVERTENT DISCLOSURES SHOULD ALIGN WITH THE RULES OF EVIDENCE, RULES OF CIVIL PROCEDURE, AND PRIVATE AGREEMENTS

The working premise behind this Article's proposal is that the rules of evidence, rules of civil procedure, and private agreements more justly address the proper ethical response to inadvertent disclosures than any one-size-fits-all rule of ethics. It is important to recognize that the proposal takes the rules of evidence and rules of civil procedure as they are; it is agnostic on how these litigation rules *should* govern inadvertent disclosures. For ease of reference and analysis, this Article focuses on the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Be assured, however, that the following analysis has uniform application no matter how a jurisdiction addresses inadvertent disclosures through its litigation rules.

A. *Inadvertent Disclosures under the Federal Rules of Civil Procedure*

Because the challenges faced by inadvertent disclosures were nearly fully formed by 2006, the Federal Rules of Civil Procedure were amended. In addressing inadvertent disclosures in federal litigation, the Advisory Committee on the Rules of Civil Procedure explained that it had “repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery.”¹⁵⁹ The Committee recognized that in the digital

159. FED. R. CIV. P. 26(b)(5) advisory committee's note to 2006 amendment; *see also* EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.12.5 (3d ed., 2018) (“At one of the Advisory Committee public hearings on proposed Rule 502, ‘representatives from Verizon testified . . . that the company had spent \$13.5 million on one privilege review relating to a U.S. Department of Justice antitrust investigation.’”) (citing Alvin F. Lindsay, *New Rule 502 to Protect Against Privilege Waiver*, NAT'L L.J., Aug. 25, 2008, at S2); Schaefer, *supra* note 2, at 200 (“When attorneys are charged with handling [digital] information

age, “the risk of waiver, and the time and effort required to avoid it, can increase substantially” given the sheer volume of information.¹⁶⁰ In response to this burgeoning problem, Rule 26(b)(5) was crafted on “Claiming Privilege or Protecting Trial-Preparation Materials.”¹⁶¹ Relevant here, Rule 26(b)(5)(B) created explicit mechanisms for lawyers who are engaged in federal litigation to contemplate and address inadvertent disclosures of privileged information:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information *until the claim is resolved*; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.¹⁶²

Rule 26(b)(5) provides the default rule on how lawyers may respond when confronted with inadvertent disclosures during federal litigation. The comments to Rule 26(b)(5)(B) clarify that the procedural rule “*does not* address whether the privilege or protection that is asserted after production was waived by the production.”¹⁶³ Instead, courts will “determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information.”¹⁶⁴ Rule 26(b)(5)(B) simply provides a clear and helpful “procedure for presenting and addressing these issues.”¹⁶⁵

In essence, the Federal Rules of Civil Procedure offer two basic mechanisms that regulate inadvertent disclosures. The first mechanism creates default rules upon which lawyers may rely when confronted with inadvertent disclosures

for their clients, it is now more difficult than ever to prevent the inadvertent disclosure of confidential information,” which is “a substantial risk faced by every practicing attorney regardless of the care taken to prevent it” and “strikes fear and sometimes pain in the hearts of attorneys.”).

160. FED. R. CIV. P. 26(b)(5) advisory committee’s note to 2006 amendment; *see also* Barkett, *supra* note 3, at 1589 (“The inadvertent production of privileged or work-product protected documents is a genuine risk in litigation today because of the magnitude of electronically stored information (ESI) and the electronic transmission habits of individuals who send and receive privileged communications”); Schaefer, *supra* note 2, at 195 (“With high-speed communication and a staggering volume of electronically stored information, the risks of inadvertent disclosure are greater today than ever before.”).

161. FED. R. CIV. P. 26(b)(5).

162. FED. R. CIV. P. 26(b)(5)(B).

163. FED. R. CIV. P. 26(b)(5) advisory committee’s note to 2006 amendment.

164. *Id.* An expert in E-Discovery and member of the Advisory Committee for Civil Rules of the Federal Judicial Conference explained it this way: “The Rule, by design, stays out of the battle of whether the producing party’s delay in giving notice results in a waiver of the privilege or protection.” Barkett, *supra* note 3, at 1593.

165. FED. R. CIV. P. 26(b)(5) advisory committee’s note to 2006 amendment.

during litigation. The second mechanism allows lawyers to opt out of those default procedural rules on inadvertent disclosures through private agreements and scheduling orders before any issues of inadvertent disclosures arise during litigation. The following paragraphs introduce both options in the context of how they support this Article's proposed ethics rule.

1. Default Mechanism for Inadvertent Disclosures Made during Litigation

Even though Rule 26(b)(5)(B) provides a crystal-clear mechanism to follow when inadvertent disclosures occur during discovery, the comments provide a step-by-step guide for lawyers.¹⁶⁶ Initially, a lawyer who believes that privileged information has been inadvertently disclosed must notify the receiving lawyer.¹⁶⁷ In response, the receiving lawyer “must promptly return, sequester, or destroy the information and any copies it has.”¹⁶⁸ The receiving lawyer then “must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived.”¹⁶⁹ The Federal Rules of Civil Procedure anticipate that courts will make a “waiver determination under the governing law.”¹⁷⁰ While the court is considering the privilege claim, the receiving lawyer must not use or disclose the inadvertently disclosed information.¹⁷¹ If the receiving lawyer seeks to use inadvertent disclosures, the lawyer may challenge any claim that the inadvertently disclosed information has retained its privileged status.¹⁷²

If this Article's proposal is adopted, Rule 26(b)(5)(B) will guide a receiving lawyer's ethical response to inadvertent disclosures and move any contested issue toward efficient resolution. Under Rule 26(b)(5)(B), the receiving lawyer labors under no notification obligation; that obligation is heaped upon the

166. *Id.*

167. *Id.* The high volume of discoverable materials in litigation contributes to rising legal costs and higher risks that privileged information will be inadvertently disclosed. S. REP. NO. 110-264, at 1-3 (2008). Rule 26(b)(5)(B) works with Federal Rule of Evidence 502 in attempting to limit “the consequences of inadvertent disclosure, thereby relieving litigants of the burden that a single mistake during the discovery process can cost them the protection of a privilege.” *Id.* While Rule 26(b)(5)(B) places the notification obligation on the sending lawyer, Model Rule 4.4(b) actually promotes and supports these goals by requiring a receiving lawyer to notify an opposing lawyer when he receives inadvertently disclosed material. An ethical notification obligation jumpstarts the protections afforded by the Federal Rules of Civil Procedure to adequately address inadvertent disclosures.

168. FED. R. CIV. P. 26(b)(5) advisory committee's note to 2006 amendment.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

sending lawyer.¹⁷³ Model Rule 4.4(b) contains a glaring difference in that it foists upon the *receiving* lawyer a notification obligation once that lawyer reasonably believes that he possesses inadvertently disclosed documents that contain privileged information.¹⁷⁴ This Article's proposal wholeheartedly supports the notification obligation that Model Rule 4.4(b) places on the receiving lawyer as a matter of professional courtesy and transparency. By placing an ethical notification obligation on the receiving lawyer, the rules of ethics ultimately aid the rules of procedure by getting the ball rolling toward a resolution of inadvertent disclosures.¹⁷⁵ If the rules of ethics look to the rules of evidence and rules of civil procedure, the receiving lawyer's ethical notification obligation should trigger the sending lawyer's duty to guard against waiver caused by the inadvertent disclosure by promptly taking "reasonable steps to rectify the error."¹⁷⁶ Such steps include seeking the protections afforded by the rules of civil procedure and rules of evidence. Working together, those rules provide the prudent protocol to resolve fully and fairly the legal issue of whether a receiving lawyer may use inadvertent disclosures. This is exactly the procedure that a receiving lawyer should understand when deciding how to proceed under his ethical obligations. Any effort by a receiving lawyer's misplaced sense of ethics to highjack the legal benefits afforded by the rules of civil procedure working in concert with the rules of evidence would collapse the very purposes that undergird those rules.

Indeed, the Federal Rules of Civil Procedure "should be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."¹⁷⁷ The Federal Rules of Evidence in turn work closely with procedural rules to ensure that the adversarial process functions effectively to ensure "the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case."¹⁷⁸ There exists a strong governmental "interest in the orderly conduct of [trials that should be] sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence."¹⁷⁹ When these

173. See FED. R. CIV. P. 26(b)(5) advisory committee's note to 2006 amendment.

174. See MRPC 4.4(b); see also, *Mt. Hawley Ins. Co. v. Felman Prod. Inc.*, 271 F.R.D. 125, 128 (S.D. W. Va. 2010) (recognizing that Rule 26(b)(5)(B) does not impose any duty on the receiving party unless and until the sending party notifies the receiving lawyer of a privilege claim).

175. It is true that not all state rules of ethics, rules of procedure, and rules of evidence are uniform. To the extent that a rule of ethics diverges from Model Rule 4.4(b) by not placing a notification obligation on the receiving lawyer, then there might not be a notification obligation on a receiving lawyer at all. See *Mt. Hawley Ins. Co.*, 271 F.R.D. at 131.

176. FED. R. EVID. 502(b)(3).

177. FED. R. CIV. P. 1.

178. *Taylor v. Illinois*, 484 U.S. 400, 411 (1988).

179. See *id.*

rules are carefully tailored to promote fair, just, and efficient administration of justice, it would be odd for ethical obligations to run contrary to them. No set of ethics rules or misunderstanding of one's ethical obligations should place barricades that block the use of otherwise useable inadvertent disclosures.

This Article's proposal contends that the rules of ethics should yield at this intersection of the rules of procedure and the rules of evidence. Working in tandem, these two bodies of law sufficiently and justly resolve inadvertent disclosure issues. There is no reason for the rules of ethics to impede a lawyer's ability to use the rules of civil procedure and rules of evidence to seek a "just, speedy, and inexpensive determination" of inadvertent disclosure issues. Now is the time to align the rules of ethics with the default rules of civil procedure and rules of evidence.

2. Alternate Mechanism for Private Agreements

The second option under the Federal Rules of Civil Procedure frees lawyers from using default evidentiary and procedural rules to resolve competing claims over inadvertent disclosures. This option allows lawyers to agree on how to address inadvertent disclosures in federal litigation. Rule 26(b)(5)(B) works in tandem with the Federal Rules of Evidence to provide the default rules on how lawyers and courts will decide inadvertent disclosure issues. But lawyers do not have to employ those default rules; they may opt out through private agreements that create scheduling orders to govern inadvertent disclosures.¹⁸⁰ By opting out of default rules, lawyers eliminate the uncertainty, delay, and cost embedded in litigating privilege issues.¹⁸¹ If lawyers wish to opt out of Rule 26(b)(5)(B) to resolve privilege issues in scheduling orders, they simply must follow Rules 26(f) and 16(b). Scheduling orders will normally control the privilege issue if they differ from how Rule 26(b)(5)(B) would resolve the issue.¹⁸²

At the same time that Rule 26(b)(5)(B) was adopted, Rule 26(f) was "amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection."¹⁸³ Rule 26(f)(2) requires that parties consider a discovery plan and submit it to the court for approval.¹⁸⁴

180. See, e.g., Barkett, *supra* note 3, at 1617 (encouraging lawyers to seek "a thoroughly drawn Rule 502(d) order [to] disclaim the application of Rule 502(b), and instead identify the order as the sole vehicle under which the availability of the privilege should be evaluated" and "declare that any production of a privileged or work-product protected document is inadvertent").

181. See, e.g., *id.* at 1593 ("Some litigants seek to eliminate the risk of waiver or reduce the cost of a privilege review by entering into nonwaiver agreements by stipulation or through a court order.").

182. FED. R. CIV. P. 26(b)(5) advisory committee's note to 2006 amendment.

183. *Id.*

184. FED. R. CIV. P. 26(f).

Critical here, Rule 26(f)(3)(D) allows lawyers to tackle inadvertent disclosure issues by agreeing how to address “claims of privilege or of protection as trial-preparation materials, including . . . whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.”¹⁸⁵ Once lawyers enter private agreements on how they would like to address inadvertent disclosures, Rule 26(f) then works with Rule 16 to create controlling scheduling orders.

Rule 16(a) utilizes pretrial conferences to explore ways to expedite resolution of disputes, avoid protracted litigation due to poor case management, and discourage “wasteful pretrial activities.”¹⁸⁶ Rule 16(b) provides the controlling mechanism to further these goals—the scheduling order.¹⁸⁷ Relevant here, Rule 16(b)(3)(B)(iv) permits lawyers to include in the scheduling order “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.”¹⁸⁸

Thus, the Federal Rules of Civil Procedure anticipate that lawyers may wish to opt out of default procedural and evidentiary rules through private agreements to regulate inadvertent disclosures. This opt-out prospect that is embedded in the rules of civil procedure reinforces this Article’s proposal to modify the rules of

185. *Id.* at (f)(3)(D). It is important to at least note that when a lawyer attempts to use private agreements to opt out of default rules of evidence and rules of civil procedure, the lawyer must understand the scope of those agreements and to whom they control. Addressing the “Controlling Effect of a Party Agreement,” Federal Rule of Evidence 502(e) elucidates how any “agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.” FED. R. EVID. 502(e). The Advisory Committee’s Explanatory Note makes clear that this “well-established proposition” authorizes parties to enter into a private “agreement to limit the effect of waiver by disclosure between or among them.” FED. R. EVID. 502(e) advisory committee’s note to 2008 amendment. Recognizing that because “such an agreement can bind only the parties to the agreement,” Rule 502(e) “makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.” *Id.* One expert in federal litigation provides this helpful illustration on an efficient way to safeguard privileged information against inadvertent disclosures by utilizing the rules of ethics, the rules of civil procedure, and the rules of evidence:

Let me offer this illustration of the interplay of these various rules. If a lawyer receives an inadvertently produced privileged document, under Model Rule 4.4(b), the lawyer should “promptly” notify the sender. If the sender discovers the inadvertent production first in a federal proceeding, FRCP 26(b)(5)(B) should result in notice and resolution of the claim of waiver by the district court. Rule 502(b) would then provide a uniform rule of law to determine if a waiver has occurred. Parties that wish to address the potential of inadvertent production upfront should ask the district court to enter a Rule 502(d) order to protect the parties from claims of privilege waiver by parties within the litigation or by third parties.

Barkett, *supra* note 3, at 1598–99.

186. FED. R. CIV. P. 16(a)(1)–(3).

187. FED. R. CIV. P. 16(b).

188. *Id.* at 16(b)(3)(B)(iv).

ethics to allow lawyers to enter private agreements to control inadvertent disclosures if the lawyers are not content to be bound by the default rules of civil procedure and rules of evidence. By aligning the rules of ethics with the rules of civil procedure and allowing opposing lawyers to enter private agreements on inadvertent disclosures with informed consent from their respective clients, every point of view on the proper ethical response to inadvertent disclosures should be satisfied.¹⁸⁹ No matter if one's position is that the rules of ethics *should* prohibit a lawyer from using inadvertent disclosures, such a position would enjoy a fair opportunity to be adopted by individual lawyers through private agreements. Harkening back to the reasons that Formal Opinion 92-368 gave to place strict ethical restrictions on a receiving lawyer, those abstract reasons for non-use may find an audience in lawyers who choose to enter private agreements that place restrictions on the use of inadvertent disclosures. Additionally, the current Comments to Rule 4.4(b) that encourage lawyers to forego any use of inadvertent disclosures can be directed toward lawyers as they ponder whether to utilize the ethical and procedural private-agreement option. At bottom, any ethical stricture would yield to ethical choice.

Finally, the private-agreement option should be particularly enticing to lawyers who feel a moral calling not to use the mistakes of another lawyer. Through opting out of any default substantive rule that would allow such use, the lawyer would not be tempted to forego heeding the direction mandated by his ethical compass. For any lawyer who does not wish to opt out of the default rules of civil procedure and rules of evidence through private agreement, however, it would be mandatory that a lawyer fully understand how the rules of civil procedure interact with the rules of evidence to resolve inadvertent disclosure issues.

B. Inadvertent Disclosures under the Federal Rules of Evidence

Under this Article's proposal, the rules of evidence play a central role in determining the ethical obligations of a lawyer who receives an inadvertent disclosure.¹⁹⁰ The purpose of the Federal Rules of Evidence is "to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and

189. One California court boldly proclaimed, "We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its 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." *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999). Private agreements should ameliorate a client's fears.

190. A big-firm commercial litigator and expert on e-Discovery has argued that "Federal Rule of Evidence 502(d) plays an important role . . . [in] solving the privilege-protection puzzle." Barkett, *supra* note 3, at 1590; *see also*, Schaefer, *supra* note 2, at 213 ("The law of privilege waiver is the key doctrine used to address the consequences of inadvertent disclosure.").

securing a just determination.”¹⁹¹ At their core, these rules seek to ensure that evidence is trustworthy.¹⁹² The working premise of this Article is that if the rules of evidence proffer that inadvertent disclosures are trustworthy and fairly serve to ascertain truth and secure just determinations, it would be a perversion of justice if an overactive set of ethics rules worked against those goals.¹⁹³ If the rules of evidence authorize the use of inadvertent disclosures, that authorization should inform the proper ethical response. On the other hand, if the rules of evidence preclude the use of inadvertent disclosures, then that restriction, too, should counsel—and bind—a lawyer’s ethical obligation. That result would not be any more or less restrictive than restrictions that ethics rules and ethics opinions have placed on receiving lawyers without properly considering how the rules of evidence address the issue. This Article’s proposal explicitly obligates a receiving lawyer to understand fully how the rules of evidence govern inadvertent disclosures before knowing how to meet the ethical obligations to his client.

To be clear, every lawyer must have a thorough understanding of the rules of evidence to meet his ethical obligations when confronted with inadvertent disclosures in litigation. A receiving lawyer’s ethical decision to use or not to use inadvertent disclosures for his client’s benefit boils down to whether the rules of evidence authorize such use. When the rules of evidence authorize the use of inadvertently disclosed information, then only a private agreement (with the client’s informed consent) would authorize the lawyer to not use the information for his client’s benefit and still meet his ethical obligations.

For ease of discussion and reference, instead of analyzing the rules of evidence of a multitude of jurisdictions, this Article will look to the federal rules to illustrate how the proposal will work. But again, this proposal works with any

191. FED. R. EVID. 102. In addressing a privilege issue other than that of attorney-client, one court recognized that an essential public interest seeks “the fair administration of justice,” which “is embodied in the core provisions of the Federal Rules of Evidence whose purpose it is to develop all relevant facts at trial.” *Flora v. Hamilton*, 81 F.R.D. 576, 579 (M.D.N.C. 1978) (addressing the admissibility of evidence from psychiatric counseling under the physician-patient privilege).

192. See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973).

193. See, e.g., *Opinion #146. Obligation to Return Inadvertently Disclosed Privileged Documents*, BD. OF OVERSEERS OF THE BAR, PROFESSIONAL ETHICS COMMISSION (Dec. 9, 1994), http://www.mebaroverseers.org/attorney_services/opinion.html?id=696513 [https://perma.cc/Z97H-GB4B]. (“So long as use of the [inadvertently disclosed] memorandum is permitted by the Rules of Evidence or Procedure, use of the memorandum cannot be said to be prejudicial to our adversary system of litigation.”). “The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.” *United States v. Nixon*, 418 U.S. 683, 709 (1974). “The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.” *Id.* It cannot be overstated that an ethical restriction on the use of inadvertent disclosures that otherwise are admissible would fundamentally undermine the integrity of our adversarial judicial system, which, over time, would erode public confidence.

variation of how rules of evidence regulate inadvertent disclosure issues. Currently, Federal Rule of Evidence 502(b) employs a three-step negligence analysis to determine whether inadvertently disclosed information results in the loss of the attorney-client privilege:

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).¹⁹⁴

This test creates a presumption in favor of the return of inadvertently disclosed information.¹⁹⁵ The Advisory Committee's Explanatory Note explains that Rule 502 "has two major purposes."¹⁹⁶ First, it resolves longstanding splits in authority in various courts on how inadvertent disclosure impacts waiver of privilege.¹⁹⁷ Second, building on the findings that prompted the promulgation of Federal Rule of Civil Procedure 26(b), Rule 502 tries to correct a "widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product" through inadvertent disclosures "have become prohibitive."¹⁹⁸ Lawyers have legitimate concerns that any disclosure—no matter how innocent or minimal—will operate as a subject matter waiver of all

194. FED. R. EVID. 502(b).

195. IRS CCN CC-2009-023, 2009 WL 2486470.

196. FED. R. EVID. 502(e) advisory committee's note to 2008 amendment.

197. *Id.*; see also 154 CONG. REC. H7818 (daily ed. Sept. 8, 2008) (statement of congressional intent regarding Rule 502 of the Federal Rules of Evidence) (explaining that the chosen standard simply follows "the majority rule in the federal courts").

198. FED. R. EVID. 502(e) advisory committee's note to 2008 amendment; see also, IRS CCN CC-2009-023, 2009 WL 2486470 ("The stated objective for the adoption of Rule 502 is to alleviate some of the costs associated with electronic discovery and document production in litigation by reducing the risks associated with inadvertent production of material protected by the attorney-client privilege or the work product doctrine."); Laurie A. Weiss, *Protection of Attorney-Client Privilege and Work Product in the E-Discovery Era*, in THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 163 (Vincent S. Walkowiak ed., 4th ed. 2008) ("In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product."); Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 239 (D. Md. 2005) ("Responding to a discovery request for a corporation's internal e-mail may seem simple and straightforward to the courts or lawyers. However, a company served with a request to produce e-mail messages faces time consuming and expensive processes. . . . The cost of responding to a discovery request can be in the millions of dollars. . .") (quoting Linda Volonino, *Electronic Evidence and Computer Forensics*, 12 COMM'NS OF THE ASS'N FOR INFO. SYS. 27, October 2003, at 14, available at <http://aisel.aisnet.org/cais/vol12/iss1/27/> [<https://perma.cc/4YL8-WBF8>]).

protected communications or information. This concern is especially acute in cases involving large amounts of electronic discovery.¹⁹⁹

Before Rule 502(b) was promulgated, the law's treatment of inadvertent disclosures was not uniform.²⁰⁰ Typically, courts employed one of three tests to decide whether an inadvertent disclosure waived the attorney-client privilege.²⁰¹ At one end of the spectrum, some courts followed a strict no-waiver approach, deciding that true inadvertence does not constitute waiver.²⁰² At the opposite end of the spectrum, a few courts followed an always-waived approach, concluding that disclosure, by definition, waived privilege.²⁰³ As often happens in the law,

199. See, e.g., *Hopson*, 232 F.R.D. at 244 (recognizing that because electronic discovery "may encompass hundreds of thousands, if not millions of electronic records, that are potentially discoverable," a "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation"). Everyone was not enamored with Rule 502:

We can state the policy of Rule 502 succinctly, albeit simplistically, as "special waiver rules for the wealthy." Corporate lawyers and corporate-funded Congressmen originally pushed the Judicial Conference to draft the bill. People of modest means do not make so many communications to attorneys that they need to do extensive screening to make sure that they do not mistakenly turn over privileged information in discovery. Nor do they engage in so much litigation that they must worry about the effect of the disclosures in one lawsuit in some subsequent lawsuit. Only corporations and the filthy rich face the problems that Rule 502 claims to fix.

23A ANN MURPHY, FEDERAL PRACTICE & PROCEDURE § 5442 (1st ed., 2018); see also, IMWINKELRIED, *supra* note 159, at § 6.12.5 (remarking that "some commentators have dubbed [Federal Rule of Evidence 502] the Lawyers' Relief from Mistakes Rule") (citing Jerold S. Solovy & Robert L. Byman, *Discovery: Mistakes Happen*, NAT'L L.J., Jan. 19, 2009, at 14).

200. See FED. R. EVID. 502(e) advisory committee's note to 2008 amendment ("Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver."). Rule 502's approach to waiver issues serves to "provide a predictable, uniform set of standards." FED. R. EVID. 502 advisory committee's note to 2008 amendment. See also, 154 CONG. REC. H7818 (daily ed. Sept. 8, 2008) (statement of congressional intent regarding Rule 502 of the Federal Rules of Evidence) ("The majority rule in the federal courts has simply been distilled here into a standard designed to be predictable in its application.").

201. "The first approach is called the traditional or strict approach, which holds that an inadvertent disclosure *always* constitutes a waiver of privilege." *Jones v. Eagle-North Hills Shopping Centre L.P.*, 239 F.R.D. 684, 685 (E.D. Okla. 2007). "The second approach is the 'no waiver' approach or 'subjective intent test,'" which "holds that an inadvertent disclosure does not constitute a waiver of privilege without extreme negligence." *Id.* "The third approach is referred to as the 'skeptical balancing test,' which gives the court discretion in determining whether the inadvertent disclosure results in a waiver" with full awareness "that, in spite of many peoples' thoughts otherwise, even lawyers are human and are capable of making mistakes." *Id.*

202. FED. R. EVID. 502 advisory committee's note to 2008 amendment.

203. FED. R. EVID. 502 advisory committee's note to 2008 amendment ("[A] few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure.").

a third path was forged in the middle. Courts that followed this middle path employed a negligence test that balanced various factors to determine if the privilege had been waived.²⁰⁴ When employing the negligence or balancing test, most courts employed these five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) overriding interests in justice.²⁰⁵ Under this third option, courts employ a two-part analytical framework when considering privilege issues involving inadvertent disclosures.²⁰⁶ The first part analyzes Rule 502(b)'s three-step negligence test: (1) whether the disclosure was inadvertent; (2) whether *reasonable* steps were taken to prevent disclosure; and (3) whether *reasonable* steps were taken to rectify the error after disclosure.²⁰⁷ The second part recognizes that in order to analyze the reasonableness aspects of Rule 502(b)(2) and (3), one must apply the five-factor test.²⁰⁸ It is important to note that this balancing test is not highly calibrated. None of these factors is dispositive; they simply serve as non-determinative guidelines to flexibly test the reasonableness of a lawyer's conduct within the overriding value of fairness.²⁰⁹

Perhaps surprisingly, this Article has no interest in critiquing the wisdom of how the rules of evidence—whether the federal rules or rules in various state

204. Rule 502 “opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error.” FED. R. EVID. 502 advisory committee’s note to 2008 amendment. Indeed, this test follows “the majority view on whether inadvertent disclosure is a waiver.” *Id.* (“Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner.”).

205. FED. R. EVID. 502 advisory committee’s note to 2008 amendment. *See, e.g.*, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). Judge Joyner’s opinion in *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516 (E.D.Pa.1996), is widely cited as setting the appropriate factors under the negligence test used to determine whether an inadvertent disclosure results in the loss of the attorney-client privilege:

- (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production.
- (2) The number of inadvertent disclosures.
- (3) The extent of the disclosure.
- (4) Any delay and measures taken to rectify the disclosure.
- (5) Whether the overriding interests of justice would or would not be served by relieving the party of its errors.

Id. at 521–22.

206. FED. R. EVID. 502 advisory committee’s note to 2008 amendment.

207. *Id.* (italics added).

208. *Id.*

209. *Id.*

jurisdictions—choose to resolve privilege issues when confronted with inadvertent disclosures. That battle has raged for decades and probably will continue to do so in the fifty-one federal and state systems. How various rules of evidence address the inadvertent disclosure issue is wholly irrelevant. This Article’s proposed rule of ethics is content to take the rules of evidence and rules of procedure as they are—and even as they will be over time—because those rules should govern ethical responses; not the other way around. At this stage, perhaps it is prudent to illustrate how tethering the rules of ethics to the rules of evidence will work in practice.

C. Practical Illustrations of Amended Model Rule 4.4(b)’s Interaction with Rules of Evidence

If a receiving lawyer were to forego private agreements to limit use of inadvertent disclosures, then an understanding of the rules of evidence is necessary. This Article highlights how aligning the rules of ethics with the rules of evidence, rules of civil procedure, and private agreements is the best path forward. It is beyond the scope of this Article to delve deeply into each area, because the wisdom of the proposal does not rely on the types of rules of evidence or rules of civil procedure that lawyers might confront. Instead, the proposal’s bright-line rule works no matter the state of evidentiary or procedural rules on inadvertent disclosures. Lawyers must take those rules as they come when deciding the appropriate ethical response to inadvertent disclosures. Additionally, the private agreement option always stands ready to assist lawyers whose ethical values might not be consistent with rules of evidence and rules of civil procedure.²¹⁰ Although inadvertent disclosure cases will span a wide spectrum of potential results under this Article’s proposal, an analysis of a few scenarios should offer a sense of the practical reality in litigation.

1. Never-Waived Approach

If a jurisdiction followed a strict no-waiver approach when confronting inadvertent disclosures, the ethical response under the updated Model Rule 4.4(b) would be straightforward—the receiving lawyer would not be authorized to use the disclosed information. It might be wise to draw an important distinction between merely possessing privileged materials and actually attempting to use them. Because the rules of evidence govern the use and admissibility of evidence, the receiving lawyer’s desire to use privileged information would be rendered moot if that information retains its coveted privileged status. Without the ability to use privileged information, there would not be much benefit for a receiving lawyer to possess it.

210. Given the inherent uncertainty in privilege litigation—and its inordinate cost—one readily can see why many lawyers might choose the private agreement option to settle inadvertent disclosure issues before they become expensive to litigate.

One pre-Rule 502(b) case revealed how a court disavowed the traditional balancing test in favor of a never-waived approach. In *Jones v. Eagle-North Hills Shopping Centre*,²¹¹ a lawyer inadvertently sent a privileged email to opposing counsel in litigation.²¹² Within eight minutes, the sending lawyer realized his mistake and immediately asked opposing counsel to delete the email.²¹³ Displaying the opposite of a charitably cheery disposition, the receiving lawyer let the sending lawyer know that it was “too late,” because she had already read the short email.²¹⁴ This is where it is important to recognize that simply reading the email versus using its contents to benefit a client are not the same thing.

Without the guidance of Rule 502(b), the court acknowledged the three primary approaches that determine whether an inadvertent disclosure waives the attorney-client privilege.²¹⁵ The court had to choose to apply the always-waived approach, the never-waived approach, or the negligence approach (often called the “skeptical balancing test”).²¹⁶ The court refused to follow the strict always-waived approach, believing “that privileges are to be taken quite seriously” and “should not, therefore, be blithely disregarded.”²¹⁷ The court also rejected the balancing test, complaining that “the benefit of flexibility is often overshadowed by the cost of uncertainty.”²¹⁸ Left with one remaining option, the court adopted the never-waived approach “based on the idea that a waiver when the client is

211. 239 F.R.D. 684 (E.D. Okla. 2007).

212. *Id.* at 685.

213. *Id.*

214. *Id.*

215. *Id.*

216. 239 F.R.D. at 685.

217. *Id.*

218. *Id.* Undoubtedly, multi-factor balancing tests can lead to uncertainty in outcome, which leads to enthusiasm for rules that promote uniformity and certainty. This Article’s proposed ethics rule would in no way contribute to that uncertainty, because it takes other rules as they come. One author, however, has complained that the lack of uniformity in federal litigation when it comes to inadvertent disclosures is troubling:

Recent Rule 502(b) case law . . . demonstrates a stubborn adherence to former, not uniform case law as part of the application of a rule that was intended to create uniformity. . . [S]ome courts have entered a time warp—as if e-discovery were nonexistent. A major goal of Rule 502 is to decrease litigation costs. This means looking at the data storage world we face today and eschewing reliance on cases decided in a different era that do not account for the costs of restoration, retrieval, and review of electronically stored information. Court orders need to encourage the use of technology in smart ways that may not be 100 percent privilege protective, meaning that these court orders must protect the privilege in meaningful ways to avoid stifling the benefits technology can provide to reducing litigation costs. . . . The combination of Model Rule 4.4, FRCP 26(b)(5)(b) and 26(f)(3)(D), and Rule 502(d) demonstrates that rule makers and Congress have recognized the challenges facing lawyers to protect privileged and work-product documents while simultaneously trying to control litigation costs that are financially choking those lawyers’ clients.

Barkett, *supra* note 3, at 1619–20.

not aware of an inadvertent disclosure serves only to punish the innocent.”²¹⁹ The court remarked, “Even if not driven by a warm feeling of collegiality, such deference to human fallibility would evince familiarity with the ancient wisdom of: ‘What goes around comes around.’”²²⁰ Revealing the staying power of the confusing ambiguity in the Model Rules when it comes to inadvertent disclosures, the court commented that “the spirit of Model Rule 4.4(b)” certainly required the receiving lawyer to forbear from seeking to use the inadvertent disclosure.²²¹

This is a clear example of how some courts demonstrate a loathsome response to a receiving lawyer’s use of inadvertent disclosures. Again, this Article does not take a position on what test should be applied to determine whether an inadvertent disclosure waives the attorney-client privilege. If a jurisdiction follows the never-waived approach, then that rule of evidence would engender the ethical obligation that prohibits the receiving lawyer from using the inadvertent disclosure. Remarkably, even while the court was satisfied to apply the never-waived approach, it nevertheless felt compelled to enlist Model Rule 4.4(b) as another reason—an ethical reason—to rule against the receiving lawyer. Neither Model Rule 4.4(b) nor its gratuitous Comments provides support for the court, which should have stuck to its clear-eyed evidentiary ruling. That is why this Article seeks to modify Model Rule 4.4(b) so that a court and, ultimately, receiving lawyers rely on a proper analysis of the rules of evidence and rules of civil procedure (which incorporate private agreements) to resolve privilege claims for inadvertent disclosures.

2. Always-Waived Approach

What would be the ethical response on the opposite end of the spectrum if a jurisdiction followed an always-waived approach in which inadvertent disclosures always result in the waiver of the privilege? That would depend on how a lawyer chose to address inadvertent disclosures. Under proposed Model Rule 4.4(b), recall that a lawyer may follow default rules of evidence or opt-out

219. *Eagle-North Hills Shopping Ctr.*, 239 F.R.D. at 685.

220. *Id.* at 686. Undoubtedly, there is comfort in knowing that opposing lawyers may enjoy reciprocity in favorable responses to regrettable disclosures of a client’s privileged information. Underscoring the “what goes around comes around” saying, one can hear the oft-quoted “there but for the grace of God go I.” Routinely attributed to John Bradford, the quote more accurately reads, “But for the grace of God there goes John Bradford.” *See also*, *Burt Hill, Inc. v. Hassan*, No. 09-1285, 2010 U.S. Dist. LEXIS 7492, at *17 (W.D. Pa. Jan. 29, 2010) (providing an ethical rule of thumb that “if something appears too good to be true, it probably is”).

221. *Eagle-North Hills Shopping Ctr.*, 239 F.R.D. at 686. It should be obvious that this Article’s proposal seeks to end—once and for all—any misplaced reliance on the various spirits that arise from Model Rule 4.4(b), its penumbras, or the “larger, and more fundamental, framework” that Formal Opinion 92-368 found so illuminating. Instead, this Article’s proposal creates a clear, unmistakable, easy-to-follow rule that does not allow for various distractions.

in favor of private agreements. If the lawyer were convinced that it is improper to use inadvertent disclosures, then the lawyer may choose to enter a private agreement with either his client or an opposing lawyer to prohibit the use of those disclosures. The private agreement (incorporated into a scheduling order in the case of a mutual agreement between opposing lawyers in litigation) would then control a receiving lawyer's ethical obligation. Absent a private agreement that prohibits use of inadvertent disclosures, a receiving lawyer's ethical obligation would be to use the inadvertent disclosures unless prohibited by the rules of evidence. Because the rules of evidence would authorize such use in an always-waived jurisdiction, the receiving lawyer's ethical duty would be to use the inadvertent disclosures to aid his client's case.

3. Negligence Approach

As opposed to the never-waived or always-waived approaches, the negligence approach does not offer obvious solutions to every inadvertent disclosure issue.²²² By tethering ethical obligations to those types of evidentiary rules, there will be uncertainty at times. That uncertainty does not arise from this Article's proposal, however; it is driven by the evidentiary response to whether the privilege is waived. It will not affect a lawyer's ability to comply with the clear ethics rule that this Article proposes.

Again, Federal Rule of Evidence 502 codified the majority common-law approach to inadvertent disclosures that analyzed privilege issues under a negligence test. Under this approach, courts use the two-part analytical framework to determine whether an inadvertent disclosure waives the privilege. The first part will result in a no-waiver conclusion if (1) the disclosure was inadvertent; (2) the privilege holder "took reasonable steps to prevent disclosure"; and (3) "the holder promptly took reasonable steps to rectify the error."²²³ The second part is to determine whether the privilege holder "took reasonable steps," which requires a consideration of these five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) overriding interests in justice.²²⁴ What can a receiving lawyer expect if his ethical obligations are governed by Rule 502? Because that depends on how a court applies the negligence test, this Article will explore five cases to analyze how receiving lawyers could have approached inadvertent disclosures under the proposed Model Rule 4.4(b).

222. One court has bemoaned the fact that it is not easy for lawyers to forecast how courts might rule on questions of waiver. *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005).

223. FED. R. EVID. 502(b).

224. FED. R. EVID. 502 advisory committee's note to 2008 amendment.

a. *Rhoads Industries v. Building Materials Corp. of America*

One case from Pennsylvania provides an extreme example of staggering carelessness in disclosing privileged material without resulting in a waiver of the attorney-client privilege. In *Rhoads Industries, Inc. v. Building Materials Corp. of America*,²²⁵ the plaintiff sent what it believed were 78,000 non-privileged emails to the defendants.²²⁶ Complying with their obligations under Rule 26(b)(5)(B), the defendants notified the plaintiff that it had inadvertently disclosed over 800 privileged documents, segregated the documents, provided them to the court for review, and litigated the waiver issue.²²⁷

The court asked whether the plaintiff had “at least minimally complied with the three factors stated in Rule 502, i.e., that the waiver was inadvertent, the party took reasonable steps to prevent disclosure, and attempted to rectify the error.”²²⁸ Concluding that the plaintiff had “shown at least minimal compliance with the three factors in Rule 502,” the court evaluated reasonableness under “the traditional five-factor test.”²²⁹ As the court analyzed each factor, it appeared that the court was going to rule in the defendants’ favor. The court concluded that the plaintiff had failed to act reasonably in failing to conduct sufficient searches and failing to sufficiently prepare for the segregation of privileged and non-privileged documents.²³⁰ The court’s analysis of the first four factors weighed heavily against the plaintiff who had been negligent in its failure to take precautions, the number and extent of inadvertently disclosed materials, and its post-disclosure measures.²³¹ The court was nonplussed by this level of enduring negligence or the analytical weight of the first four factors. Instead, the court gave tremendous weight to the fifth factor of “the interest of justice.”²³² The court concluded that because the loss of privilege “in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice,” the fifth factor strongly favored the plaintiff and outweighed the four other factors.²³³ Further evoking images of injustice, the court saw no prejudice to the defendants who should have had no reason to expect access to the privileged communications in the first instance.²³⁴

What would it have looked like had the proposed Model Rule 4.4(b) governed the receiving lawyer’s ethical obligations in *Rhoads Industries*? From the onset, the defendants’ lawyer should have recognized that because he was

225. 254 F.R.D. 216, 222 (E.D. Pa. 2008).

226. *Id.* at 222.

227. *Id.* at 218.

228. *Id.* at 226.

229. *Id.*

230. *Rhoads Industries*, 254 F.R.D. at 226.

231. *Id.* at 227

232. *Id.*

233. *Id.* at 227.

234. *Id.*

litigating in a jurisdiction that employed the negligence standard, Model Rule 4.4(b) would have required him to use inadvertent disclosures if the plaintiff's lawyer negligently disclosed privileged material. With the recognition that ethics rules might require the use of inadvertent disclosures, the receiving lawyer enjoyed the option to choose ahead of time to not pursue that legal benefit for his client under the rules of evidence by entering a private agreement with his client or opposing counsel. If he had entered a private agreement with opposing counsel to opt out of Rule 502's default treatment of inadvertent disclosures, he would have been wise to incorporate the agreement in a protective order under Rules 26(f) and 16(a). And then when the plaintiff inadvertently disclosed privileged materials, the receiving lawyer simply would have complied with the protective order rather than trigger Rule 26(b)(5)(B) and seek to use the materials under the rules of evidence.

If the defendants' lawyer had not opted out of the default evidentiary rules through private agreement, however, then he would have been required to know how the rules of civil procedure and rules of evidence addressed the issue. Once he had received the inadvertent disclosures, he would have been required to proceed precisely as he did. Pointedly, he would have followed Rule 26(b)(5)(B) and Rule 502 to satisfy his ethical obligations. He would *not* have had the option to rely on an abstract feeling that he should not pursue his client's lawful right to use the disclosed information. Under this Article's proposal, there are no remnants of Comment 3 to Model Rule 4.4(b) that allow a receiving lawyer to ruminate on whether he will pursue inadvertent disclosures for his client when the rules of evidence and rules of civil procedure do not prohibit it. The only caveat here is if the receiving lawyer's independent judgment in zealously advocating for his client led him to conclude that there was no chance that the privilege issue would go his way (i.e., it would have been frivolous to seek to use the privileged materials). In that case, he would have been authorized to forego trying to use the inadvertent disclosures. That is, if the receiving lawyer analyzed the rules of evidence and rules of civil procedure and concluded that those rules—as applied to his facts—would result in his inability to use the disclosed materials, then that inherently results in a legal conclusion that those rules prohibit such use, which would then govern his ethical obligation.

b. *Heriot v. Byrne*

Another illustration of how a receiving lawyer's understanding of the rules of evidence would provide the proper ethical response to inadvertent disclosures comes from an Illinois court. In *Heriot v. Byrne*,²³⁵ the plaintiffs used a vendor-created database to sort and flag documents for privileged information before producing documents to opposing counsel.²³⁶ Two months after producing 6952

235. 257 F.R.D. 645, 651 (N.D. Ill. 2009).

236. *Id.*

pages to opposing counsel, the plaintiff discovered that privileged materials had been disclosed.²³⁷ Within twenty-four hours, the plaintiff asked the defendant to destroy the privileged materials.²³⁸ Holding that the inadvertent disclosures did not waive the privilege, the court permitted the plaintiff to claw back the privileged documents.²³⁹ Although the court recognized it was “not insignificant” that between five and thirteen percent of the produced materials were privileged, the court concluded that the plaintiff acted reasonably when he responded to the mistake within twenty-four hours of its discovery, took reasonable steps to prevent the disclosure when he employed a multi-step process to inspect the documents before he turned them over to the vendor, and timely remedied the inadvertent disclosure.²⁴⁰ In the final calculus, the court declared that “*how* the disclosing party *discovers and rectifies* the disclosure is more important than *when* after the inadvertent disclosure the discovery occurs.”²⁴¹

Had the receiving lawyer been laboring under this Article’s proposed Model Rule 4.4(b), he would have known that he was litigating a federal case in a jurisdiction that applied the negligence standard to waiver issues for inadvertent disclosures. He could have opted out of those rules through private agreements with his client or opposing counsel. If he had not chosen that route, the receiving lawyer would have faced an ethical dilemma when the plaintiff inadvertently produced privileged materials. At that point, Model Rule 4.4(b) would have required that the receiving lawyer notify the sending lawyer of the inadvertent disclosures. Whether the receiving lawyer would have been ethically required to try to use the privileged information would not have been so clear, because the evidentiary response was unclear. There absolutely would have been no ethical prohibition from making a good-faith argument that the privilege had been waived, which is how the receiving lawyer proceeded in *Heriot*. But perhaps it is not obvious that this Article’s proposed ethics rule might not have required the receiving lawyer to use the inadvertent disclosures. The rule only requires that a receiving lawyer use inadvertent disclosures unless prohibited by the rules of evidence. If a receiving lawyer reasonably concludes that the rules of evidence do not authorize use, he may forego an expensive effort to litigate the matter and return the privileged materials unused. One final observation, however, would be to underscore that private agreements provide protection against costly and lengthy battles in litigation over close calls on waiver issues.

237. *Id.*

238. *Id.*

239. *Id.* at 656-57.

240. 257 F.R.D. at 659-60.

241. *Id.* at 662. *See also*, BNP Paribas Mortg. Corp. v. Bank of America, N.A., Nos. 09 Civ. 9783 (RWS), 9784 (RWS), 2013 WL 2322678, (S.D.N.Y. May 21, 2013) (holding that the inadvertent disclosure of 116 documents, which represented less than .001% of the 1.5 million documents reviewed and produced, did not waive the privilege).

c. *Kandel v. Brother International Corp.*

One case from California demonstrates how rules of civil procedure work with rules of evidence to provide the adequate response to inadvertent disclosures. In *Kandel v. Brother International Corp.*, between mid-June and mid-August, the defendants produced over 10,000 documents containing 67,678 pages.²⁴² Because many documents were in Japanese, the defendants conducted a Japanese language review and a privilege review.²⁴³ For help, the defendants hired a consultant.²⁴⁴ Even after extensive meetings, guidance on privilege issues, and instructions to run keyword searches to help segregate privileged documents, the defendants discovered that privileged documents had been produced.²⁴⁵ Immediately contacting the consultant, the defendants learned that the consultant had not run the instructed keyword searches.²⁴⁶ The defendants instructed the consultant to run keyword searches of all documents, including those already produced.²⁴⁷ This search revealed 722 privileged documents, of which 110 had been produced.²⁴⁸ The defendants promptly notified the plaintiffs about the inadvertent disclosures and triggered the agreed-upon procedures in the protective order under Rule 26(b)(5)(B).²⁴⁹

Confronted with whether the inadvertent disclosures waived the attorney-client privilege, the court held that because the defendants had acted reasonably in the face of the inadvertent disclosures, Rule 26(b)(5)(B) and Rule 502(b) guarded against waiver.²⁵⁰ Enforcing the clawback provision of the protective order, the court ordered the plaintiffs to return the privileged documents to the defendants.²⁵¹

Under Model Rule 4.4(b), the plaintiff would have been required to notify the defendants if the plaintiff had reason to know of the inadvertent disclosures.

242. 683 F. Supp. 2d 1076, 1085 (C.D. Cal. 2010).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Kandel*, 683 F. Supp. 2d at 1085.

248. *Id.*

249. *Id.* at 1085-86.

250. *Id.* at 1086.

251. *Id.*; *see also*, *Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 698 (N.D. Ga. 2010) (applying Rule 26(b)(5)(B) and Rule 502 to order the return of privileged documents that had been inadvertently disclosed because only four of over 2000 produced pages were privileged, numerous lawyers had reviewed the documents before they were produced, and as soon as inadvertent disclosure was discovered, a lawyer immediately sought the return of the documents); *Northrop Grumman Sys. Corp. v. United States*, 120 Fed. Cl. 436, 437-39 (2015) (applying Rule 502 to enforce a clawback provision on inadvertent disclosures in a protective order in a large contract case in which a government lawyer took reasonable steps (barely, perhaps) to examine over three million documents for privilege but inadvertently disclosed 1500 privileged documents and then notified opposing side six times in seven months).

This would have triggered the defendants to seek the shelter of the protective order even before the defendants actually did on their own. Because of the protective order, which resulted from a private agreement under Rule 26(b)(5)(B) and Rule 502, the plaintiff was limited in its ability to use the inadvertent disclosures. That is a perfect illustration of how a receiving lawyer under this Article's proposed Model Rule 4.4(b) would look to the rules of evidence, rules of civil procedure, and private agreements to know the proper ethical response to inadvertent disclosures. Had there been no private agreement or protective order, then the receiving lawyer would have sought to use the disclosures under the rules of evidence after complying with his ethical notification obligation.

d. *Gloucester Township Housing Authority v. Franklin*

An important federal case from New Jersey illustrates an opposite conclusion in which the court deemed the negligent disclosure of materials waived the attorney-client privilege. In *Gloucester Township Housing Authority v. Franklin Square Associates*,²⁵² the court addressed the waiver issue by analyzing Rule 26(b)(5)(B), Rule 502(b), and the traditional five-factor negligence test.²⁵³ In that case, a landlord's agent inadvertently disclosed two letters between itself and its lawyer while producing more than 3500 pages of documents.²⁵⁴ The court held that the negligent failure to take reasonable steps to prevent the disclosure or rectify the error resulted in a waiver of the privilege.²⁵⁵ The court recognized that because the volume of inadvertent disclosures—three out of more than 3500 pages—was *de minimis*, that factor supported the protection of the privilege.²⁵⁶ The court was more persuaded by other factors that revealed that the landlord was unable to identify *any* precautions that it had taken to prevent disclosure of privileged information, the letters were “*clearly* privileged, substantive information pertaining to this litigation” because they were “communications between attorney and client” and “warranted a significant level of scrutiny” prior to production,” and the landlord made no attempt to rectify its erroneous disclosure for months.²⁵⁷

This case reveals the perils of an overactive ethics rule that prohibits a receiving lawyer from using inadvertent disclosures to benefit his client. Had the

252. 38 F. Supp. 3d 492 (D.N.J. 2014).

253. *Id.* at 496–99.

254. *Id.* at 495–96.

255. *Id.* at 499–500.

256. *Id.* at 498.

257. *Gloucester Hous. Auth.*, 38 F. Supp. 3d at 497–99. *See also*, *Mt. Hawley Ins. Co.*, 271 F.R.D. at 125 (holding that inadvertent disclosures waived the privilege when a lawyer engaged in a frustrating “document dump” in which thirty percent of the documents were wholly nonresponsive and all were marked confidential, even though the lawyer later realized that over three hundred documents were privileged and tried to get protection under a protective order).

receiving lawyer labored under restrictive ethics rules, he would have returned the privileged material even though the rules of evidence and rules of procedure authorized the use of those materials for his client's cause. This case illustrates the wisdom of this Article's proposal to tether the receiving lawyer's proper ethical response to inadvertent disclosures to the rules of evidence and rules of civil procedure.

e. *Eden Isle Marina, Inc. v. United States*

Finally, the facts of a United States Court of Federal Claims case reveal how a receiving lawyer's ethical response under this Article's proposal would have been to use inadvertent disclosures to benefit his client. This clear ethical response would be different under current ethics rules. *Eden Isle Marina, Inc. v. United States*²⁵⁸ is an open-and-shut case of failure to take reasonable steps to protect privileged information. During litigation, the defendant disclosed eight privileged files to the plaintiff.²⁵⁹ Surprisingly, at no point during the litigation over the loss of privilege did the defendant show the scope of its pre-disclosure screening processes or object to or rectify its mistake after discovering it.²⁶⁰ The defendant negligently took little or no remedial action!²⁶¹ Concluding that the defendant failed to act reasonably, the court held that the defendant waived the attorney-client privilege for the disclosed documents.²⁶²

Had the receiving lawyer labored under a murky understanding of his ethical obligations in light of the defendant's obvious negligence, the lawyer might have chosen to return the materials without so much as a courtesy call to his client. That course would have been allowed under the current rules. Under this Article's proposal, however, the only way that course would have been ethical is if the lawyer had opted out of the default rules of evidence through private agreement with his client or opposing counsel. Absent such an opt-out agreement, the receiving lawyer would have been required to ethically use the inadvertent disclosures unless prohibited by the rules of evidence or rules of civil procedure. Because the receiving lawyer was not subject to a restrictive protective order under the rules of civil procedure, the lawyer would have been required to use the evidence unless prohibited by the rules of evidence. Given the manifest negligence involved, the only proper ethical response would have been for the receiving lawyer to use the privileged information to benefit his client's case. That is how it played out in the *Eden Isle Marina* case.

It cannot go unnoticed that there could have been a particularly troublesome result for the receiving lawyer's client had his lawyer labored under a false sense

258. 89 Fed. Cl. 480 (Fed. Cl. 2009).

259. *Id.* at 520.

260. *Id.*

261. *Id.*

262. *Id.*

of legal ethics by unilaterally choosing to not use the inadvertent disclosures for his client's benefit and without his client's knowledge. That would have been an option under the current Comments to Model Rule 4.4(b). That would have been an unfortunate result, because the rules of evidence allowed free use of the documents. This Article's proposed amendment to Model Rule 4.4(b) would not authorize such a result short of private agreement, because the receiving lawyer's ethical obligation would have been driven by the rules of evidence, rules of civil procedure, and private agreement instead of blind adherence to an overly restrictive ethics rule.

V. RULES OF ETHICS SHOULD NOT PREEMPT SOCIETY'S VALUES

It is prudent to point out that this Article presupposes that ethics rules should not reject society's values already embedded in the law; ethics rules should reflect those values. In 2010, I promoted "a well-defined investigation exception to the prohibition of attorney deception" in the Model Rules of Professional Conduct.²⁶³ That article reasoned that "[i]f society has not outlawed the use of deception in [criminal, civil rights, and intellectual property investigations], then a set of ethics rules governing attorney behavior should not tamp down the ability of others to lawfully engage in deception for limited but equally important purposes."²⁶⁴ That sentiment induces similar reasoning when it comes to inadvertent disclosures. If the rules of evidence and rules of civil procedure reflect society's values on the appropriate response to inadvertent disclosures within a comprehensive system of justice, then "a set of ethics rules governing attorney behavior should not tamp down the ability" of a receiving lawyer to provide those legal benefits to his client. That is a catalyst behind this Article's proposal.

This desire to allow legal ethics to defer to other law comes with a word of caution. The search for the proper scope of ethics rules must "ensure that any unintended byproducts do not include the creation of distrust in the legal profession or the system of justice."²⁶⁵ To safeguard that such distrust is not an unintended byproduct of this Article's proposal, it is vital to re-emphasize that "the public should be conditioned to believe that attorneys are honest and fair rather than dishonest and deceptive."²⁶⁶ One may contend that this Article's

263. Tory L. Lucas, *To Catch A Criminal, to Cleanse A Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Co*, 89 NEB. L. REV. 219, 221 (2010).

264. *Id.* at 289.

265. *Id.* at 221.

266. *Id.* at 272. It might be wise to point out that my proposed rule of ethics would not condone the use of inadvertent disclosures when it violates the law. *See, e.g.*, Cal. Formal Ethics Op. 2013-188 (2013) (explaining that the receipt of another person's potentially privileged documents from a third party may implicate computer crime, constitute receipt of stolen property, violate the Uniform Trade Secrets Act, or violate a protective order).

proposal would increase public perception that lawyers are deceptive. That is, one might argue that ethics rules that restrict the use of inadvertent disclosures allow lawyers to be viewed as honest and fair while rules that allow a lawyer to “take advantage” of inadvertent disclosures could be viewed as dishonest and deceptive. Not at all. Requiring lawyers to use inadvertent disclosures “unless prohibited by rules of evidence, rules of civil procedure, or private agreement” encourages lawyers to follow the law. It protects every client within a just system by ensuring that everyone knows the rules of the game. That line of reasoning ensures that Model Rule 4.4(b) would align with society’s values on inadvertent disclosures that are embedded in other law—rules of evidence and rules of civil procedure—to deliver the greatest benefit to all clients, the profession, and the justice system. Curiously, current ethics rules allow—or perhaps encourage—deception, because the Comments to Model Rule 4.4(b) implicitly promote a lawyer’s unilateral and potentially uninformed decision to not use inadvertent disclosures. The Comments actually encourage a lawyer to make these decisions without so much as a whisper to the client or thoughtful consideration of whether the client has the lawful right to use that information.

To remedy such an ill-advised consequence, lawyers “owe each other, the legal profession, the administration of justice, and the citizens that rely on our efforts, a full and open debate on the ethics of” inadvertent disclosures.²⁶⁷ This Article’s proposal shines sunlight on the inadvertent disclosure issue so that no one—including clients—are kept in the dark about a lawyer’s intentions and ethical obligations.²⁶⁸

CONCLUSION

This Article’s tenor and tone reflects a sharp policy disagreement with those who seek to force the rules of ethics to govern inadvertent disclosure issues without fully considering how other laws inform the proper ethical response. This Article seeks to unify and harmonize potentially conflicting bodies of law

267. Lucas, *supra* note 263, at 221.

268. At a minimum, this Article contends that “[t]he legal profession, as guardian of the administration of justice, needs some disinfecting sunlight to pour over the [inadvertent disclosure] issue, one that for too long has vexed and perplexed attorneys and judges.” *Id.* at 220. There are tremendous benefits of cascading sunlight on legal issues that lurk in the dark: “Nearly a century ago, Louis D. Brandeis wrote that publicity can remedy social diseases, because sunlight is the best disinfectant and can effectively police human behavior.” *Id.* (citing LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914)). Bolstering that theme, Lord Acton famously declared, “Every thing secret degenerates, even the administration of justice.” *United States v. Salemme*, 91 F. Supp. 2d 141, 148 (D. Mass. 1999) (quoting JOHN EMERICH EDWARD DALBERG ACTON, *LORD ACTON AND HIS CIRCLE* 166 (Abbot Gasquet ed., Burt Franklin 1968) (1906)). This Article elicits those sunlit sentiments to implore the ethics community to solve the vexing and perplexing issue of inadvertent disclosures through rules of evidence, rules of civil procedure, and private agreements rather than preempting those rules through a misunderstood sense of ethics.

on inadvertent disclosures by ensuring that the rules of ethics play a supporting role in inadvertent-disclosure decisions by aligning them with governing rules of evidence, rules of civil procedure, and private agreements. This Article's proposed amendment to Model Rule 4.4(b) is simple and straightforward: "The receiving lawyer shall use inadvertently disclosed documents or information unless prohibited by rules of evidence, rules of civil procedure, or private agreement."

The law has long-contemplated the proper response to inadvertent disclosures, whether from an ethical or evidentiary viewpoint, but it has taken a series of baby steps over the past two decades that have generally traveled in this direction. This Article's inadvertent-disclosure proposal ends the wandering with a clear rule that fairly balances the interests of the justice system, civility in the legal profession, and protection of clients. Now is the time to complete the journey by ensuring that the rules of evidence, the rules of civil procedure, and private agreements—not the rules of ethics themselves—govern a receiving lawyer's ethical obligation when confronted with inadvertent disclosures of privileged information.