Fordham Law Review

Volume 90 | Issue 3 Article 9

2021

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THE RISK OF ZEALOUS ADVOCACY: LITIGATORS RECEIVING ANONYMOUSLY DISCLOSED DOCUMENTS AND THE NOTIFICATION REQUIREMENT

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The American Bar Association (ABA) created the Model Rules of Professional Conduct to provide guidance to lawyers, courts, and the entire legal profession regarding what a lawyer's ethical duties entail. Model Rule 4.4(b) requires a lawyer to notify opposing counsel once the receiving lawyer knows, or reasonably should know, that the documents received were inadvertently sent. The ABA, however, explicitly left documents disclosed intentionally and without authorization beyond the scope of the rules, thus leaving lawyers who receive these documents with little guidance. Courts have taken varying approaches to handling documents of this type: some analogize unauthorized disclosures to inadvertent disclosures and mandate notice for documents provided by anonymous third parties, while others instead refuse to impose a notification requirement.

This Note discusses the conflict about the notification requirement and anonymously disclosed documents. It examines the arguments for and against mandating notice to the opposing party in these situations. This Note proposes that notice should be required for intentional disclosures made by anonymous third parties because these documents can be analogized to those addressed in Model Rule 4.4(b), which implements a notice requirement for inadvertent disclosures. This Note then discusses how the ABA is in the best position to resolve the inconsistencies discussed and proposes a revised Model Rule 4.4(b) to help alleviate the uncertainty in this realm.

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INTRODUCTION

Just as the primary methods of communication have evolved and changed with the times, so too have the legal ethics rules governing communications. Alongside this evolution comes new dilemmas for lawyers trying to determine what their ethical duties entail.[1] The American Bar Association (ABA) originally adopted the Model Rules of Professional Conduct (the "Model Rules") in 1983 and has continued to revise them since, in part to help law firms keep up to date with the internet and other technology.[2] While the Model Rules address some of the ethical quandaries a lawyer may face,[3] there remain many situations in which lawyers might find themselves without clear guidance as to what their ethical obligations are.[4]

A lawyer has an obligation to "zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law,"[5] but there must be limits to that obligation.[6] For example, perhaps a lawyer receives an email, with no indication as to the sender's identity,[7] containing documents which are extremely helpful to one of the lawyer's ongoing cases. The lawyer cannot ascertain any information about the source of the documents but knows they are valuable documents that are clearly confidential and perhaps protected by attorney-client privilege.[8] This Note explores situations such as this

1. *See generally* Bruce Green, *Handle with Care*, 42 AM. BAR ASS'N LITIG. J. 9 (2016).
2. Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 176 (2013).
3. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2021).
4. *See infra* Parts I.A–B, II.
5. MODEL RULES OF PRO. CONDUCT pmbl.
6. *See infra* notes 229–33 and accompanying text.
7. This could occur because the documents are sent from a fake email address, for example, which can mask the sender's identity.
8. Determining whether the documents are confidential or privileged is often irrelevant to the court's determination of the lawyer's ethical duties. *See infra* Parts I.C.2.c, II.

hypothetical and examines whether a lawyer who receives[9] anonymously provided documents[10] should be required to notify opposing counsel to avoid court-imposed sanctions.[11]

Unauthorized disclosures occur when a third party deliberately sends information to a lawyer that the lawyer is not authorized to have.[12] While there are many facets of unauthorized disclosures,[13] this Note only discusses solutions in the context of anonymously disclosed documents. In a time when hacking and cybersecurity breaches are increasingly frequent, anonymous disclosures leave many lingering questions,[14] and this Note seeks to resolve some of these uncertainties.

Although the ABA has contemplated bringing unauthorized disclosures within the scope of the Model Rules, it ultimately decided that these documents were best left to the discretion of the courts. Only inadvertent disclosures, therefore, are included in Model Rule 4.4(b).[15] The ABA's explicit omission has led to inconsistent decisions from courts tasked with handling unauthorized disclosures, which in turn has sown confusion among lawyers finding themselves in these situations.[16] This Note argues that anonymous disclosures—which are presumed to be given without authorization from the owner of the documents because the documents are detrimental to the opposition's case—should be subject to a mandatory notice requirement. This Note subsequently contends that because the ABA is in the best position to provide such guidance, the ABA should revise Model

9. This Note does not discuss situations in which the lawyer personally plays a role in obtaining the documents because this is generally seen as unethical. *See supra* Part I.E.1. It instead focuses specifically on instances in which an anonymous third party provides the documents.

10. This Note focuses on litigators' ethical obligations. Transactional lawyers, who generally practice outside the courtroom, are not formal discovery process participants and thus have different obligations. *But see generally* Paula Schaefer, *Transactional Lawyers and Inadvertent Disclosure*, 13 TRANSACTIONS: TENN. J. BUS. L. 107 (2011) (arguing that transactional lawyers also need inadvertent disclosure protections). Litigators face unique problems in this realm because there is a risk of inadvertent disclosure during discovery and because the presiding judge could decide, among other things, to waive attorney-client privilege or to sanction the lawyer for improper conduct pertaining to improperly discovered documents. *See generally* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485 (D. Kan. June 30, 2017); Chamberlain Grp., Inc. v. Lear Corp., 270 F.R.D. 392 (N.D. Ill. 2010). This Note, when discussing notice obligations, generally refers to the obligation to provide notice to opposing counsel, which is the notification requirement imposed in Model Rule 4.4(b). *See* MODEL RULES OF PRO. CONDUCT r. 4.4(b).

11. This Note discusses court-imposed sanctions only; therefore, discipline imposed by state bar associations is beyond its scope.

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

13. *Id.*

14. *See, e.g.*, Nathaniel Popper, *Ransomware Attacks Grow, Crippling Cities and Businesses*, N.Y. TIMES (Feb. 9, 2020), https://www.nytimes.com/2020/02/09/technology/ransomware-attacks.html [https://perma.cc/2LZH-K6SN]; David E. Sanger & Nicole Perlroth, *More Hacking Attacks Found as Officials Warn of 'Grave Risk' to U.S. Government*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2020/12/17/us/politics/russia-cyber-hack-trump.html [https://perma.cc/7TYU-F8T5].

15. *See infra* notes 33–45 and accompanying text.

16. *See infra* Part II.

Rule 4.4(b) to explicitly bring anonymous disclosures within the purview of the Model Rules.[17]

Part I provides relevant background information regarding the ABA's history of dealing with inadvertent and unauthorized disclosures and details other potentially relevant law. Part II examines opposing viewpoints regarding whether notice should be mandatory for documents disclosed by an anonymous third party. Part III proposes a revised ABA Model Rule that would be the most efficient solution to the problem of notice and anonymously disclosed documents.

I. INADVERTENT DISCLOSURES AND UNAUTHORIZED DISCLOSURES

The receipt of unauthorized documents[18] continues to present a gray area in lawyering ethics.[19] To start, this part discusses the background of inadvertent and unauthorized disclosures. Part I.A explains the distinction between inadvertent and unauthorized disclosures. Part I.B provides a brief overview of how the ABA has previously addressed unauthorized disclosures. Part I.C examines other laws that can be helpful when determining a lawyer's obligations since unauthorized disclosures fall beyond the scope of the ethical rules. Part I.D highlights the conflicting interests contemplated when lawyers question their ethical duties. Lastly, Part I.E discusses how the method of obtaining the documents may impact the notice obligation.

A. Defining Unauthorized and Inadvertent Disclosures

The key difference between inadvertent and unauthorized disclosures is that an unauthorized disclosure results from the provider's *deliberate*, not mistaken, disclosure. Inadvertent disclosures generally refer to instances where the sender of the information in question did not intend to make the disclosure.[20] Conversely, a lawyer may also receive materials from a source who *deliberately* sends them to the lawyer without permission from the document's owner—an unauthorized disclosure.[21] This situation is often seen in wrongful termination and qui tam[22] proceedings where the client or third party (often an employee or former employee of the opposing party or

17. *See infra* Part III.B.

18. In this Note, "documents" refers to electronic or physical copies of information. This Note does not cover verbally disseminated information.

19. *See generally* Mitchell James Kendrick, Comment, *A Shot in the Dark: The Need to Clearly Define a Lawyer's Obligations Upon the Intentional Receipt of Documents from an Anonymous Third Party*, 123 PENN ST. L. REV. 753 (2019). *See also infra* notes 33–45 and accompanying text.

20. *See* James M. Fischer, *Ethically Handling the Receipt of Possibly Privileged Information*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 200, 206 (2011).

21. *Id.* at 221. When discussing unauthorized disclosures, there could be implications of breaches of contract, fiduciary duties, or similar claims. However, this Note focuses solely on the lawyer's duties and whether the lawyer breached an ethical duty.

22. Qui tam proceedings are statutory claims that allow a private person to sue for a penalty, part of which the government or some public institution will receive. *See Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

a whistleblower) delivers information believed to be useful to the party opposing the party's former employer.[23] Unauthorized disclosures occur when the person who obtains or sends the documents does so without permission from the original owner of the documents.[24] These are two distinct types of disclosures; however, treatment of them is intertwined.

B. The ABA's History with Inadvertent and Unauthorized Disclosures

The ABA has previously addressed inadvertent and unauthorized disclosures but ultimately decided to withdraw the formal opinion that discussed unauthorized disclosures, thus leaving other relevant law to govern them.[25] Part I.B.1 introduces the ABA Model Rules. Part I.B.2 discusses the relevant ABA formal opinions.

1. The Model Rules of Professional Conduct and Model Rule 4.4(b)

The ABA's Model Rules provide a basis for ethical guidelines for lawyers.[26] Although each state has its own version of ethics rules, many states' rules are based on the Model Rules.[27] Approximately two-thirds of the states, along with the District of Columbia, have adopted the Model Rules, while several other states have developed hybrid rules based off the Model Rules' predecessor, the Model Code of Professional Responsibility, or have created their own unique versions of legal ethics rules by making amendments to any of these sources.[28] The Model Rules themselves are not inherently binding and only take on the force of law to the extent that they influence what version(s) the states adopt as their own legal ethics rules.[29]

There are a few rules a lawyer may consider when dealing with anonymously disclosed documents. First, Model Rule 4.2 prohibits communication about the subject matter of the representation between a lawyer and a person the lawyer knows to be represented unless the lawyer has the consent of that individual's lawyer or is authorized by law to do so.[30] Model Rule 8.4, a more general provision, prohibits a lawyer from engaging in criminal or dishonest conduct.[31] Model Rule 8.4(d) prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice."[32]

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23. *See* Fischer, *supra* note 20, at 221.
24. *See id.* at 221–22.
25. *See id.* at 229–30.
26. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2021).
27. *See, e.g.*, Watkins v. Trans Union, LLC, 869 F.3d 514, 520 (7th Cir. 2017) ("Indiana adopted the Model Rules of Professional Conduct as its Rules of Professional Conduct in 1987.").
28. Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868, 884–85 (2003).
29. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 168–69 (1986) (discussing how once Iowa adopted the ethics rule, it became binding on all lawyers who appear in courts in Iowa).
30. MODEL RULES OF PRO. CONDUCT r. 4.2.
31. *Id.* r. 8.4.
32. *Id.* r. 8.4(d).

Most important to this Note, Model Rule 4.4(b) states that "[a] lawyer who receives a document or electronically stored information . . . and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."[33] Adopted in 2002, Rule 4.4(b) was written as a compromise. By only requiring notification and nothing further (such as returning the document), the rule permits the sending lawyer to "take whatever steps might be necessary or available to protect the interests of the sending lawyer's client."[34] Model Rule 4.4(b), however, is silent regarding the ethical implications of documents that are sent intentionally rather than inadvertently.[35] A comment[36] to Model Rule 4.4 further elaborates that this rule does not involve receipt of stolen documents but rather merely addresses the issue of lawyers receiving something by mistake.[37] Model Rule 4.4(b) states the lawyer must know (actually or constructively) that the information was inadvertently sent[38] but provides no guidance as to how the lawyer would determine this.[39] Model Rule 4.4(b) only addresses the notice obligation—leaving any further steps needed to be taken by the lawyer to considerations of privilege and waiver—and thus leaves the resolution of the issue to the application of case law and other relevant law.[40]

In the annotations[41] to Model Rule 4.4, the ABA Standing Committee on Ethics and Professional Responsibility (the "Committee") acknowledges the lack of consistency in the adoption and application of Model Rule 4.4(b).[42] The annotations address unauthorized disclosures and acknowledge that many courts have chosen to expand the scope of Model Rule 4.4(b) beyond its existing minimum requirement.[43] The annotations concede that the rule "tempers the zeal with which the lawyer is permitted to represent a client" but confirm that the scope of the rule, as written, does not reach unauthorized

33. *Id.* r. 4.4(b).

34. CTR. FOR PRO. RESP., AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 556 (2006).

35. *See* MODEL RULES OF PRO. CONDUCT r. 4.4(b).

36. The comments do not add obligations to the Model Rules but rather provide guidance on how to interpret the Model Rules. *Id.* pmbl.

37. *Id.* r. 4.4(b) cmt. 2.

38. *See* MODEL RULES OF PRO. CONDUCT r. 1.0(f) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."); *id.* r. 1.0(j) ("'Reasonably should know' . . . denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.").

39. *See* Fischer, *supra* note 20, at 207.

40. *See id.* at 208; *see infra* Part I.C.2.

41. The *Annotated Model Rules of Professional Conduct* is an ABA publication that discusses how courts, disciplinary bodies, and ethics committees apply the Model Rules. *See Annotated Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/products/inv/book/364918796/ [https://perma.cc/4T73-V9GD] (last visited Oct. 29, 2021).

42. ANNOTATED MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS'N 2019).

43. *Id.*

disclosures.[44] The Model Rules, therefore, result in significant ambiguity for lawyers dealing with intentionally produced documents.[45]

2. The ABA's Formal Opinions

In addition to the Model Rules themselves, the ABA has published numerous formal opinions that shed light on the history of the ABA's treatment of unauthorized and inadvertent disclosures. These opinions are not binding but are merely advisory and explain how the ABA would interpret certain provisions or situations.[46] The ABA first addressed the issue of inadvertent disclosures in Formal Opinion 92-368, which placed ethical obligations squarely on the receiving lawyer and required the receiving lawyer to refrain from examining the materials, notify the sending lawyer, and abide by the sending lawyer's instructions.[47] However, no corresponding model rule supported this position.[48]

Next, before adopting Model Rule 4.4(b), the Committee issued Formal Opinion 94-382 and placed obligations on lawyers who received unsolicited confidential or privileged documents that were intentionally disclosed without authorization.[49] The Committee recognized that inadvertent disclosures and unauthorized disclosures were similar because, in both situations, the disclosure was nonconsensual from the adverse party's perspective.[50] However, the Committee noted two dissimilarities: (1) with inadvertent disclosures, the transmitting party does not intend to send the materials and (2) unauthorized disclosures may involve situations evidencing improper conduct.[51] Notwithstanding these differences, the Committee concluded that the lawyer's obligations should be the same for both inadvertent disclosures and unauthorized disclosures.[52]

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44. *Id.*

45. *See, e.g.*, Ass'n of the Bar of the City of N.Y. Comm. on Pro. Ethics, Formal Op. 2019-3 (2019) (discussing how Rule 4.4(b) does not address further obligations of the receiving lawyer and noting that "[s]ubstantive law, procedural rules, judicial decisions, court orders, and/or agreements between the parties typically will impose additional obligations or restrictions").

46. *See In re* Meador, 968 S.W.2d 346, 349 n.1, 350, 354 (Tex. 1998) (discussing how the formal opinion on which the court of appeals relied is merely advisory and does not impose a binding standard); *see also Publications: Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/ [https://perma.cc/6WKD-DVP3] (last visited Oct. 29, 2021) ("ABA Formal Ethics Opinions are interpretations of the Model Rules of Professional Conduct . . . . [They] are not binding authority in any jurisdiction without adoption in such a jurisdiction. They are persuasive authority and express policy of the American Bar Association.").

47. ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-368 (1992).

48. *See* Tory L. Lucas, *Rethinking Lawyer Ethics to Allow the Rules of Evidence, Rules of Civil Procedure, and Private Agreements to Control Ethical Obligations Involving Inadvertent Disclosures*, 63 ST. LOUIS U. L.J. 235, 242 (2019) (criticizing Formal Opinion 92-368 and noting that the Committee did not define and apply an ethics rule but rather placed significant weight on the preamble).

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

50. *Id.*

51. *Id.*

52. *Id.*

However, after the ABA adopted Model Rule 4.4(b) in 2002, it withdrew Formal Opinion 94-382 in its entirety because the Model Rules no longer supported it.[53] In its place, the Committee released Formal Opinion 06-440, which makes clear that Model Rule 4.4(b) does not apply to intentionally sent documents disclosed without authorization and that the lawyer's action in those situations is beyond the scope of the Model Rules.[54] Lastly, the Committee confirmed in Formal Opinion 11-460 that the lawyer has no duty to notify the opposing party under the Model Rules when dealing with intentionally sent documents that are disclosed without authorization.[55] In this formal opinion, however, the Committee did advise lawyers to proceed with caution and not risk a potential ethical violation when dealing with confidential and privileged documents.[56]

The ABA has continued to go back and forth in deciding how best to deal with intentional disclosures of documents.[57] Currently, even when the Model Rules are viewed together with the formal opinions, there is still a void in guidance for lawyers dealing with unauthorized disclosures.[58]

C. Unauthorized Disclosures Are Beyond the Scope of the Model Rules

Because the ABA explicitly situates unauthorized disclosures beyond the scope of the Model Rules,[59] lawyers must turn to other law and courts' jurisprudence when navigating this issue. Part I.C.1 discusses courts' role as the ultimate authority in determining a lawyer's ethical duties. Part I.C.2 briefly examines how unauthorized disclosures may be governed by the laws concerning privilege.

1. Courts' Role in Lawyering Ethics

Because ethics rules generally fail to prescribe the appropriate action for recipients of unauthorized disclosures, it is often left to the discretion of the

53. ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-440 (2006) (withdrawing Formal Opinion 94-382 in its entirety). Formal Opinion 94-382 remains relevant because some courts have continued to rely on it despite the ABA's withdrawal. *See* Kendrick, *supra* note 19, at 762–63 (discussing how some courts, in determining the proper course of conduct dealing with intentionally disclosed documents, relied on withdrawn ABA formal opinions); *see, e.g.*, Burt Hill v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *8 (W.D. Pa. Jan. 29, 2010) (referencing Formal Opinion 94-382).

54. ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-442 (2006) ("[T]here is no Model Rule that addresses the duty of a recipient of [intentionally] transmitted information."). This opinion also addresses the fact that there might be other law or other obligations beyond Model Rule 4.4(b). *Id.*

55. ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011).

56. *Id.*

57. *See supra* notes 47–56 and accompanying text; *see also* Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 334 (1996) (noting that the ABA formal ethics opinions often set forth the ABA Ethics Committee's "view of what the rules *should* say or were *meant* to say" rather than reflect a straightforward rule that leaves little to interpret).

58. *See infra* Part II. *See generally* Kendrick, *supra* note 19.

59. *See supra* note 54 and accompanying text.

courts to step in and decipher the complicated set of applicable laws.[60] The Model Rules make clear that "[t]he legal profession is largely self-governing."[61] Because of this self-governing nature, the ultimate authority is found in the court system.[62] Courts may look beyond the ethics rules, given a court's "responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests."[63] Courts thus have the discretion to decide if attorneys have violated their moral and ethical responsibilities and, if so, to fashion appropriate remedies; this leads to many inconsistencies among jurisdictions.[64]

2. Attorney-Client Privilege and Privilege Waiver

Courts may also draw on relevant law beyond the ethics rules to determine a lawyer's obligations.[65] Many of the documents in question, such as those disclosed by a former employee in the examples discussed above, may be protected by the attorney-client privilege covering the communications between the former employer and the employer's counsel.[66] The attorney-client privilege is the result of an evidentiary rule that, at a high level, allows both a lawyer or a client to refuse to disclose certain communications[67] between the attorney and the client.[68] This protection encourages the client to disclose everything that is pertinent to the attorney's representation without fear that the communication will be used to the client's detriment, which in turn allows the attorney to represent the client to the best of the attorney's ability.[69]

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60. *See generally* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485 (D. Kan. June 30, 2017); Chamberlain Grp., Inc. v. Lear Corp., 270 F.R.D. 392 (N.D. Ill. 2010); Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010).

61. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2021).

62. *Id.* (stating that "ultimate authority over the legal profession is vested largely in the courts").

63. Woods v. Covington Cnty. Bank, 537 F.2d 804, 810 (5th Cir. 1976).

64. *See* Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385–86 (3d Cir. 1972) ("It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar."); *see also* Sanders v. Russell, 401 F.2d 241, 245 (5th Cir. 1968) ("[T]he District Court has a valid interest in regulating the qualifications and conduct of counsel . . . .").

65. *See supra* notes 45, 63 and accompanying text.

66. *See, e.g.*, Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *2 (D. Kan. June 30, 2017) (noting that some of the anonymously delivered documents were stamped "privileged").

67. *See* MODEL RULES OF PRO. CONDUCT r. 1.6; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–86 (AM. L. INST. 2000). The work product doctrine also protects attorney work product from discovery. *See generally* Hickman v. Taylor, 329 U.S. 495 (1947) (establishing the work product doctrine); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87(3).

68. *See* FED. R. EVID. 501 (stating the general rule of privileges); *see also* Jenna C. Newmark, Note, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699, 711–12 (2010).

69. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (discussing how the purpose of privilege is to "encourage full and frank communication between attorneys and their clients"); *see also* Newmark, *supra* note 68, at 712.

This section discusses the various intricacies of privilege laws, which are critical because many unauthorized disclosures are likely to be privileged and/or confidential. Part I.C.2.a discusses the differing views on when privilege may be waived. Part I.C.2.b explains Federal Rule of Evidence 502 and Federal Rule of Civil Procedure 26(b)(5)(B). Lastly, Part I.C.2.c highlights the differences between confidentiality and privilege and explains how the courts tend to handle these distinctions.

a. Varying Views on Privilege Waiver

Model Rule 4.4(b) notes that the issue of privilege waiver is beyond the scope of the Model Rules.[70] This topic continues to stir debates because of the differences in how courts handle it.[71] The traditional view states that the failure to protect privileged information from unauthorized disclosure[72] destroys documents' privileged status, placing a strict obligation on the owner of the documents.[73] The modern view, contrarily, is that the unauthorized disclosure of privileged information does not automatically destroy the protected status of the information.[74]

It is important, however, to distinguish the ethical issues from the privilege waiver issues. The law of waiver does not resolve every issue that emerges.[75] For example, return to the hypothetical of the lawyer who receives valuable documents from an anonymous third party.[76] In the relevant hypothetical jurisdiction, an unauthorized disclosure automatically waives the attorney-client privilege.[77] Many may then assume that, because the privilege has been waived, a lawyer's ethical obligations become irrelevant and the lawyer has the right—maybe even the obligation—to use the document as the lawyer sees fit to zealously serve the client's interests.[78] However, simply because there is "a legal right to use a document does not mean that the ethics rules should allow the lawyer to take advantage of that

70. MODEL RULES OF PRO. CONDUCT r. 4.4(b) cmt. 2.

71. *See* Fischer, *supra* note 20, at 223–28.

72. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(c) ("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.").

73. *See* Fischer, *supra* note 20, at 223; *see also* People v. Rittenhouse, 206 P. 86, 88 (Cal. Dist. Ct. App. 1922) (stating that an incriminating note intended for the defendant's attorney from the defendant in his jail cell was privileged, but stating the privilege was waived because the defendant did not protect the note from discovery by third parties); David B. Smallman, *The Purloined Communications Exception to Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 TORT & INS. L.J. 715, 724–28 (1997) (discussing cases addressing the issue of waiver of privilege when confidential information is misappropriated).

74. Fischer, *supra* note 20, at 223–24.

75. *See* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 778 (2005).

76. *See supra* notes 7–8 and accompanying text.

77. *See* Smallman, *supra* note 73, at 723.

78. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2021) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *see also* Perlman, *supra* note 75, at 778.

right."[79] Therefore, as some commentators argue, the issue of privilege waiver does not end the inquiry into whether or not a lawyer's actions are *ethical* regarding privileged documents.[80]

b. Federal Rule of Evidence 502 and Federal Rule of Civil Procedure 26(b)(5)(B)

Federal Rule of Evidence (FRE) 502 addresses disclosure of a communication or information covered by the attorney-client privilege.[81] FRE 502(b) states in pertinent part that disclosure does not result in a waiver of privilege if the disclosure was inadvertent, the privilege holder took reasonable steps to prevent disclosure, and the privilege holder took reasonable steps to rectify the error (including possibly following Federal Rule of Civil Procedure (FRCP) 26(b)(5)(B)).[82] This is a fact-specific inquiry assessed on a case-by-case basis.[83]

Next, FRCP 26(b)(5) establishes that any claims of privilege must be documented in sufficient detail such that other parties can ascertain whether the privilege applies.[84] FRCP 26(b)(5)(B), also known as the clawback rule, imposes no duty on the lawyer who receives inadvertently sent privileged information unless and until the lawyer is notified that the information was inadvertently sent.[85] If the receiving lawyer is notified, the lawyer must return, sequester, or destroy the document and any copies. The receiving lawyer must also take reasonable steps to retrieve any information that was already disclosed and may not use or disclose the information until the claim is resolved.[86]

FRCP 26(b)(5)(B) applies during the discovery phase of a civil lawsuit in federal court.[87] Therefore, if a lawyer receives inadvertently disclosed and protected documents during the discovery phase of a federal lawsuit, the lawyer must consider the state's version of Model Rule 4.4(b), FRCP 26(b)(5)(B), and FRE 502 together.[88] On the one hand, unlike Model Rule 4.4(b), FRCP 26 does not impose any obligations on the receiving party to

79. Perlman, *supra* note 75, at 778.

80. *Id.* at 780 ("[W]aiver law does not determine the obligations of lawyers who have received inadvertently disclosed, privileged information from an adversary."). The issue falls more directly within the province of professional ethics and explains why the courts tend to treat this as an ethics issue. *Id.*

81. FED. R. EVID. 502. FRE 502 also concerns communication or information protected by the work product doctrine. *Id.*

82. FED. R. EVID. 502(b); *see also* Ann M. Murphy, *Is it Safe?: The Need for State Ethical Rules to Keep Pace with Technological Advances*, 81 FORDHAM L. REV. 1651, 1652 (2012).

83. *See* John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 FORDHAM L. REV. 1589, 1595–96 (2013).

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

85. *Id.* 26(b)(5)(B).

86. *Id.*

87. *Id.*

88. *Id.*; FED. R. EVID. 502; MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2021).

notify the producing party.[89] On the other hand, FRCP 26 imposes greater obligations on the receiving lawyer, once notified, to sequester and refrain from using the allegedly privileged document; Model Rule 4.4(b) does not impose such obligations.[90] Lastly, FRE 502(b) determines whether a waiver of privilege has occurred.[91] These rules, however, do not address the issue of intentional, anonymous disclosures, leaving lawyers who receive such documents with little guidance.[92]

c. Confidential Versus Privileged Documents

To cause even more confusion, confidentiality and privilege are sometimes conflated in the legal world.[93] There are numerous cases in which courts even conflate the two principles.[94] Confidentiality was developed as a matter of professional etiquette, and it is concerned with how lawyers' relationships with their clients should evolve to best serve the legal system.[95] Therefore, confidentiality rules are extremely broad and cover essentially all information that relates to a client's case, with extremely narrow exceptions.[96] Many confidential documents, in contrast to privileged documents, are subject to discovery or production in court.[97]

On the other hand, courts and legislators are the creators of the attorney-client privilege rules.[98] Judges tend to interpret attorney-client privilege narrowly to cover only certain types of communications, with many exceptions.[99] Due to the narrow construction of attorney-client privilege and

89. *See* FED. R. CIV. P. 26(b)(5)(B); MODEL RULES OF PRO. CONDUCT r. 4.4(b).

90. *See supra* notes 33–40 and accompanying text; *see also* FED. R. CIV. P. 26(b)(5)(B); MODEL RULES OF PRO. CONDUCT r. 4.4(b).

91. FED. R. EVID. 502; *see also* Barkett, *supra* note 83, at 1598.

92. *See supra* Parts I.C.1–2.

93. *See* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 71–72 (1999).

94. *See, e.g.*, Vela v. Superior Ct., 255 Cal. Rptr. 921, 924 (Ct. App. 1989) (equating confidentiality and privilege for purposes of judicial review); State v. Phelps, 545 P.2d 901, 903–05 (Or. Ct. App. 1976) (confusing privilege and confidentiality).

95. Zacharias, *supra* note 93, at 72–73.

96. *See id.* at 73 ("[P]rofessional confidentiality rules developed extremely broadly, in all jurisdictions."); *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2021) (defining confidential information as all "information relating to representation of a client"). The permitted exceptions to confidentiality include revealing information necessary to "prevent reasonably certain death or substantial bodily harm," to "secure legal advice about the lawyer's compliance" with the Model Rules, or to "prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." *Id.* r. 1.6(b).

97. Zacharias, *supra* note 93, at 75.

98. *Id.* at 73–74.

99. *See, e.g.*, United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984) (construing privilege narrowly); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547 (D.D.C. 1970) (holding that "[the privilege] has such an effect on the full disclosure of the truth that it must be narrowly construed"); *see also* Weil v. Inv./Indicators Rsch. & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981) (noting the obstacles that the attorney-client privilege imposes on the discovery of truth); Diversified Indus. v. Meredith, 572 F.2d 596, 602 (8th Cir.

the fact-sensitive nature of a privilege inquiry, it is often difficult for attorneys to predict whether a received document is privileged.[100]

Therefore, courts, clients, and lawyers are often confused about the differences between confidential and privileged documents.[101] As a result, some courts have declined to distinguish between the two types of documents and have avoided the issue of privilege waiver altogether.[102] Consequently, it can be difficult for a lawyer, especially when dealing with documents that are anonymously delivered, to determine whether a document is privileged or confidential just by looking at it.[103] For this reason, anonymously disclosed documents should be treated the same, regardless of if they are privileged or confidential, due to the lack of knowledge on the part of the receiving lawyer at the time of receipt.

D. Conflicting Interests of a Lawyer's Duty

When grappling with the answers to difficult ethical questions, there are a multitude of interests at play.[104] First, there is the lawyer's responsibility to act in the client's best interests.[105] This notion has been instilled in lawyers since their first day of law school. However, the lawyer is also obligated to uphold justice, fairness, and equality and serve the public good.[106] Lastly, there is the personal interest of lawyers, who want to best serve their career and their conscience by remaining ethical and serving their clients to the best of their ability.[107] The concern arises when these interests are at odds with one another and when a lawyer receives a questionable document: which interest should prevail?[108]

1977) (arguing that because privilege hinders the discovery of truth, it may be strictly construed).

100. *See In re* Allen, 106 F.3d 582, 601 (4th Cir. 1997) (discussing how a district court's holding that the attorney-client privilege does not protect communications is a determination of fact); Adam Pierson, *What's Yours Is Ours: Making Sense of Inadvertent Disclosure*, 22 GEO. J. LEGAL ETHICS 1095, 1099–100 (2009).

101. *See* Zacharias, *supra* note 93, at 71–72; *see also* Pierson, *supra* note 100, at 1099.

102. *See, e.g.*, Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *16 (D. Kan. June 30, 2017) ("[T]here appears to be no reason to distinguish between those documents marked privileged and those which are merely marked confidential or proprietary.").

103. *See* Pierson, *supra* note 100, at 1099–100. *See generally* Kendrick, *supra* note 19.

104. *See* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2021).

105. *Id.* ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.").

106. *Id.* ("[A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.").

107. *Id.* (discussing the "lawyer's own interest in remaining an ethical person while earning a satisfactory living").

108. *See infra* Parts II, III.A.

E. The Method of Obtaining Documents

Ascertaining how documents are obtained is the first step in determining a lawyer's obligations. For inadvertent disclosures, if the receiving lawyer obtained the documents seemingly by mistake, Model Rule 4.4(b) requires that the receiving lawyer notify the sending lawyer.[109] However, there are many questionable methods of obtaining documents. This section briefly discusses the different methods of obtaining information and how these methods indicate whether the lawyer has violated an ethical rule or has a further ethical obligation beyond using the document in the client's best interest. This section focuses on two methods of obtaining documents, which are generally *impermissible* and thus beyond the scope of this Note's proposal. Part I.E.1 highlights the obligations applicable to a lawyer soliciting documents, while Part I.E.2 discusses the obligations involving illegally obtained documents.

1. Solicited Documents

Solicitation is defined as "[t]he act or an instance of requesting or seeking to obtain something."[110] First, Model Rule 4.4(a) states that, when representing a client, a lawyer shall not "use methods of obtaining evidence that violate the legal rights of [a third party]."[111] The "legal rights" protected under Rule 4.4(a) include a third party's right to protect confidential and privileged information.[112] In these situations, to avoid possible disciplinary action, the attorney must make clear to the third party: (1) who the attorney is representing and (2) that the third party should not disclose any privileged information.[113]

For example, return to the previously discussed hypothetical involving documents disclosed by an opposing party's former employee.[114] However, now imagine that the lawyer is actually aware that the anonymous party sending the information is a former employee. If the lawyer contacts the former employee, the lawyer would need to state who the lawyer is representing and should endeavor to ensure that additional protected information is not revealed.[115] When evaluating the attorney's conduct and determining whether sanctions are appropriate, the court's inquiry focuses on

109. MODEL RULES OF PRO. CONDUCT r. 4.4(b).

110. *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

111. MODEL RULES OF PRO. CONDUCT r. 4.4(a).

112. *See* Arnold v. Cargill Inc., No. 01-2086, 2004 WL 2203410, at *7 (D. Minn. Sept. 24, 2004) (finding that, because the lawyer knew that the individual he was speaking to had extensive exposure to confidential and privileged information and yet the lawyer made no effort to protect those confidences, the lawyer violated Rule 4.4); *see also* Olson v. Snap Prod., Inc., 183 F.R.D. 539, 545 (D. Minn. 1998); Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 347 (D. Conn. 1991).

113. *See* Gifford v. Target Corp., 723 F. Supp. 2d 1110, 1120 (D. Minn. 2010) (discussing how the lawyers properly cautioned the individual not to divulge attorney-client information); *Dubois*, 136 F.R.D. at 347 (requiring the lawyers to "make clear . . . the nature of the lawyer's role in this case").

114. *See supra* note 7 and accompanying text.

115. *See Gifford*, 723 F. Supp. 2d at 1120.

the likelihood that the information gathered by the attorney was protected by privilege.[116] To deter unethical and extralegal discovery by parties, when a lawyer plays an active role (such as soliciting the documents instead of passively receiving them), the court can prohibit the use of the tainted material.[117] This serves to encourage lawyers to obtain the documents through ethical processes.[118] Therefore, soliciting privileged or confidential documents is beyond the scope of this Note because these actions are generally considered unethical and prohibited rather than merely questionable.[119]

2. Illegally Obtained Documents

Courts generally state that a lawyer who knowingly uses illegally obtained materials (e.g., evidence that the lawyer knows is stolen) clearly violates ethics rules.[120] Courts in most jurisdictions are consistent in their rulings that lawyers may not use documents taken illegally or improperly (as distinguished from those inadvertently received).[121]

There are many situations that do not involve solicited or illegally obtained documents, however. While multiple courts have held that a lawyer cannot personally obtain documents illegally,[122] there could be questionable situations if a document was obtained by an outside third party and the lawyer lacks knowledge of the circumstances surrounding how the document was obtained.[123] Those questionable situations are exactly what this Note discusses in Part II.

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116. *See, e.g.*, Jose Luis Pelaez, Inc. v. McGraw-Hill Glob. Educ. Holdings LLC, 366 F. Supp. 3d 567, 572 (S.D.N.Y. 2019) (noting that ex parte conversation was acceptable "so long as measures are taken to steer clear of privileged or confidential information"); *Olson*, 183 F.R.D. at 545 (finding no grounds for disqualification when the attorney was in contact with the adverse party's CEO because the attorney alerted the CEO who he represented and did not ask the CEO to discuss privileged matters).

117. *See* Madanes v. Madanes, 186 F.R.D. 279, 292 (S.D.N.Y. 1999); *see also* Perna v. Elec. Data Sys. Corp., 916 F. Supp. 388, 396–98 (D.N.J. 1995); Smith v. Armour Pharm. Co., 838 F. Supp. 1573, 1578 (S.D. Fla. 1993).

118. *See, e.g.*, *Madanes* 186 F.R.D. at 292. Additionally, if a court were to find an ethics violation by a lawyer who passively received documents from a questionable source, there would be no deterrent value because the punishment would not fall on the wrongdoer, who may not even be involved in the litigation. *See Perna*, 916 F. Supp. at 400–01 (stating that an effective sanction must deter the individual, as well as others, from engaging in that behavior again).

119. *See, e.g.*, *Madanes*, 186 F.R.D. at 292; *Olson*, 183 F.R.D. at 545; Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 347 (D. Conn. 1991).

120. JOSEPH T. MCLAUGHLIN & J. KEVIN MCCARTHY, CORPORATE INTERNAL INVESTIGATIONS—LEGAL PRIVILEGES AND ETHICAL ISSUES IN THE EMPLOYMENT LAW CONTEXT 950 (2001).

121. *See* 69 AM. JUR. TRIALS 411 *Ethics in Adversarial Practice* § 30 (1998).

122. *See, e.g.*, Castellano v. Winthrop, 27 So. 3d 134, 137 (Fla. App. 2010).

123. *See infra* Part II.

II. ARGUMENTS FOR AND AGAINST MANDATING NOTICE FOR ANONYMOUS DISCLOSURES

Documents disclosed intentionally,[124] rather than inadvertently, lie beyond the scope of the Model Rules.[125] This part discusses anonymously delivered documents that the lawyer takes no active role in obtaining[126] and that themselves are either privileged or protected by a combination of confidentiality and privilege.[127] Courts have taken divergent views in this narrow realm of case law.[128] Part II.A discusses the arguments for mandating notice for unauthorized disclosures. Part II.B examines the opposite view and discusses the arguments against mandating notice for unauthorized disclosures.

A. Lawyers Should Notify Opposing Counsel of Anonymous Disclosures

Various courts, state ethics opinions, ethics rules, and academics have examined whether inadvertent and unauthorized disclosures are sufficiently analogous to warrant expansion of the notice requirement derived from Model Rule 4.4(b) for anonymous disclosures. Part II.A.1 discusses how the Model Rules and case law emphasize that the rules themselves should not end a lawyer's inquiry into ethical obligations. Part II.A.2 discusses the argument that, because there are no ethics rules on point, unauthorized disclosures should at least be treated the same as inadvertent disclosures and notice should thus be mandated. Part II.A.3 briefly discusses the argument that, in these situations, a court's interest in maintaining judicial integrity should outweigh any conflicting interests.

1. The Rules Should Not End the Inquiry into Ethical Duties

The court system has repeatedly endorsed the idea that a lawyer's ethical obligations do not end with the black letter law.[129] The ethics rules make clear that the rules themselves should not end a lawyer's inquiry—that just because the rules might not specifically address an issue does not allow the lawyer to conclude that nothing should be done to protect the document

124. *See supra* note 21 and accompanying text.
125. *See supra* notes 33–45 and accompanying text; *see also infra* Part II.A.
126. *See supra* Part I.E.
127. *See supra* Part I.C.2.c.
128. *See infra* Part II. While many of the arguments discussed in Part II and emphasized in Part III can apply generally to all unauthorized disclosures, not just those anonymous third-party disclosures, this Note is limited in scope by arguing that the notice requirement should extend to the small facet of case law discussed in Part II.
129. *See, e.g.*, Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *10 (D. Kan. June 30, 2017); *see also* Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137, 165–66 (1994) ("The prevailing viewpoint, however, seems to be that attorneys can be disqualified or disciplined even for conduct not prohibited under any applicable attorney-ethics code. Some federal courts have stated that applicable codes are not an exhaustive list of ethical considerations, and that attorneys can be sanctioned for conduct not specifically proscribed by the court's code." (footnote omitted)).

owner's privilege and confidentiality interests.[130] Additionally, the preamble of the Model Rules notes that the Model Rules do not exhaust a lawyer's ethical and moral considerations but simply provide a *framework* for ethical lawyering.[131] Formal Opinion 06-440 reinforces that same point.[132]

Unfortunately, as these sources acknowledge, a set of rules is not able to capture every single circumstance in which ethical questions and conflicts may arise.[133] Commentators note that ethical rules are inherently limited and that lawyers must seriously consider their actions in situations when there is no rule clearly on point.[134] Any set of ethics rules lacks "definition, depth, and applicability until and unless [the rules] are read along with the stories and narratives that illustrate their content, reach, and purpose."[135] Absent a rule on point, a lawyer should not immediately do what is in the best interest of the client but rather should consider the broader principles on which the rules rest.[136] Requiring something that is clearly not present in the current ethical law forces lawyers to rely on their own judgment and ethical decision-making to determine the proper conduct.[137] As the court in *Raymond v. Spirit AeroSystems Holdings, Inc.*[138] emphasized, "if something appears too good to be true, it probably is."[139]

The court in *Merits Incentives, LLC v. Eighth Judicial District Court of Nevada ex rel. County of Clark*[140] acknowledged that Nevada Rule of Professional Conduct 4.4(b)[141] as written was not applicable to the anonymously sourced documents before the court, since the rule explicitly addressed only inadvertently disclosed documents.[142] Nevertheless, the

130. *See* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2021); *see also Raymond*, 2017 WL 2831485, at *10.

131. MODEL RULES OF PRO. CONDUCT pmbl.

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

133. 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, 1282 (1999).

134. *Id.* at 1282–83.

135. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 175–76 (1996).

136. Jones, *supra* note 133, at 1295–96.

137. Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *12 (D. Kan. June 30, 2017).

138. No. 16-1282, 2017 WL 2831485 (D. Kan. June 30, 2017).

139. *Id.* at *11 (quoting Burt Hill, Inc. v. Hassan, No. Civ.A 09-1285, 2010 WL 419433, at *5 (W.D. Pa. Jan. 29, 2010)).

140. 262 P.3d 720 (Nev. 2011).

141. The Nevada Rule of Professional Conduct 4.4(b) is identical to Model Rule 4.4(b). NEV. RULES OF PRO. CONDUCT r. 4.4(b) (2019); *see also* MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2021).

142. *Merits*, 262 P.3d at 724. In the state district court opinion, the court noted that plaintiffs did indeed notify the state district court that the plaintiffs had received these documents and that defendants took no action to "disavow [p]laintiff of the notion that they were fair game." Bumble & Bumble Prods., LLC v. Merits Incentives, LLC, No. A557670-B, 2010 WL 8034115, at *6 (Nev. Dist. Ct. June 11, 2010). The court specifically commented that there was no discussion of whether the documents give plaintiffs an unfair advantage and therefore denied the motion for dismissal or disqualification. *Id.* at *6–7. Additionally, the court noted that it did not find that defendants acted in bad faith but that, in light of the schedule

court implemented a notice requirement for the documents and underscored the importance of lawyers looking beyond the scope of the black letter ethical rules.[143]

2. Treat Unauthorized Disclosures the Same as Inadvertent Disclosures

Some courts, therefore, have held that, because there is no ethics rule on point, analogizing documents disclosed by an anonymous third party to inadvertent disclosures is valid and, thus, notice should be required for both.[144] One scholar argued even more broadly that all unauthorized disclosures can be treated the same as inadvertent disclosures.[145]

This Note, however, focuses on anonymously disclosed documents because multiple courts examining anonymous disclosures have expressed concern about the lack of knowledge regarding the source of the information.[146] In both *Raymond* and *Burt Hill, Inc. v. Hassan*,[147] the courts emphasized that the lawyer's lack of knowledge surrounding the source was suspicious, criticizing "[d]efense counsel's failure to provide more specific information."[148] If treated the same, then both inadvertent and unauthorized disclosures would require, at a minimum, notifying opposing counsel once the lawyer knows or reasonably should know that someone erred by giving the lawyer the documents.[149]

Treating inadvertent and unauthorized disclosures as the same for the purpose of determining proper conduct would minimize the ambiguity that riddles many of these situations.[150] Several courts have endorsed this approach—or at least a form of it. In *Raymond*, with minimal guidance from other case law, state ethics rules, or the Model Rules, the court decided that counsel had a duty to, at a minimum, notify the defendants of the received documents.[151] In the case, former Spirit AeroSystems employees who were

for trial, the court would have felt "a lot more comfortable" about the potential for disqualification if the motion had been brought up earlier. *Id.* at *8.

143. *Merits*, 262 P.3d at 724–25. The *Merits* court noted, however, that the *Burt Hill* opinion was not persuasive because, in this case, the lawyer signed an affidavit in which he declared he had no knowledge of the source of the disk, thus eliminating any sense of wrongdoing on the part of the lawyer that the *Merits* court indicates was present in *Burt Hill*. *Id.*

144. *See, e.g.*, *Raymond*, 2017 WL 2831485, at *22; *Burt Hill*, 2010 WL 419433, at *4.

145. Fischer, *supra* note 20, at 229–36. Fischer uses "privileged" to include materials protected by the attorney-client privilege and the work product doctrine, as well as confidential and proprietary information; in other words, Fischer's terminology covers all of the types of information discussed in this Note. *Id.* at 202 n.1.

146. *See Raymond*, 2017 WL 2831485, at *11; *Burt Hill*, 2010 WL 419433, at *4.

147. No. Civ.A 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010).

148. *Id.* at *2; *Raymond*, 2017 WL 2831485, at *11 (quoting *Burt Hill*, 2010 WL 419433, at *2).

149. *See* Fischer, *supra* note 20, at 234.

150. *See id.* at 233. Fischer goes on to explain what a lawyer may do upon receipt of information that is unintentionally disclosed (the phrase he uses to describe both types of disclosures), such as whether the lawyer may or must return the document, use it, review it, or clarify the circumstances surrounding it. *Id.* at 240–48. Other than the notification requirement, the rest of these issues are beyond the scope of this Note.

151. *Raymond*, 2017 WL 2831485, at *15.

members of a labor union brought a collective action against Spirit AeroSystems alleging employment discrimination.[152] During the investigation into the viability of the claims, the director of the labor union provided the plaintiffs' lawyer with a packet of documents he claimed were anonymously delivered to the union's office.[153] The *Raymond* court noted that it was "entirely appropriate to analogize" the unauthorized, anonymously disclosed documents to the inadvertently disclosed documents discussed in Kansas Rule of Professional Conduct 4.4(b).[154] The court explained that the purpose of the rule was to permit the accidental sender to take proper protective measures.[155] Emphasizing the documents' "dubious origins," the court said that the protections that are applied to inadvertently disclosed privileged or proprietary information should be at least the same, if not heightened, when the disclosure is clearly unauthorized.[156]

In *Burt Hill*, one defendant received, from an anonymous source, privileged and confidential documents delivered in a manila envelope outside his office space and gave them to his attorneys.[157] Defense counsel, unsure of what their ethical obligations were in these circumstances, sought advice from a lawyer with expertise in legal ethics and professional responsibility.[158] The expert opined that retaining and reviewing the documents was permissible.[159] The *Burt Hill* court, however, explained that the "justifications underlying the protections afforded to inadvertent products . . . apply with even greater, and stricter, force in connection with advertent but unauthorized disclosures."[160] Therefore, according to the *Raymond* and *Burt Hill* courts, the lawyers had a duty to notify opposing

152. *Id.* at *1.

153. *Id.* at *3–4. Some of these documents were stamped "privileged" and were thus set aside and not used in the case, but the other documents were retained and used to prepare the plaintiffs' complaint without notifying opposing counsel. *Id.* at *4–5. The court said that "there appears to be no reason to distinguish between those documents marked privileged and those which are merely marked confidential or proprietary." *Id.* at *16. The Model Rules and the Kansas Rule of Professional Conduct Rule 4.4(b) do not distinguish between the two types of documents, so the court found it unnecessary to do so. *Id.*

154. *Id.* at *14. An exact duplicate of Model Rule 4.4(b), Kansas Rule 4.4(b) reads: "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." KAN. RULES OF PRO. CONDUCT r. 4.4(b) (2014).

155. *Raymond*, 2017 WL 2831485, at *14.

156. *Id.* Plaintiffs objected to the decision by the magistrate judge. *See* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 3895012, at *1 (D. Kan. Sept. 6, 2017). The objections were denied because the district judge found that the magistrate judge properly relied on case law and the inherent powers of the court to sanction misconduct, which is not limited by the ethics rules themselves. *Id.* at *4.

157. Burt Hill, Inc. v. Hassan, No. Civ.A 09-1285, 2010 WL 419433, at *1–2 (W.D. Pa. Jan. 29, 2010).

158. *Id.* at *5.

159. *Id.* at *2–3. The expert opined that because the client did nothing to solicit the materials in question and the materials were provided before the litigation began, the relevant ethics rules did not apply. *Id.* at *3. He commented that he "simply cannot find anything that would prohibit your use of the information in question." *Id.*

160. *Id.* at *4.

counsel because "documents intentionally and anonymously produced should create a heightened awareness in both parties and counsel, and the mysterious nature of the production must also generate an amplified duty of notification."[161]

Chamberlain Group Inc. v. Lear Corp.[162] involved an engineer who previously worked for the defendant company.[163] The engineer sent an unsolicited email to one of the plaintiffs, and the continued communication ultimately led to the plaintiff's receipt of unsolicited, privileged documents that were forwarded to the plaintiff's counsel.[164] The court in *Chamberlain* agreed with the *Burt Hill* court, "fail[ing] to see why" the duty to disclose an inadvertent receipt under Model Rule 4.4 "should cease where confidential documents are sent *intentionally and without permission*."[165]

Though it did not deal with anonymously disclosed documents, *Stengart v. Loving Care Agency, Inc.*[166] provides another example of a court willing to extend Model Rule 4.4(b) beyond its plain text.[167] This case dealt with a former employee filing an employment discrimination action.[168] Her former employer retained a computer forensic expert to retrieve emails containing privileged and confidential information that was saved on the hard drive and later used in the course of discovery.[169] Noting that the employer itself did not hack into the plaintiff's account or perform any acts of bad faith,[170] the New Jersey Supreme Court found that the employer's counsel should have promptly notified opposing counsel when it discovered the nature of the emails, even if the emails were not inadvertently sent but rather provided intentionally by a third party.[171] New Jersey later codified this result when it revised Rule 4.4(b) of the New Jersey Rules of Professional Conduct to explicitly address wrongfully obtained documents and implement a notice requirement for such documents.[172] Tennessee has also codified a similar

161. *Raymond*, 2017 WL 2831485, at *22.
162. 270 F.R.D. 392 (N.D. Ill. 2010).
163. *Id.* at 393–94.
164. *Id.* at 394–95. The engineer's identity was not known at the onset and was only discovered when the engineer and one of the plaintiffs planned to meet in person. *Id.* at 395.
165. *Id.* at 398 (emphasis added) (citing *Burt Hill*, 2010 WL 419433, at *4–5).
166. 990 A.2d 650 (N.J. 2010).
167. *See id.* at 666.
168. *Id.*
169. *Id.* at 655.
170. *See supra* Part I.E.
171. *See Stengart*, 990 A.2d at 666.
172. N.J. RULES OF PRO. CONDUCT r. 4.4(b) (N.J. BAR ASS'N 2015). New Jersey Rule 4.4(b) adds a separate section, after one that is very similar to Model Rule 4.4(b), that implements a notify-and-return requirement for lawyers who receive a document that contains privileged attorney-client communications or who have reasonable cause to believe the document or information was wrongfully obtained. *Id. Harris Davis Rebar, LLC v. Structural Iron Workers Local Union No. 1, Pension Trust Fund*, No. 17-473, 2019 WL 447622 (N.D. Ill. Feb. 5, 2019), draws a similar analogy to Rule 4.4(b) for an intentional disclosure and deals with identified former employees providing internal documents to the opposing lawyers. *Id.* at *4–5. The court noted that it found it "difficult to see why [the sending party's known or anonymous identity] would matter" in this specific case. *Id.*

rule.[173] These rules address an even broader scope of unauthorized disclosures than the scope of disclosures this Note focuses on.

Although the ABA had two reasons for treating inadvertent disclosures differently from unauthorized disclosures,[174] one scholar argues that these reasons do not provide a sufficient rationale for distinguishing these types of disclosures.[175] Professor James Fischer says that the distinctions provided by the ABA are "elusive."[176] Both disclosures occur when someone erred, and the identity of the person who erred may be relevant to the question of waiver but does not differentiate between the two types of disclosures.[177] Second, the ABA's speculation of a greater likelihood that unauthorized disclosure cases deal with information that shows improper or unjust conduct[178] is "asserted, not established" because there was no evidence provided in the formal opinion other than anecdotal evidence.[179] Whether the documents show evidence of improper conduct could impact the lawyer's ability to use the information at trial, but this does not distinguish between the two types of disclosures at the moment the lawyer receives them.[180] Thus, Fischer argues, the best resolution when evaluating the proper conduct for both forms of disclosures is to use a single approach.[181] A single approach would be fairer when evaluating the consequences because a lawyer will probably be unsure of how the documents were sent before at least reviewing the documents in some way.[182]

In the cases discussed above, the courts emphasized that documents that are disclosed intentionally by an anonymous third party should be treated *at least* the same as those inadvertently disclosed.[183] Therefore, Fischer and these courts argue that the notice requirement found in Model Rule 4.4(b) should be extended to include intentional disclosures, even if that requirement is not explicitly written in the rule.

3. Courts' Interest in Maintaining Integrity Should Outweigh Other Interests

In addition to analogizing to Model Rule 4.4(b), another argument for requiring notice is that courts have an interest in maintaining the integrity of the judicial system by prohibiting unethical, extrajudicial discovery. The *Raymond* court posited this by detailing policy arguments and discussing how "obligations of decency, fundamental fairness, and frankly the golden rule" should have prompted the lawyers to notify opposing counsel of their

173. TENN. RULES OF PRO. CONDUCT r. 4.4(b) (2018).
174. *See supra* notes 49–52 and accompanying text.
175. Fischer, *supra* note 20, at 230–32.
176. *Id.* at 231 (emphasis added).
177. *Id.* at 232.
178. *See supra* note 51 and accompanying text.
179. Fischer, *supra* note 20, at 232.
180. *Id.* at 232–33.
181. *Id.* at 233.
182. *Id.*
183. *See supra* notes 157–82 and accompanying text.

receipt of the documents.[184] In that case, by holding on to these documents for over two years, plaintiffs' counsel impermissibly sidestepped the authorized discovery process.[185]

When the court in *Raymond* was determining the proper sanctions for the lawyers' handling of the unauthorized receipt of an adverse party's information, the court referred to two primary interests: (1) the conduct of counsel itself and (2) the effects of that conduct, including whether the conduct was "prejudicial to the administration of justice."[186]

Similarly, the *Burt Hill* court concluded that using its inherent sanctioning power was warranted and cited numerous cases in which sanctions were fitting to punish the inappropriate avoidance of the formal discovery process.[187] The court discussed how the defendants and their counsel were discontent with waiting until the formal discovery process concluded and therefore chose to inappropriately circumvent it.[188] Finally, the Model Rules themselves acknowledge that lawyers do not need to "press for every advantage" for their clients but rather should aim to treat "all persons involved in the legal process with courtesy and respect."[189] Therefore, these sources argue that, to maintain judicial integrity and order in the court system, lawyers should have a notification requirement for anonymous disclosures.

B. Lawyers Should Not Have to Notify Opposing Counsel of Anonymous Disclosures

There are courts, states, and academics, however, that argue that notice should not be mandated for unauthorized disclosures. This viewpoint leaves the question of ethical obligations in the event of unauthorized disclosures to other areas of law, such as the relevant evidence or civil procedure rules. Part

184. *Raymond*, 2017 WL 2831485, at *14.

185. *Id.* at *15.

186. *Id.* at *16. Ultimately, the court decided that disqualifying the entire firm of plaintiffs' counsel would be detrimental to the plaintiffs' case because it would limit plaintiffs' access to counsel and therefore only pursued evidentiary sanctions regarding the use of the anonymously delivered documents. *Id.* at *17–19.

187. *See, e.g.*, S.E.C. v. Brady, 238 F.R.D. 429, 445 (N.D. Tex. 2006) (stating that "[f]ederal courts have authority to remedy litigation practices that threaten judicial integrity and the adversary processes" and that "[s]uch inherent authority includes the ability to 'exclude proprietary documents obtained . . . outside the context of formal discovery'" (quoting Lahr v. Fulbright & Jaworski, L.L.P., No. 94-CV-0981, 1996 WL 34393321, at *5–6 (N.D. Tex. July 10, 1996))); Knitting Fever, Inc. v. Coats Holding Ltd., No. 05-CV-1065, 2005 WL 3050299, at *1, *4 (E.D.N.Y. Nov. 14, 2005) (stating that when plaintiffs obtained documents from "an undisclosed . . . employee" of defendants, plaintiffs' counsel had "a clear ethical responsibility to notify [defense] counsel and either follow the latter's instructions with respect to the disposition of the documents or refrain from using them pending ruling by the [c]ourt"); Arnold v. Cargill Inc., No. 01-2086, 2004 WL 2203410, at *7–10 (D. Minn. Sept. 24, 2004) (disqualifying plaintiffs' counsel for using "privileged and/or confidential" documents obtained from defendant's former employee).

188. Burt Hill, Inc. v. Hassan, No. Civ.A 09-1285, 2010 WL 419433, at *8 (W.D. Pa. Jan. 29, 2010).

189. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2021).

II.B.1 describes the textualist view, emphasizing that the current ABA Model Rules and formal opinions explicitly chose to *not* include intentional disclosures. Part II.B.2 describes the technocratic view, which argues that because there is no ethical rule on point, the lawyer should be free to act as the lawyer best sees fit. Part II.B.3 discusses the argument that this issue is best left to other law.

1. The ABA Explicitly Leaves Unauthorized Disclosures Out of Its Rules

As discussed, the ABA has clearly stated that all unauthorized disclosures are outside the scope of the ethics rules.[190] Previously, the ABA has utilized a textualist approach and has limited the scope of Model Rule 4.4(b) to include only what is explicitly in the text of the rule.[191] A previous formal opinion had addressed unauthorized disclosures, but it was later withdrawn.[192]

Some courts have similarly decided that notice is not required given the absence of an explicit requirement in the ethical rules. In *Chesemore v. Alliance Holdings, Inc.*,[193] a federal district court in the Western District of Wisconsin declined to mandate notice for unauthorized disclosures.[194] One plaintiff in this class action lawsuit against an employer instructed other employees to either send documents directly to counsel or to leave them with her "anonymously."[195] A current employee took advantage of this opportunity and "anonymously" gave valuable documents to the plaintiff, who then provided these documents to counsel.[196]

The court found no wrongdoing on the lawyer's part and held that the anonymous delivery may have suggested an orchestration of plausible deniability by plaintiffs' counsel but noted that the situation was "still far from counsel affirmatively directing employees to reveal confidential documents."[197] The court held that, as long as the lawyer did not solicit the confidential information,[198] there was no wrongdoing.[199] Adhering closely to the exact wording used in Rule 4.4(b) of Wisconsin's Rules of Professional

190. *See supra* note 54 and accompanying text.
191. *See supra* notes 33–45 and accompanying text.
192. *See supra* notes 49–54 and accompanying text.
193. 276 F.R.D. 506 (W.D. Wis. 2011). This case is about certifying a proposed class for the lawsuit. *Id.* at 509.
194. *Id.* at 513–14.
195. *Id.* at 513.
196. *Id.* at 513–14.
197. *Id.* at 515–16. However, the U.S. District Court for the Western District of Wisconsin did mention, without elaborating, that there may be policy reasons for sanctioning a lawyer for not providing notice in this situation but that defendants did not attempt to articulate them and "the ABA's revision of its position on the matter weighs against such a view." *Id.* at 515. The *Raymond* court distinguished the *Chesemore* opinion partially on this basis—that in *Raymond*, the parties clearly articulated policy arguments (which the *Raymond* court found persuasive). *See* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *12 (D. Kan. June 30, 2017).
198. *See supra* Part I.E.1.
199. *Chesemore*, 276 F.R.D. at 514.

Conduct for Attorneys,[200] the *Chesemore* court highlighted the narrow situation in which Rule 4.4(b) actually applies and refused to expand the scope of the rule.[201]

Additionally, the *Chesemore* court noted that the *Burt Hill* case relied on withdrawn ABA opinions rather than the newest ABA Formal Opinion 06-440,[202] which revised the ABA's position to not include a notice requirement in these cases.[203] The court said that "the ABA's revision on this matter weighs against such a view."[204] This approach adhered closely to the textualist approach that the ABA had previously engaged with respect to this controversy.[205] However, the *Raymond* court disagreed with the *Chesemore* court's interpretation of ABA Formal Opinion 06-440, because the *Raymond* court found that the formal opinion explicitly warns lawyers that the black letter rules must not end their inquiry into what the proper conduct is.[206]

Furthermore, over two-thirds of states have adopted ethics rules that are almost identical to Model Rule 4.4(b).[207] All of these jurisdictions have opted to follow the lead of the ABA and its version of Model Rule 4.4(b),[208] demonstrating that the issue of intentional disclosures must be beyond the scope of Rule 4.4(b) and, thus, notice should not be mandated.[209] In Oregon, for example, Formal Opinion No. 2011-186 concludes that Rule 4.4(b), by its express terms, does not require a lawyer to take or refrain from taking any particular action with respect to documents that were sent purposely.[210]

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200. Wisconsin's Rule 4.4 implements a notification requirement (along with requiring the lawyer to stop reading the document) for inadvertently sent documents, much like Model Rule 4.4(b). WIS. RULES OF PRO. CONDUCT FOR ATT'YS r. 4.4 (2020); *see* MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2021).

201. *Chesemore*, 276 F.R.D. at 515–16.

202. *See supra* notes 53–54 and accompanying text.

203. *Chesemore*, 276 F.R.D. at 515.

204. *Id.*

205. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011) (stating that "[a] 'document [is] inadvertently sent' to someone when it is accidentally transmitted to an unintended recipient" but that "a document is not 'inadvertently sent' when it is retrieved by a third person from a public or private place where it is stored or left" (quoting MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2021)); Kendrick, *supra* note 19, at 760 (discussing how the Committee applied a textualist approach when crafting its formal opinions); *see also* MODEL RULES OF PRO. CONDUCT r. 4.4(b); ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-440 (2006) (proffering that if the receipt of "materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply").

206. Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *12 (D. Kan. June 30, 2017); *see supra* Part II.A.2; *see also supra* note 54 and accompanying text.

207. Becker, *supra* note 28, at 884–85.

208. *See* AM. BAR ASS'N, JURISDICTIONAL RULES COMPARISON CHARTS, RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.pdf [https://perma.cc/62P9-B35B].

209. *See supra* notes 33–45 and accompanying text.

210. Oregon State Bar, Formal Op. No. 2011-186 (2011). This formal opinion does note, however, that if the documents contain evidence of a crime, the lawyer may have an obligation to make the evidence available to the prosecution under Rule 8.4(a)(4). *Id.* This may not apply

These states, following the lead of the Model Rules, have chosen to leave unauthorized disclosures outside of the ethics rules.

2. A Lawyer Is Likely to Act in the Client's Best Interests

Absent an ethical rule on point, many commentators say that a lawyer is most likely to have one goal in mind: pursuing whatever course of action is in the client's best interests.[211] Professor Heidi Feldman calls this "technocratic" decision-making, emphasizing that a technocrat will utilize any available weapon to secure the client's ends or justify an already made decision.[212] As a result of often inconclusive and conflicting ethics rules, technocratic decision-making has become more prevalent.[213] A technocratic lawyer can develop defensible arguments for almost any position using the black letter law.[214] A technocrat, therefore, will interpret the rules to permit pursuit of the client's ends without considering other ethical concerns.[215]

Professor Feldman further argues that the ethical statutory rules can actually *elicit* the technocratic style.[216] While Feldman comments that she values uniformity and predictability, she argues that a good technocrat can produce valid arguments for interpreting codified legal rules in a wide variety of ways, resulting in a wide variety of behavior.[217] Instead, Feldman argues for a common-law approach that would tend to narrow the spectrum of behavior.[218] "A robust common law of lawyers' ethics would provide constraining information about what sorts of situations create which ethical responsibilities."[219] She therefore seems to endorse the view that, absent a rule on point, notice should be discretionary and courts should determine on a case-by-case basis when notice should be required, creating guidelines for lawyers in the future with similar factual situations to follow.[220]

In addition, Professor Monroe Freedman, one of the most widely cited proponents of zealous advocacy, argues that a lawyer has no duty to protect the confidentiality between the opposing side and its counsel and that the lawyer should not be forced to weigh this obligation of confidentiality more heavily than the lawyer's own obligation to represent the client zealously.[221] His position also illustrates this "strong impulse towards technocratic

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if the documents are still entitled to protection under substantive law of privilege or otherwise. *Id.*

211. Jones, *supra* note 133, at 1283–84 (describing the flaws of rule-oriented decision making).

212. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 886–87 (1996).

213. *Id.* at 886 n.2.

214. *Id.* at 897.

215. *Id.* at 898.

216. *Id.* at 887.

217. *Id.* at 934.

218. *Id.* at 887.

219. *Id.* at 946–47.

220. *See infra* notes 243–51 and accompanying text.

221. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004).

decision making."[222] For example, in an article published before the adoption of Model Rule 4.4(b), Freedman argues that lawyers should have the right to read and use any supposedly inadvertently sent document to help their clients' cases—with no notice required—because the opposing lawyers did not take care to protect the documents from disclosure.[223] This group of thinkers argues that zealous advocacy furthers autonomy,[224] due process rights,[225] and clients' trust and confidence in their lawyers.[226] Freedman asserts that counsel should take "all reasonable lawful means to attain the objectives of the client"[227] and that any inadequacies in the Model Rules will "be overcome by tradition and corrected by interpretation."[228]

Professors Trina Jones and Andrew Perlman both discuss the possibly troublesome consequences of Freedman's view.[229] Jones argues that Freedman's view encourages lawyers to become dismissive of or to oversimplify ethical matters not resolved by the Model Rules, by interpreting the rules as narrowly as possible to promote whatever is in the client's best interest.[230] Perlman emphasizes the lack of justification for Freedman's view, which Perlman says leaves questions as to why zealous advocacy should be the "nearly exclusive factor" when determining one's ethical obligations.[231] In a response to Perlman's article, Freedman emphasized that Perlman's statement was wrong: Freedman believes ethics are rooted in the Bill of Rights and in the autonomy and the dignity of the individual, which encompasses much more than simply zeal, as Perlman contended.[232] Therefore, there is an argument that zealous advocacy should outweigh any other conflicting interests, and thus lawyers should not have to provide notice to the opposing party if a rule does not require them to do so.[233]

3. Anonymous Disclosures Should Be Left to Other Law

Federal courts and scholars following the view that Model Rule 4.4(b) does not apply to documents that are sent intentionally rely on the FRE, FRCP, and private agreements to determine what lawyers may or must do with these documents.[234] Depending on what claim is brought in what court,

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222. Jones, *supra* note 133, at 1284.

223. FREEDMAN & SMITH, *supra* note 221, at 78–79 (criticizing suggestions that the "advocate's zeal on behalf of a client should be constricted by moral standards that have not been enacted into law by the legislature or recognized by the courts").

224. *Id.* at 71.

225. *Id.* at 23.

226. *Id.* at 130–34.

227. *Id.* at 84 (quoting Nix v. Whiteside, 475 U.S. 157, 166 (1986)).

228. *Id.*

229. *See generally* Jones, *supra* note 133; Perlman, *supra* note 75.

230. Jones, *supra* note 133, at 1284.

231. Perlman, *supra* note 75, at 791.

232. Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179, 182–83 (2006).

233. *See supra* notes 211–32 and accompanying text.

234. *See supra* Part I.C.2; *see also* Chesemore v. All. Holdings, Inc., 276 F.R.D. 506, 515 (W.D. Wis. 2011).

state laws may also govern. For example, in *Merits* and *Chesemore*, each court decided that the scope of its state's Rule 4.4 clearly excludes unauthorized disclosures, and therefore, other law should govern these situations.[235]

One commentator, Professor Tory Lucas, argues that inadvertent disclosure decisions should be aligned with related outside law and that the rules of ethics should play only a supporting role.[236] His solution, while also advocating for Fischer's idea of treating both types of disclosures similarly,[237] endorses the view that a receiving lawyer's ethical obligations revolving around these disclosures should be left to applicable state or federal law.[238] Leaving this determination to other law would protect every client with a fair system by ensuring that everyone knows the "rules of the game."[239] Furthermore, this would align Model Rule 4.4(b) with possible societal values on these types of disclosures: to serve the interests of the client, the profession, and the justice system.[240] Overall, Lucas's analysis advocates for a simple revision of Model Rule 4.4(b)[241] and asserts that the other relevant law does enough to govern this area of ethics.[242]

Furthermore, this argument contends that the ABA obviously intended for the inquiry to be a fact-specific one that allows the courts to use their discretion when determining what is required of lawyers in the event they receive unauthorized disclosures.[243] Intentional disclosures could concern a wide variety of cases, each with different interests weighing in favor and against obligations, such as a notice requirement.[244] Instead of mandating notice (or any further ethical obligations, such as the obligation to stop reading or to return the documents), courts could look to factors and then conduct a balancing test.[245] These factors could include: impropriety of counsel's conduct in obtaining the documents;[246] the incentives and

235. *Chesemore*, 276 F.R.D. at 515; Merits Incentives, LLC v. Eighth Jud. Dist. Ct. of State, *ex rel.* Cnty. of Clark, 262 P.3d 720, 724–26 (Nev. 2011).

236. Lucas, *supra* note 48, at 238.

237. *Id.* at 251 n.74.

238. *Id.* at 239.

239. *Id.* at 289.

240. *Id.*

241. His proposed amendment to Model Rule 4.4(b) is: "The receiving lawyer shall use inadvertently disclosed documents or information unless prohibited by rules of evidence, rules of civil procedure, or private agreement." *Id.* at 290.

242. *Id.* Alternatively, the court in *Burt Hill* emphasized that the two types of documents should *not* be treated similarly, even though they found that the notice requirement from Rule 4.4(b) could be used as a starting point for anonymous disclosures that are intentional. *See* Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *4 n.4 (W.D. Pa. Jan. 29, 2010) ("Although rules and decisions regarding inadvertent disclosures present an appropriate starting point, the analogy, by definition, eventually loses its vitality.").

243. *See supra* notes 53–58 and accompanying text; *see also* Perlman, *supra* note 75, at 809–11 (arguing that notice should be discretionary on the part of the lawyer).

244. *See* Brado v. Vocera Commc'ns, Inc., 14 F. Supp. 3d 1316, 1322 (N.D. Cal. 2014).

245. *See id.*

246. *See supra* Part I.E; *see also* Lahr v. Fulbright & Jaworski, L.L.P., No. 94-CV-0981, 1996 WL 34393321, at *4 (N.D. Tex. July 10, 1996) (identifying the court's primary concern as whether the attorneys encouraged or were involved in dishonest conduct); *In re* Shell Oil

disincentives of employees to wrongfully take documents;[247] the prejudice to the opposing party;[248] the court's desire to pursue the truth when resolving a dispute;[249] and the public policy motivations of the Sarbanes-Oxley Act,[250] which favors whistleblowers and allows them to remain anonymous.[251]

For example, imagine a hypothetical in which a large pharmaceutical company unlawfully promotes certain products. A whistleblower from within the company provides information revealing the criminal activity to the U.S. Department of Justice (DOJ). Here, that information from the whistleblower is valuable for protecting the public's well-being. This may be a situation in which the DOJ's having to provide notice would cause more harm than good.

In the cases discussed in Part II.A, many of the courts emphasized that because the documents were obtained without authorization from "dubious" origins and because of the source's anonymity, notice should be required.[252] A fact-specific inquiry would allow the court to use its own discretion and weigh these interests, and such an inquiry is obviously what the ABA intended to occur in these situations.[253] In the hypothetical above, a court could decide that public policy weighs in favor of allowing use of the documents disclosed. Making notification discretionary would most effectively allow the court to balance the interests involved.[254]

Refinery, 143 F.R.D. 105, 107–08 (E.D. La. 1992) (disallowing use of documents in litigation where counsel circumvented the discovery process by obtaining internal documents from a current Shell employee).

247. *See* JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697, 702–03 (E.D. Va. 2007) (finding employee liable for breach of contract for taking documents without authorization from his employer); Fayemi v. Hambrecht and Quist, Inc., 174 F.R.D. 319, 325–26 (S.D.N.Y. 1997) (disallowing use of documents when the plaintiff took the documents).

248. *See Brado*, 14 F. Supp. 3d at 1322 (involving an instance in which the only prejudice to the opposing party was merely the timing of the access to the documents, since they would have been produced through discovery anyway); *see, e.g.*, Ashman v. Solectron, Corp., No. C-08-1430, 2008 WL 5071101, at *4 (N.D. Cal. Dec. 1, 2008) (declining to exclude use of improperly taken documents and only ordering the documents' return when the documents likely would have been produced through discovery).

249. *See Brado*, 14 F. Supp. 3d at 1323 ("While the documents may supply greater detail and constitute a more reliable source of information, in that regard the documents thereby serve the paramount truth-seeking function of the Court."); *Lahr*, 1996 WL 34393321, at *4 (declining to suppress use of improperly taken documents in light of pursuing the truth and considering all relevant evidence).

250. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C.).

251. *See generally JDS Uniphase Corp.*, 473 F. Supp. 2d 697.

252. *See supra* note 156 and accompanying text.

253. *See supra* note 63 and accompanying text.

254. Perlman, *supra* note 75, at 811 (discussing how consumer protection and morality are the two factors that favor mandatory notification for inadvertent disclosures, but that because zealous advocacy, legal analogies, and justice weigh against a legal obligation to notify, notification should be discretionary).

III. REVISING THE ABA MODEL RULE

As demonstrated, intentionally sent documents that are disclosed by an anonymous third party pose an ethical quandary for lawyers.[255] With no clear guidance from courts, the ABA, or the majority of states, lawyers are left to guess what their ethical obligations are if they receive intentionally sent documents from an anonymous third party.[256] All of the authorities addressed above seek to provide opportunities for efficient and inexpensive exchanges of information, while also drawing lines for how, when, and what information can properly be obtained.[257] The varying standards adopted between the court systems create uncertainty for lawyers who find themselves in this situation,[258] and creating a clearer standard would result in lawyers being less likely to attempt to push ethical boundaries.[259]

This part proposes that the ABA revise Model Rule 4.4(b) to provide the clearest guidance for and most efficient solution to the problem of intentional disclosures by anonymous third parties. A clear revised rule would minimize sanctions imposed on lawyers who previously had to navigate a vague rule and courts' contradictory opinions. Lawyers would be able to structure their behavior accordingly to avoid sanctions. Clear and detailed rules that leave less discretion to the court system would minimize lawyers' needs to seek the opinion of ethics professionals to deal with a situation or to expend time and energy to determine how to handle the documents correctly.[260] The goal of the ABA Model Rules is not to cause more confusion but to provide guidance to the legal profession.[261] Currently, Rule 4.4(b) does not serve that goal and needs to be revised.

This section presents numerous solutions to the problem discussed in Part II. Part III.A discusses why several of the justifications for not mandating notice for anonymous disclosures fall short of sufficiently addressing the issue. Part III.B explains why the ABA should amend Model Rule 4.4(b) based on its position as the leading authority on legal ethics. This section also proposes a revision for the ABA to consider. Lastly, Part III.C explains why, should the ABA decline to amend the Model Rule, courts should exercise their discretion to implement a notice requirement for anonymous disclosures.

A. Extend the Notice Requirement to Anonymous Disclosures

Notice should be required for anonymous disclosures in order to provide clear guidelines for lawyers dealing with these types of disclosures. Part III.A.1 discusses why unauthorized and inadvertent disclosures are sufficiently similar and should be treated the same. Part III.A.2 explains why

255. *See supra* Part II.
256. *See supra* Part II.
257. *See* Becker, *supra* note 28, at 883; *see also supra* Parts I.B, II.
258. *See supra* Part II.
259. *See* Lucas, *supra* note 48, at 289.
260. *See supra* notes 158–60 and accompanying text.
261. *See supra* notes 26–29 and accompanying text.

the issue of notice and unauthorized disclosures should be addressed by ethics rules rather than left to other law. Lastly, Part III.A.3 discusses the conflicting interests involved and explains why judicial integrity should outweigh the interest of a zealous advocate.

1. Inadvertent and Unauthorized Disclosures Are Sufficiently Similar

First, there is a strong argument for why inadvertent and unauthorized disclosures are sufficiently similar to justify uniform treatment.[262] The lawyer often has no idea how documents were obtained before receiving them, and therefore, streamlining the process to cover both inadvertent and intentionally disclosed documents is logical. The courts in *Burt Hill* and *Raymond* noted that documents that are obtained in a questionable manner and disclosed without authorization probably deserve an even *higher* level of ethical obligation than those sent inadvertently.[263] With this consideration in mind, implementing the same notice requirement for both types of disclosures is the bare minimum required to protect the information and the interests of the parties involved. Furthermore, it seems nonsensical to apply a notice requirement to documents that are mistakenly sent to the lawyer, while allowing the lawyer to utilize documents that are, for example, anonymously delivered to the lawyer's office.[264] This is a distinction without a difference. Furthermore, it has been argued that one party should not benefit from a mere clerical error resulting in inadvertent disclosures.[265] Accordingly, then, it seems clear that one party should also not benefit from a third party's improper acts that result in intentional disclosures. Therefore, the notice requirement that is mandated for inadvertent disclosures should also be extended to include anonymous disclosures.

2. Anonymous Disclosures Should Not Be Left to Other Law

The argument that the governance of unauthorized disclosures should be left to other law is unavailing.[266] Even in light of FRCP Rule 26[267] and FRE 502,[268] there are still major gaps concerning documents that are disclosed intentionally, as all of these laws only discuss inadvertent disclosure.[269] Professor Perlman discusses how bar associations have consistently concluded that this topic indicates ethical concerns, so the idea that these open questions "are now somehow more appropriately dealt with outside of the realm of legal ethics is a dubious departure from past practice."[270]

262. Fischer, *supra* note 20, at 231–32; *see supra* Part II.A.1.

263. Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *14 (D. Kan. June 30, 2017); Burt Hill, Inc. v. Hassan, No. Civ.A 09-1285, 2010 WL 419433, at *4–5 (W.D. Pa. Jan. 29, 2010); *see supra* notes 174–83 and accompanying text.

264. *See supra* notes 174–83 and accompanying text.

265. *See* Jones, *supra* note 133, at 1322.

266. *See supra* notes 234–42 and accompanying text.

267. *See supra* notes 84–87 and accompanying text.

268. *See supra* notes 81–83 and accompanying text.

269. *See supra* notes 33–45 and accompanying text.

270. *See* Perlman, *supra* note 75, at 782.

Furthermore, none of the other law discussed makes a single mention of documents that are disclosed without authorization.[271] Additionally, leaving it to other law becomes more complicated when dealing with lawyers who practice in multiple jurisdictions and would need to be aware of and understand nuances in each jurisdiction's rules and contract laws.[272] This gap in other law addressing intentional disclosures is evident because none of the above cases mention any other law as being highly relevant to the decision.[273] The argument that unauthorized disclosures should be left to other law falls short of providing an efficient solution for how lawyers should deal with these types of documents.

3. The Need for Judicial Integrity Should Outweigh Zealous Advocacy

Notifying the opposing party of what was received is not a difficult task, and it can be accomplished in minutes. Notification allows the sending attorney to take protective measures for the document, communicate instructions on how to proceed with the documents or go to the court to ensure other steps are taken.[274] While receiving lawyers would benefit from the opportunity to use documents to their client's advantage, the judicial system must uphold its integrity and should require its lawyers to do the same. The competing interests issue arises again,[275] but here, the lawyer's obligation to the judicial system should outweigh the other interests. The *Raymond* and *Chamberlain* courts emphasized that allowing lawyers to receive and use these documents without notifying the other side seems to encourage extrajudicial discovery and should raise "red flags" for the lawyers.[276] Extrajudicial discovery can encourage backdoor dealings and skullduggery and could create a slippery slope of decreasing ethical standards if a lawyer does not proceed through formal methods. While the lawyer's ultimate goal is to help the client, the lawyer must also uphold the integrity of the profession; allowing lawyers to utilize documents or information that was disclosed without authorization just because there is essentially a "loophole" does not serve the legal system well.[277]

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271. *See supra* notes 87–92 and accompanying text. Lucas proposed to add the following text to the end of Rule 4.4(b): "The receiving lawyer shall use inadvertently disclosed documents or information unless prohibited by rules of evidence, rules of civil procedure, or private agreement." Lucas, *supra* note 48, at 265. This proposal would still cause confusion even when just dealing with inadvertent disclosures. *Id.* In his article, he claims that unauthorized disclosures and inadvertent disclosures can be equated with one another, yet he proposes a solution that would only include "inadvertent disclosure." *Id.*

272. *See, e.g.*, Larry E. Ribstein, *Ethical Rules, Law Firm Structure and Choice of Law*, 69 U. CIN. L. REV. 1161, 1163–64 (2001).

273. *See supra* Part II.

274. Pierson, *supra* note 100, at 1104–05.

275. *See supra* notes 104–08 and accompanying text.

276. *See* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *11 (D. Kan. June 30, 2017); *see also* Chamberlain Grp., Inc. v. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill. 2010).

277. *See supra* notes 104–08 and accompanying text.

Freedman's argument that, without a rule directly on point, a lawyer should be left to pursue whatever means is in the best interest of the client is unreasonable.[278] Lawyers must take various considerations into account—such as the integrity of the lawyer, the profession, and the court system—when they determine their applicable ethical duties.[279] Any set of ethical rules is inherently limited, and there is simply no practical way for a set of rules to cover every situation in which lawyers may find themselves.[280] Instead of aiming to cover all these situations, the legal profession expects a lawyer to act reasonably, even if not specifically prescribed by a rule. This might not *always* mean acting in the best interest of the client because a lawyer's duty is not just to the client.[281] Therefore, the interest of avoiding unethical extrajudicial discovery should outweigh the interest of the lawyer to zealously act without ethical bounds for the interests of the client. Thus, notice should be mandated.

All of these concerns appear even more relevant when dealing with disclosures from anonymous third parties, as the case law in Part II discussed.[282] That the third party is maintaining anonymity at all implies a greater chance that something awry is occurring.[283] Additionally, when documents are anonymously disclosed, the lawyer does not have a chance to question the third party to discuss how the third party obtained the documents or garner any specific details. Thus, the need for judicial integrity in these situations, as supported by the courts in *Merits* and *Raymond*,[284] should outweigh any conflicting interests.

B. The ABA Should Revise Model Rule 4.4(b) to Include Anonymous Disclosures

The ABA should adopt a clearer standard to handle situations in which documents are intentionally disclosed without authorization by an anonymous third party. It should do so by expanding Model Rule 4.4(b) to cover unauthorized disclosures of this type, thus implementing a notice requirement for both inadvertent and anonymous disclosures.[285] Part III.B.1 discusses why the ABA is in the best position to provide ethical guidance to the legal profession. Part III.B.2 highlights why there is a need for clearer guidance for lawyers in this realm. Part III.B.3 describes the proposed amendment to Model Rule 4.4(b).

278. FREEDMAN & SMITH, *supra* note 221, at 84; *see supra* notes 221–33 and accompanying text.
279. *See supra* notes 104–08 and accompanying text.
280. *See supra* note 134 and accompanying text.
281. *See supra* notes 104–08 and accompanying text.
282. *See supra* Part II.
283. *See supra* Part II.
284. *See supra* notes 137–43 and accompanying text.
285. *See supra* notes 33–45 and accompanying text.

1. The ABA Is in the Best Position to Provide Guidance on Ethics

The ABA is in the best position to create clear guidelines to address intentional, anonymous disclosures of unsolicited privileged or confidential documents.[286] The ABA's role in developing these professional conduct rules is to decide, if there are conflicting interests,[287] which interests should prevail.[288] Looking at the ABA's history in addressing this issue,[289] the previous Formal Opinion 94-382 did address unauthorized disclosures and seemed to indicate that ethics rules were the best way to address this issue.[290] After adopting Model Rule 4.4(b) and rescinding that formal opinion, the ABA failed to explain why intentionally disclosed documents are not included under Model Rule 4.4(b).[291] Confusingly, now the ABA seems to indicate that these disclosures are better handled by sources of authority outside the realm of legal ethics.[292] As one of the highest national ethics authorities the legal world has, the ABA should not continue to waffle on the matter. Courts, states, and individual lawyers all look to the ABA for guidance.[293] It is the ABA's responsibility to provide clear instruction rather than leaving the determination to other law that does not adequately address the issue.[294] The other relevant law is not always applicable,[295] and ultimately, the issue of unauthorized disclosure and the requirement of notice to the opposing party are sufficiently ethics-related and deserve proper guidance. Furthermore, a uniform model rule, which has been shown to influence many states to adopt an identical or similar version,[296] could reduce forum shopping in cases in which a conflict of law analysis would apply.[297] People expect lawyers to act as advocates, not angels, and thus a revised Model Rule would serve to temper their zeal.

2. The Legal Profession Needs Clear Guidance About Anonymous Disclosures

When it is difficult for lawyers to ascertain what their ethical obligations are, they are likely to fall short of fulfilling the bar's expectations—even if

286. *See* Kendrick, *supra* note 19, at 776.
287. *See supra* notes 104–08 and accompanying text.
288. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 245–46 (2010) (discussing how the Model Rules require or permit an attorney to put the interests of an opponent, a court, or a third party ahead of the lawyer's own client).
289. *See supra* Part I.B.
290. *See supra* notes 49–52 and accompanying text; *see also* Perlman, *supra* note 75, at 782.
291. *See supra* Part I.B.2.
292. *See supra* note 54 and accompanying text.
293. *See supra* notes 26–29 and accompanying text.
294. *See supra* Part II.C.2.
295. *See supra* notes 87–92 and accompanying text.
296. *See supra* notes 28–29 and accompanying text.
297. *See* Gloria A. Kristopek, *To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel*, 33 VAL. U. L. REV. 643, 680 (1999).

the failure is not done in bad faith.[298] For example, in *Burt Hill*, the lawyer believed that he was fulfilling his ethical duties by following the black letter law that was relevant in the forum state.[299] However, because the court chose to expand the scope of Rule 4.4(b), the court sanctioned the lawyer to remedy his ethical violation.[300] Professional conduct rules should "say what they mean and mean what they say."[301] Since the ABA presumably wants lawyers in each jurisdiction to comply with the rules, it would be logical for the ABA to create clear rules that leave little room for interpretation.[302]

By amending Rule 4.4(b) to include anonymously disclosed documents, lawyers would be left with fewer questions, and courts would not have to make discretionary judgments on a case-by-case basis.[303] Leaving this determination to case law has clearly led to inconsistencies and is not a sustainable solution to an increasingly relevant problem.[304] Furthermore, state courts should adopt these standards in order for the revised rule to have the force of law and to provide consistent ethical obligations across state borders, which would allow the rules to be integrated into federal courts.

3. Proposed Amendment to Model Rule 4.4(b)

Amending Model Rule 4.4(b) by extending it to include intentional disclosures by an anonymous third party would help alleviate the concerns discussed in Part II.[305] Model Rule 4.4(b) should be revised to read:

> (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*, or was disclosed by an anonymous third party,* shall promptly notify the sender.[306]

In practice, this would resolve all the cases discussed in Part II. All documents that are anonymously disclosed would automatically confer a

298. *See* Schaefer, *supra* note 288, at 241.

299. Burt Hill, Inc. v. Hassan, No. Civ.A 09-1285, 2010 WL 419433, at *6 (W.D. Pa. Jan. 29, 2010).

300. *Id.* at *9–10.

301. *See* Schaefer, *supra* note 288, at 242.

302. *Id.*

303. *See* Kendrick, *supra* note 19, at 776 (proposing that the ABA "broaden [Model Rule 4.4(b)'s] scope and make it applicable in circumstances where privileged or confidential documents are *intentionally* disclosed"); *see also supra* notes 33–45 and accompanying text.

304. *See supra* Part II. *Compare* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *14 (D. Kan. June 30, 2017) (requiring notice for an anonymous delivery of helpful documents), *and Burt Hill*, 2010 WL 419433, at *9 (same), *with* Chesemore v. All. Holdings, Inc., 276 F.R.D. 506, 515–16 (W.D. Wis. 2011) (declining to require notice under similar facts).

305. As previously mentioned, many of the arguments discussed in Part II could apply to unauthorized disclosures more generally. However, this Note proposes that this notice requirement only applies to the facet of case law dealing with the anonymous disclosures discussed in Part II.

306. The addition is shown in *italicized* text. This Note acknowledges that this may cause problems with, for example, criminal cases. However, since the ABA does not carve out an exception for criminal cases or SEC lawyers, for example, the edited rule similarly does not.

notice requirement on the receiving attorney, serving the interest of maintaining judicial integrity and encouraging lawyers to go through ethical discovery processes.[307] Instead of questioning how anonymous disclosures fit within other law,[308] a clear model rule that is adopted by the states[309] would better serve the legal community.[310]

C. Courts Should Exercise Their Discretion and Mandate Notice with Anonymous Disclosures

If the ABA fails to make a new rule, courts should act based on their interest in maintaining judicial integrity, by expanding the notice requirement to anonymous disclosures.[311] The inconsistency with which courts have handled documents that are disclosed from an anonymous third party makes it extremely difficult for lawyers to understand their ethical obligations, especially for those who practice in multiple state and federal courts.[312] The courts, as the ultimate ethical authority, have the discretion to impose ethical duties as they see fit.[313] Therefore, courts have the ability to implement a notice obligation for anonymous disclosures.[314] While guidance by the ABA is preferred,[315] the courts hold the authority to create a similar solution through their decisions.[316]

When adopting such a solution, if there is no modification to the current ABA Model Rules and the jurisdiction has a Rule 4.4(b) that is identical or substantially similar to Model Rule 4.4(b), courts in that jurisdiction should follow the guidance from the courts that chose to expand Rule 4.4(b) and implement the notice requirement for documents that are disclosed from an anonymous third party.[317] Courts should consider that the ethical rules are simply a starting point for determining a lawyer's ethical duties and that the lawyer must look beyond them to determine their obligations.[318] Therefore, any res judicata issues aside, the courts should use their discretion to

307. *See supra* notes 186–89 and accompanying text.

308. *See supra* Part I.C.

309. *See supra* notes 26–30 and accompanying text.

310. This is very similar to the approach taken in the *Merits* case, which implemented a notice requirement for anonymously provided documents. *See* Merits Incentives, L.L.C. v. Eighth Judicial Dist. Ct. of State, *ex rel.* Cnty. of Clark, 262 P.3d 720, 725 (Nev. 2011).

311. *See supra* Part III.A.

312. *See* Ribstein, *supra* note 272, at 1163–64 (explaining that law firms with offices in different states are subject to a variety of ethical restrictions, often resulting in the firm's adherence to the most restrictive standards in a manner that may be inefficient and ineffective for serving the firms' clients in a particular jurisdiction); *see also supra* Part II.

313. *See supra* Part I.C.1.

314. *See generally* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485 (D. Kan. June 30, 2017); Burt Hill, Inc. v. Hassan, No. Civ.A 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010). *See also Merits*, 262 P.3d at 720.

315. *See supra* Part III.B.1.

316. An individual court's adoption of a notice requirement would be binding only in that court's specific jurisdiction. *See supra* notes 26–29 and accompanying text. This is partially why a revised model rule is preferred: because of its likelihood that the impact would be more widespread than a court decision, which would impact only that jurisdiction. *Id.*

317. *See supra* Part II.A.

318. *See supra* notes 129–32 and accompanying text.

analogize documents disclosed from an anonymous third party to inadvertently disclosed documents and thus expand the notice requirement from Model Rule 4.4(b) to include both.[319]

CONCLUSION

In a world where accessing important information is increasingly easier, there is a prevalent need for a clear rule defining a lawyer's obligations in questionable situations. The ABA has continued to switch its position on a lawyer's obligations upon the lawyer's receipt of documents that are disclosed anonymously, and this has left lawyers speculating endlessly about their ethical obligations. Model Rule 4.4(b) implements a notice requirement for inadvertent disclosures, explicitly leaving intentional disclosures to other law. However, situations involving anonymous disclosures have resulted in numerous inconsistencies in different courts and jurisdictions. It is unfair for lawyers to face ethical sanctions through no bad faith or fault of their own but rather because the ethical duties surrounding these documents are unclear. Therefore, this Note proposes a revision to Model Rule 4.4(b) to include anonymous disclosures and encourages state courts to implement this revision to clarify the ethical obligations around these types of documents.

319. *See supra* Part III.A.