# Model Rule 4.4(b) Should Be Amended

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Whether you are representing a client as a litigator or a transactional lawyer, the inadvertent disclosure of confidential information by opposing counsel thrusts you into an ethical quandary caused by your conflicting roles as a lawyer. As counsel for a client, you have a general obligation to maximize your client's advantage.[1] But, as an "officer of the legal system," you have a special responsibility to uphold the legal system and its underpinnings.[2] Thus, your duty as a client representative to exploit another's mistake for the benefit of your client conflicts with your duty as a legal officer to respect the confidentiality of such information, even the confidential information of your adversary's client, because that confidentiality underlies the proper functioning of the legal system.

Imagine this conflict as a tug-of-war between your client, on the one hand, and the legal system, on the other, in which you are being pulled in opposite directions. If this were simply a contest based upon the relative power of competing interests upon the individual lawyer, there would be no doubt about its outcome. The interests of your client are tangible and often urgent, especially to your client, who speaks to you loudly and insistently about its interests. The power of those interests is amplified because the client provides opportunities for representation and pays your bills. By comparison, the interests of the legal system are abstract and long term, and often there is no person who speaks for the legal system and no direct benefit for honoring its interests. Without a powerful voice to advocate for its interests, the legal system would succumb to your client in virtually every test of strength.

One of the goals of legal ethics is to rectify this imbalance inherent in virtually every conflict between a lawyer's roles as client representative and as officer of the legal system. A legal ethics regime is intended, at least in part, to give voice to the interests and values of the legal system as a whole by educating and reminding lawyers of their obligations to the legal system and to make those interests and values more compelling through the threat of sanctions imposed by a system of professional discipline.

## Model Rule 4.4(b)'s Regime

Within that context, let's consider Model Rule 4.4(b). The ABA House of Delegates adopted that Rule in February 2002 specifically to address the problem of inadvertent disclosure.[3] Only one sentence long, Rule 4.4(b) simply states: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Because Model Rule 4.4(b)'s use of the term "document" refers to readable electronic information as well as paper documents,[4] it governs the "errant email" as well as the "errant fax."

Before 2002, there was no Model Rule specifically addressing inadvertent disclosure. But, ten years earlier, in Formal Opinion 92-368, the ABA Standing Committee on Ethics and Professional Responsibility had opined that a lawyer who receives an inadvertently disclosed document (the "Receiving Lawyer") that appears on its face to be subject to the attorney-client privilege or otherwise to contain confidential information has three ethical obligations: first, to refrain from examining the document after receiving notice or realizing that the document had been inadvertently sent; second, to notify the person who had sent the document (the "Sender") of its receipt; and, third, to abide by the instructions of the Sender as to the disposition of the document.[5]

Compared to Opinion 92-368, Model Rule 4.4(b) dramatically reduces the ethical obligations of a Receiving Lawyer with respect to the protection of confidential information.[6] It only requires the Receiving Lawyer to notify the Sender promptly; it does not require the Receiving Lawyer to refrain from examining or using the document, or to return, destroy or sequester the document, as the Sender might request.

But Model Rule 4.4(b)'s reduced protection for confidential information can be a trap for the unwary. It may mislead Receiving Lawyers into believing that it is unnecessary to take additional steps, such as returning the inadvertently disclosed document or refraining from examining or using it. That would be unfortunate, because applicable law at both the federal and state levels provides that, at least in some circumstances, the Receiving Lawyer is obligated to do more than merely give notice to the Sender.

For example, Federal Rule of Civil Procedure 26(b)(5)(B) establishes a specific protocol for resolving claims of inadvertent disclosure that arise during the discovery phase of a federal lawsuit, and it imposes specific legal obligations upon the Receiving Lawyer beyond mere notification of the Sender. Once the Receiving Lawyer has learned about an ostensibly inadvertent disclosure, the Receiving Lawyer is required to (i) "promptly return, sequester or destroy the specified information and any copies"; (ii) "not use or disclose the information until the claim [of inadvertent disclosure of privileged information] is resolved"; and (iii) "take reasonable steps to retrieve the information" if the Receiving Lawyer disclosed it before learning of the Sender's inadvertent disclosure. Roughly half the states have similar protocols.[7]

In effect, Model Rule 4.4(b) delegates the resolution of the ethical conflict facing the Receiving Lawyer to the civil justice system.[8] It imposes no ethical obligation on the Receiving Lawyer beyond that necessary to enable the Sender to try to protect the confidentiality of the inadvertently disclosed document through judicial intervention.[9] But delegating the protection of confidential information to the courts is misconceived, because there are major gaps in that protection.

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## The Inadequate Protection of Confidential Information

The principle of client confidentiality, which encompasses the protection afforded by the attorney-client privilege as well as the broader ethical duty of confidentiality,[10] underlies both the private attorney-client relationship and the successful functioning of our public system of justice. Comment 2 to Model Rule 1.6 explains the importance of that ethical duty to the success of the attorney-client relationship:

> "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."

The principle of client confidentiality not only supports a private relationship, but also promotes the "broader public interests in the observance of law and administration of justice."[11] Full and frank communication is essential to a lawyer's skillful advocacy in our adversary system of justice.[12] Indeed, the principle of confidentiality is so fundamental to our adversary system of justice that all attorneys, as part of their obligation as officers of the court to help safeguard the key underpinnings of the legal system, share responsibility for preserving confidential information, even confidential information of clients not their own.[13] State and local bar association ethics committees have opined that the failure to shoulder that responsibility is "prejudicial to the administration of justice," a violation of Model Rule 8.4(d) or its predecessor, D.R. 1-102(A)(5).[14]

When the ABA rejected the approach of Opinion 92-368 and decided to adopt Model Rule 4.4(b), it placed confidential information at risk, because Model Rule 4.4(b) provides no immediate protection to confidential information in the inadvertently disclosed document. Instead, it deliberately places on the Sender the burden of taking legal action to retrieve and shield any confidential information. Model Rule 4.4(b) is inadequate, because, in a variety of circumstances, substantive law and procedural rules do not enable the Sender to safeguard confidential information.

Consider, first, inadvertent disclosure in the transactional context. Suppose two lawyers are negotiating a commercial lease. What happens if the landlord's lawyer receives an obviously inadvertent disclosure of an email between the tenant's counsel and the tenant discussing the strengths and weaknesses of the tenant's position on several key negotiating points and its negotiating strategy on those points? The email clearly would be protected by the attorney-client privilege, and disclosure to the landlord's lawyer surely would be damaging to the tenant lawyer's representation of the tenant. Under Model Rule 4.4(b), however, the sole ethical obligation of the landlord's lawyer would be to notify the tenant's counsel of the email's receipt.

But what remedy is available to the tenant once its lawyer learns about the errant email? Virtually none. Unlike inadvertent disclosure during discovery, when there is already a pending court proceeding in which the Sender can seek to prevent the Receiving Lawyer from examining, disclosing and using privileged information inadvertently disclosed, in the transactional context the Sender has no immediate access to a judge. Moreover, it is not even clear what claim for relief the tenant could assert successfully to prevent examination, disclosure and use of the privileged information.[15] Thus, Model Rule 4.4(b) does not adequately protect the principle of client confidentiality when inadvertent disclosure occurs in the transactional context.

Second, what if the inadvertent disclosure concerns confidential information that a Sending Lawyer has an ethical duty to protect, but is not protected by the attorney-client privilege or work product doctrine? For example, the facts regarding a client's criminal conviction – the crime, the date of conviction, even the legal proceedings that led to the conviction – are matters of public record that are not protected by the attorney-client or work product privilege, but, because they relate to the representation of a client, they are still confidential information that lawyers have an ethical duty to protect.[16] Suppose a lawyer and his client are discussing the client's conviction in an email that is mistakenly addressed to opposing counsel and the Receiving Lawyer satisfies her ethical duty under Model Rule 4.4(b) by notifying the Sender. What can the Sender do to prevent the Receiving Lawyer from using that confidential information or disclosing it to others? Nothing. Even if there is a judge available in a pending lawsuit, the Sender cannot seek a protective order preventing the Receiving Lawyer and her client from disclosing that confidential information to others or possibly using that confidential information to its benefit in the lawsuit because the confidential information is not protected by any evidentiary privilege. In that circumstance also, Model Rule 4.4(b) fails to protect client confidential information.

Third, even when a privileged document is inadvertently disclosed during discovery in a federal lawsuit and the judge ultimately grants the Sender's protective order, the interim protection afforded the privileged document under Rule 26(b)(5)(B) and state law analogues is, as a practical matter, limited. Even though the established protocols prohibit the Receiving Lawyer from disclosing or using the document until the claim of privilege has been resolved, the Receiving Lawyer is not prohibited from further examining the document. Thus, the protocols do not prevent the Receiving Lawyer from learning as much as possible about the privileged information contained in the inadvertently disclosed document. Once the Receiving

Lawyer has done so, that information inevitably becomes available to assist the Receiving Lawyer in the litigation, even if the judge ultimately prohibits the Receiving Lawyer from disclosing, using, or further examining the privileged document. [17] Rule 26(b)(5)(B) and its state law analogues make no effort to limit how much privileged information the Receiving Lawyer learns from the inadvertently disclosed document.

In short, Model Rule 4.4(b) is ethically challenged. That Rule itself fails to offer any protection to inadvertently disclosed confidential information, and the applicable law to which it defers may leave the Sender remediless—and, therefore, confidential information wrongly exposed to disclosure, use, or examination—when (i) the inadvertent disclosure takes place in a transactional context or otherwise outside the context of an existing lawsuit; (ii) the confidential information is not protected by the attorney-client privilege or work product doctrine; and, (iii) a motion for protective order will be, but has not yet been, granted.

## There Is No Justification For Leaving Inadvertently Disclosed Confidential Information Unprotected

Why, then, did the Ethics 2000 Commission propose, and the ABA House of Delegates adopt, Model Rule 4.4(b)? After publication of Opinion 92-368, some state bar ethics committees and legal commentators argued that ethics committees did not have the authority to determine how lawyers should respond to inadvertent disclosures without previously-adopted specific rules to guide them and that such lack of notice was unfair to respondents in disciplinary proceedings.[18]

This concern was understandable, given the increasing frequency with which inadvertent disclosure was occurring and would occur in the future, but, at least for the ABA, it was not a compelling reason to adopt a model rule specifically dealing with inadvertent disclosure. Opinion 92-368 itself recognized that "[a] satisfactory answer to the question [of inadvertent disclosure] cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules."[19] It pointed out that the Preamble to the Model Rules recognizes that "many difficult issues of professional discretion . . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[20] Indeed, the Model Rules themselves display an awareness that they "do not, however, exhaust the moral and ethical considerations that should inform a lawyer . . . . The Rules simply provide a framework for the ethical practice of law."[21]

If the substance of Opinion 92-368 were acceptable, the ABA did not need a model rule focused solely on inadvertent disclosure. That Opinion provided substantial ethical guidance to lawyers facing that issue, even if state bar associations and state courts that have the power to impose professional discipline may have needed to provide prior notice of their views to respondents in state disciplinary proceedings. Why, then, did the Ethics 2000 Commission consider Opinion 92-368 to be wrong as a matter of substance?

The Ethics 2000 Commission gave no clear answer to that question. In her description of the work of the Commission, Margaret Colgate Love, one of the Commission's members, explained that, beyond the requirement of giving notice of the receipt of an inadvertently disclosed document, "the Commission decided against trying to sort out a lawyer's possible legal obligations in connection with examining and using confidential documents that come into her possession through the inadvertence or wrongful conduct of another."[22] Perhaps, as some have suggested, the Commission could not reach a consensus about what, besides giving notice, the Receiving Lawyer should be required to do.[23]

The commentary of legal scholars and the opinions of ethics committees about inadvertent disclosure following Opinion 92-368 identify at least three possible justifications for rejecting Opinion 92-368. First, if the Receiving Lawyer owes a duty not to examine the inadvertently disclosed document once the Receiving Lawyer realizes or is notified that the disclosure was inadvertent and contains confidential information, there is a danger that the Receiving Lawyer might be professionally disciplined because of ambiguity about when the Receiving Lawyer should have realized that and stopped examining the document. [24] Second, the Receiving Lawyer needs the opportunity to examine the inadvertently produced document in order to evaluate and possibly litigate whether the document is privileged or the privilege was waived. [25] Third, the Receiving Lawyer has a duty, as a partisan advocate, to exploit the Sender's mistake and that duty takes precedence over the principle of client confidentiality.[26] Let's consider each of those possible justifications.

First, concern about whether disciplinary authorities will bring unwarranted cases against a Receiving Lawyer for examining an inadvertently disclosed document after realizing or being notified that the disclosure was inadvertent seems overblown. It is unlikely that disciplinary authorities would use their scarce resources to bring such fact-specific, questionable cases.[27] A healthier respect for the prosecutorial discretion of chief disciplinary counsel and the wisdom of the disciplinary decision makers seems warranted. Moreover, guidance to Receiving Lawyers about the particular circumstances when they need to cease examining inadvertently disclosed documents can be provided through opinions of bar association ethics committees.

Second, the question of whether a document was or still is privileged provides no reason for the Receiving Lawyer to examine it further after learning or realizing that it was disclosed inadvertently. In the transactional context, the Receiving Lawyer generally has no right to a document not intentionally provided by a counterparty. In the litigation context, the normal ways of dealing with allegedly privileged documents during formal discovery are time tested and workable. The Sending Lawyer will need to put the inadvertently disclosed document on a privileged log and describe it, the same as any other purportedly privileged document. The Receiving Lawyer should not be able to use the possibility that the document never was or is no longer privileged in order to bootstrap an opportunity to examine the contents of the document further before returning or destroying it, because the content of the document is unrelated to the determinative facts under Federal Rule of Evidence 502 and its state analogues regarding a privilege waiver.[28] Admittedly, the content of the document is related to an argument that the document was never privileged, but a privilege log's description of the inadvertently disclosed document will give as much information about the document's content as that provided with respect to any other purportedly privileged document. And, if there is some special need to examine the contents of the document to rule on whether it is privileged or not, the Sender can submit the document to the court *in camera* for review. Thus, whether the inadvertently disclosed document was or still is privileged provides no justification for examining the document (or sharing it with others or making use of it) prior to a judicial determination of its privileged status.

Third, in comparing the relative weight of the principle of client confidentiality against the duty of partisan advocacy, some commentators have pointed out that Model Rule 1.6 imposes a duty on the Receiving Lawyer to protect the confidential information of his or her client, but not the confidential information of opposing counsel's client.[29] That is true, but the principle of client confidentiality is broader than Model Rule 1.6, and that principle, through Model Rule 8.4 or otherwise, imposes on lawyers the duty to protect confidential information, even when it is the confidential information of another lawyer's client.[30]

Moreover, the priority of a broadly conceived principle of client confidentiality over the duty of zealous representation has been woven into the fabric of legal ethics. For example, lawyers who are interviewing former employees of adverse corporate parties represented by counsel are prohibited from eliciting information about privileged communications with company counsel.[31] Similarly, it is unethical for lawyers to elicit from litigation experts or knowledgeable others an opposing party's privileged communications with its counsel.[32] In each of these situations, the principle of client confidentiality has circumscribed the duty of zealous advocacy – as it should.

## A Revised Model Rule 4.4(b)

The fundamental problem with Model Rule 4.4(b) stems from its overly modest ambition. Model Rule 4.4(b) is ethically anemic. Rather than impose a demanding ethical standard on Receiving Lawyers confronting an inadvertent disclosure, Model Rule 4.4(b) deliberately imposed a *de minimis* ethical requirement – mere notification, in effect deferring to the civil justice system the resolution of the conflict between the principles of client confidentiality and competent client representation. Unfortunately, the applicable law sometimes leaves confidential information unjustifiably unprotected. If a specific ethics rule really was needed to define the Receiving Lawyer's obligations in the event of inadvertent disclosure, it needed to be robust—it needed to be more protective of confidential information than the normal processes of law. In terms of what was needed, Model Rule 4.4(b) is a failure. It should be amended.

The sidebar to this article contains a proposed revision of Model Rule 4.4(b). It sets forth the Receiving Lawyer's obligation upon receipt of what appears to be an inadvertently disclosed document containing confidential information based on the protocol in Rule 26(b)(5)(B) and its state law analogues. The purpose is, in effect, to broaden the protections provided privileged information in the discovery context to encompass protection for confidential information (as defined in Model Rule 1.6), not just privileged information, in any phase of a litigation or a transaction, and to make those protections a matter of professional responsibility, not just a legal requirement.

In one respect, however, the revised Rule does even more. Unlike Rule 26(b)(5)(B) and its state analogues, the revision requires the Receiving Lawyer to stop examining the document once the Receiving Lawyer has been notified or has reasonable cause to believe that the document may contain confidential information that has been inadvertently disclosed. That greater protection for confidential information is required because, on balance, the advantage of such protection outweighs the unlikely prospect that the Receiving Lawyer will be wrongly disciplined for examining the inadvertently disclosed document after he or she should have realized that confidential information was inadvertently disclosed.

This revised Rule assumes that a lawyer who has received an inadvertently disclosed document in a litigated matter may seek to obtain it through discovery after having complied with the revised Rule's directives. It is an underlying assumption of the revised Rule that, outside the litigation context, the Receiving Lawyer's client has no right to another client's confidential information, except by agreement or consent.

Under Rule 26(b)(5)(B) and its state law analogues, a party who possesses or controls a document containing client confidential information that is relevant to another party's discovery request and who seeks to prevent the disclosure of such information is entitled to claim the protection of an

### REVISED MODEL RULE 4.4(b)

A lawyer who receives a document in connection with the representation of a client and has reasonable cause to believe that the document may contain confidential information that may have been inadvertently disclosed,

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

evidentiary privilege for such a document on a privilege log. The revised Rule assumes that a Receiving Lawyer who has returned, sequestered or destroyed an inadvertently disclosed document, may, by challenging that claim of privilege, seek the right to obtain, examine, use, and disseminate that document. If the inadvertently disclosed document is responsive to an extant discovery request, then the document should be listed on a privilege log and the Receiving Lawyer can challenge that listing; if there is no such existing discovery request, then the Receiving Lawyer can formulate one to make the inadvertently disclosed document responsive to it. Coupled with the revised Rule, the standard procedures of a discovery request and a privilege log protect the confidentiality of the client information contained in the inadvertently disclosed document as much as possible until a court decides that the document is not privileged or that the privilege has been waived by the inadvertent disclosure or otherwise.



## Endnotes

1. Paragraph 2 of the Preamble to the Model Rules describes the partisan nature of client representation: "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."

2. Model Rules of Prof'l Conduct Preamble, paras. 1, 5.

3. The ABA Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000 Commission") proposed an initial version of Rule 4.4(b) at the August 2001 ABA Annual Meeting. *See* A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, 555-56 (2006). That version was modified for, debated, and adopted as modified at the February 2002 ABA Meeting. *Id.* at 555-57.

4. *See* Rule 4.4(b), Cmt [2].

5. ABA Formal Op. 92-368 (Nov. 10, 1992), withdrawn in ABA Formal Op. 05-437 (Oct. 1, 2005) based upon the adoption of Model Rule 4.4(b).

6. According to the ABA Standing Committee on Ethics and Professional Responsibility, Model Rule 4.4(b) "not only directly addressed the precise issue discussed in Formal Opinion 92-368, but narrowed the obligations of the receiving lawyer." ABA Formal Op. 05-437 (Oct. 1, 2005).

7. *See e.g.*, Ala. R.Civ.P. 26(b)(6)(B); Ariz.R.Civ.P. 26(f)(2); Ark.R.Civ.P. 26(b)(5); Cal.C.Civ.P. § 2031.285; Idaho R. Civ. P. 26(b)(5)(B); Ind. R. Tr. P. 26(B)(5)(b); Iowa R.Civ. P. 1.503(5); K.S.A. 60-226(b)(7)(B); M.R.Civ.P. 26(b)(5)(B); Md. R. P. 2-402(e)(2); Mich. Ct. R. 2.302(B)(7); Minn. R. Civ. P. 26.02(f); Mont. R. Civ. P. 26(b)(7)(B); N.J. Rule 4:10-2(e)(2); N.M. R. Civ. P. 1-026(B)(7)(b); N.D. Sup. Ct. R. 26(b)(5)(B); Ohio R. Civ. P. 26(B)(6)(b); Tenn. R. Civ. P. 26.02(5); Tex. R. Civ. P. 193.3(d); Utah R. Civ. P. 26(b)(6)(B); Vt. R. Civ. P. 26(b)(5)(B); Va. R. S. Ct. 4:1(b)(6)(ii); Wash. Ct. R. 26(b)(6); Wyo. R. Civ. P. 26(b)(5)(B).

8. *See* Model Rule 4.4(b), Comment 2 ("Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, . . . . ").

9. *See* ABA Formal Op. 06-442 n.8 (August 5, 2006) (Comment 2 to Rule 4.4 "indicates that the notification requirement exists 'in order to permit [the sender] to take protective measures'").

10. *See* Model Rules of Prof'l Conduct R. 1.6 cmt [3].

11. Upjohn Co. v. United States*,* 449 U.S. 383, 389 (1981) (discussing the purposes of the attorney-client privilege).

12. David M. Greenwald, Edward F. Malone & Robert R. Stauffer, Testimonial Privileges 1-6 (3d ed. 2005).

13. *See* N.C. Op. 2009-01 (2010) (search for confidential information embedded in metadata within document received from another "would interfere with the client-lawyer relationship of another lawyer in violation of Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice.""); N.H. Op. 2008-2009/4 ("In the Committee's view, there is a shared responsibility on both sides to protect the attorney-client privilege through imposition of a receiving lawyer's obligation to refrain from reviewing confidential information that can be nothing other than 'inadvertently sent'."); N.Y. City Op. 2003-04 ("[R]eading beyond the point where the lawyer knows or reasonably should know that the communication is an inadvertent disclosure of confidences or secrets undermines the duty incumbent on all attorneys pursuant to DR 1-102(A)(5) to respect the foundations on which our legal system is based."); N.Y. County Op. 730 (2002) ("[T]he Disciplinary Rule prohibiting lawyers from knowingly revealing the confidences and secrets of their own clients does incomplete justice to the fundamental principle that client confidences and secrets be preserved. . . . [A]ll lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved – the most basic tenet of the attorney-client relationship – is respected when privileged information belong to a client is inadvertently disclosed"); Me. Op. 172 (2000) ("as a matter of common law, the obligation to preserve the lawyer-client privilege is indeed an affirmative obligation shared by adversaries").

14. *See, e.g.,* N.C. Op. 2009-01; N.Y. County Op. 738 (2008); Me. Op. 196 (2008); N.Y. City Op. 2003-04. *But see* ABA Formal Op. 06-442 n.10 (August 5, 2006).

15. *Cf., e.g.*, United States v. Town of Moreau, New York, 979 F. Supp. 129, 137 (N.D.N.Y. 1997) (court refuses to enjoin Receiving Lawyer's disclosure and use of a confidential document inadvertently disclosed during a settlement conference to resolve a lawsuit because "neither party has demonstrated how this [disclosure] constitutes a justiciable controversy . . . . The mere fact that a party has erroneously disclosed a document [during the settlement process] which that party would rather keep confidential does not automatically bring the recipient within the Court's jurisdiction."), *aff'd*, 160 F.3d 853 (2d Cir. 1998).

16. *See, e.g.,* State *ex rel.* Oklahoma Bar Ass'n v. Chappell, 93 P.3d 25 (Okla. 2004) (Rule 1.6 violated by disclosing felony charges against client). *See also* Nassau Co. Bar Op. 96-7 (1996) (criminal conviction remains a secret unless public knowledge is widespread).

17. *See* Ill. State Bar Ass'n Adv. Op. 98-04, 1999 WL 35561, at *3 (Jan. 1999) ("once confidential information has been read, the information cannot be purged from the memory of the receiving lawyer"); Aerojet-General Corp. v. Transport Indemnity Ins.*,* 18 Cal. App. 4th 996, 1006 (Cal. App. 1st Dist. 1993) ("Once [the receiving lawyer] had acquired the information . . . , he cannot purge it from his mind").

18. *See e.g.,* Me. Op. 146 (1994) ("this Commission is not free to add ethical limitations not expressed by the Bar Rules"), withdrawn by Me. Op. 172 (2000); Monroe Freedman, *The Errant Fax*, Legal Times, Jan.

 

23, 1995. *See generally* Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, 556 (2006) ("That opinion [*i.e.*, Opinion 92-368] has been criticized, in part because there is no provision of the Model Rules directly on point.").

19. ABA Formal Op. 92-368.

20. *Id.*, *quoting* Model Rules of Prof'l Conduct, Preamble, para. 9.

21. Model Rules of Prof'l Conduct Scope, para. 16.

22. Margaret Colgate Love*, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 Geo. J. Legal Ethics 441, 469 (2002).

23. *See e.g.,* James M. Fischer, *How Should Lawyers Handle The Unintended Disclosure of Possibly Privileged Information*, Southwestern Law School Working Paper No. 1017, 8 n.15 (2010).

24. *See, e.g.,* N.H. Bar Ass'n Ethics Comm., *Inadvertent Disclosure of Confidential Materials*, Practical Ethics Article, June 23, 1994; ABA Formal Op. 94–382 (July 5, 1994), withdrawn by ABA Formal Op. 06–440 (May 13, 2006).

25. *See, e.g.,* Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Perlman*, 14 Geo. Mason L. Rev. 179, 181, 183 (2006).

26. *See id.* at 180-81.

27. In the roughly 20 years since Opinion 92-368 was promulgated, professional discipline has rarely been meted out against a Receiving Lawyer. The only reported federal case imposing a disciplinary sanction concerned an unambiguous situation: it was undisputed that the Receiving Lawyer was specifically notified by the Sender about the inadvertent disclosure *before* opening up a federal express envelope containing the inadvertently disclosed confidential information, and he deliberately disregarded the Sender's prior request not to examine the document. American Express v. Accu-Weather, Inc., No. 91 CIV 6485 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996). Since Model Rule 4.4(b) was adopted, nine jurisdictions – Colorado, District of Columbia, Kentucky, Louisiana, Maine, Maryland, New Hampshire, New Jersey and Tennessee – have adopted versions of that Rule that require a Receiving Lawyer to stop reading an inadvertently disclosed document once he or she realizes that it contains confidential information. There is only one reported case under those more stringent Model Rule 4.4(b) analogues in which discipline has been sought, and in that case discipline was not imposed because the inadvertently disclosed document did not on its face appear to be privileged or confidential. *In re* Richard E. Lee, 06–DB–22 (La. Att'y Disciplinary Bd. Apr. 2, 2007).

28. Fed. R. Evid. 502 provides that inadvertent disclosure does not automatically constitute a privilege waiver. As to whether a waiver occurred, Rule 502(b) focuses the court's attention on whether the disclosure was inadvertent, whether the Sender took reasonable precautions to prevent inadvertent disclosure, and whether the Sender promptly took reasonable steps to rectify the disclosure.

29. *See, e.g.*, Monroe Freedman, *supra* note 25 at 181.

30. *See supra* notes 13 & 14.

31. *See, e.g.,* ABA Formal Op. 91-359 (March 22, 1991).

32. *See, e.g.*, MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712 (D.Conn. 1991); American Prot. Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., No. CV-LV-82-26-HDM, CV-LV-82-96-HDM, 1986 WL 57464 (D. Nev. Mar. 11, 1986).

## Disciplinary Authority and Choice of Law in Online Advertising: Disclaimers or Double Deontology

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"advertisement will appear, electronically, both inside and outside of the state," and when the advertising "firm either has an office in Arizona or attorneys admitted to practice in Arizona," the Arizona ethical rules must be followed). Interestingly, although the Ethics 20/20 Commission's charge was "to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments," more than two years have elapsed without any tentative recommendations directly addressing the issues discussed in this Essay. *See* ABA Ethics 20/20 Comm'n, http://www.americanbar.org/groups/professional_responsibility/aba_ commission_on_ethics_20_20.html (last visited July 31, 2011). To be fair, the Commission has indeed covered a number of tough issues, and its work, including possible amendments to Rule 5.5 and 8.5, is ongoing at the time of this writing. The Commission also published a partially pertinent issue paper. *See* ABA Ethics 20/20 Comm'n Working Group on Uniformity, Choice of Law, and Conflicts of Interest, Issue Paper: Choice of Law in Cross-Border Practice (Jan. 18, 2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/20111801.authcheckdam.pdf.

47. *See generally* Model Rules of Prof'l Conduct R. 7.1 cmt. 3; American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 706 (2006) (noting widespread use of disclaimers in legal advertising). Moreover, the Supreme Court generally approves of disclaimers—essentially providing more facts rather than less—in its First Amendment commercial speech jurisprudence. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (quoting in part *In re* R.M.J., 455 U.S. 191, 201 (1982)) ("[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception.'"). *But see* Public Citizen Inc. v. Louisiana Att'y Disciplinary Bd., 632 F.3d 212, 229 (5th Cir. 2011) (striking down long disclosure requirements because they "effectively rule out the ability of Louisiana lawyers to employ short advertisements of any kind," and therefore, "they are overly burdensome and violate the First Amendment"). The court's reasoning might apply to Internet banner ads or Twitter (which permits only 140 characters), among other media. Thus, attorneys should keep this argument close when using media that cannot accommodate some or all of the suggested disclaimers above.

48. Model Rules of Prof'l Conduct R. 7.5(b) ("A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.").