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## To Peek or Not to Peek: Inadvertant or Unsolicited Disclosure of Documents to Opposing Counsel

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Kristopek: To Peek or Not to Peek: Inadvertant or Unsolicited Disclosure of  
**TO PEEK OR NOT TO PEEK: INADVERTENT  
OR UNSOLICITED DISCLOSURE OF  
DOCUMENTS TO OPPOSING COUNSEL**

*Last night your watchdog barked all night,  
So once you rose and lit the light.  
It wasn't someone at your locks.  
No, in your rural letter box  
I leave this note without a stamp...  
And it is partly to compel  
Myself, in forma pauperis,  
To say as much I write you this.<sup>1</sup>*

## I. INTRODUCTION

Attorney Anne Brown<sup>2</sup> is working on a complex products liability case involving billions of dollars in damages. Her secretary just notified her that a private investigator is in her office. From the city dump, the investigator recovered 100 trash bags containing documents from opposing counsel's office building. After going through the bags, the private investigator found two documents that seem protected by the attorney-client privilege. He hands them to Anne. Anne recognizes the documents as ones that she asked for during discovery, but did not receive. What should she do?<sup>3</sup> What are her ethical duties?

Michael Alband is an attorney working on a toxic tort case that he knows that his client probably will not win. The overnight delivery service person asks him to sign for an envelope. Michael realizes that the envelope is for opposing counsel who has the same first name as his and works in the same downtown office building. Did opposing counsel's client mistakenly send this to him? What should he do?<sup>4</sup> What are his ethical duties?

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<sup>1</sup> Robert Frost, *An Unstamped Letter in our Rural Letter Box*, in *THE POETRY OF ROBERT FROST* 380, 381 (1969).

<sup>2</sup> The two situations presented in the Introduction are hypothetical and created by the author of this Note.

<sup>3</sup> For an explanation of Anne's professional responsibilities, see *infra* part IV.

<sup>4</sup> For an explanation of Michael's professional responsibilities, see *infra* part IV. Some ethics scholars believe that women's ethical behavior is different from men's ethical behavior because feminist ethics are based on an ethics of care focusing on preserving relationships, whereas men's behavior may be more focused on rational, abstract principles. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & LAW 75 (1994).

With the arrival of new technology such as fax machines and increasingly complex litigation, inadvertent and unsolicited disclosures of confidential or privileged documents present emerging legal issues that bar associations and courts struggle to address.<sup>5</sup> This Note argues that a new Model Rule of Professional Conduct is necessary for defining an inadvertent disclosure and unsolicited disclosure and for delineating an attorney's professional responsibilities.<sup>6</sup>

The American Bar Association (ABA) has not written a Model Rule of Professional Conduct explicitly stating what an attorney's responsibilities are when he or she receives inadvertently disclosed or unsolicited confidential or privileged documents.<sup>7</sup> Currently, the attorney who receives such documents must analyze his or her duties and obligations by examining statutes, case law and ethics opinions within his or her jurisdiction.<sup>8</sup> Despite his or her search to find an answer, the attorney may find that within his or her jurisdiction, statutes, case law, and ethics opinions conflict with each other as well as with ABA Formal Opinions.<sup>9</sup> Currently, eleven of the seventeen state and

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<sup>5</sup> See Abdon M. Pallasch, *Fax Cover Sheets Carry Dire Warnings for Law and Lasagna*, CHI. LAWYER, Feb. 1995, at 14 (stating that inadvertent disclosures are becoming more common because even if an attorney has not inadvertently faxed privileged material to opposing counsel, there is a good chance that the attorney knows someone else who has done so). An example of wording on a fax cover sheet is that the information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Furthermore, any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. The cover sheet may then direct the person receiving the fax to contact the sender.

<sup>6</sup> The ABA Commission on Ethics and Professional Responsibility distinguished an inadvertent disclosure of confidential materials from an unsolicited receipt of privileged or confidential materials in that inadvertently disclosed materials appear on their face subject to the attorney-client privilege, and the sending attorney did not intend to disclose the materials. In an unsolicited disclosure of privileged or confidential materials, the sending person intended the receiving attorney to receive the materials and make use of the materials. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). See also Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598, 604 (1983) (explaining that "[i]nadvertent disclosure [during] a document production is the accidental production of a document otherwise subject to the attorney-client privilege, whereby the adversary acquires knowledge of its contents.")

<sup>7</sup> See *supra* note 6 and accompanying text.

<sup>8</sup> See *supra* note 6 and accompanying text.

<sup>9</sup> Compare Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Inquiry 94-15 (1994) (deciding that where a corporate attorney had received a confidential document inadvertently produced, the receiving attorney only had to disclose receipt of the document to his or her client and no one else) with Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 95-59 (1995) (stating that the

regional bar associations issuing one or more opinions do not follow the ABA position.<sup>10</sup> States not following the ABA Formal Opinions take a very formalistic rule-based approach.<sup>11</sup> In contrast, the states that do follow the ABA Formal Opinions place more emphasis on ethical considerations, even though the rules of professional conduct may not

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attorney-client privilege was not waived where a fax was inadvertently transmitted to opposing counsel).

<sup>10</sup> State and regional bar associations that do not follow the ABA Formal Opinions on inadvertent and unsolicited disclosure of documents are Alaska, Arizona, District of Columbia, Maine, Massachusetts, Maryland, Michigan, North Dakota, Ohio, Philadelphia, and Virginia. See Alaska Bar Ass'n Ethics Comm., Op. 97-1 (1997) (stating that the Alaska Committee distinguished its opinion from the ABA Formal Opinion on unsolicited disclosure because in the Alaska situation, the Alaska Committee decided that the person disclosing the document had unquestionable authority to make the disclosure); Comm. on Rules of Professional Conduct of the State Bar of Arizona, Op. 93-14 (1993) (opining that the Arizona Committee distinguished its opinion from the ABA Formal Opinion on inadvertent disclosure because a tape recording was left behind by the opposing spouse and this was different from a situation where an attorney had inadvertently disclosed privileged or confidential information). However, the dissent in the Arizona opinion stated that it was unclear from the facts presented to the Arizona Committee whether it was an act of the client or lawyer that the tape was left behind. *Id.* See District of Columbia Bar Legal Ethics Comm., Ethics Op. 256 (1995) (stating that under District of Columbia case law, any inadvertent disclosure of confidential documents constitutes a waiver of the attorney-client privilege). See also *infra* notes 138-51 and accompanying text. See Maine Professional Ethics Comm'n, Advisory Op. 146 (1994) (stating that the rules of evidence and procedure permitted a receiving attorney to use an inadvertently disclosed document). See also *infra* notes 152-67 and accompanying text. See Maryland State Bar Ass'n, Ethics Op. 89-53 (1989) (citing no case law in the opinion and was written before the ABA Formal Opinion on inadvertent disclosure); Massachusetts Bar Ass'n Ethics Comm. Ethics Op. 94-6 (1994) (citing countervailing principles for not following the ABA Formal Opinion on inadvertent disclosure). See also, *infra* notes 81-101 and accompanying text. See State Bar Ass'n of North Dakota Ethics Comm., Op. 95-14 (1995) (stating that even though the documents disclosed contained a confidentiality clause, the documents did not disclose confidential attorney-client information); Supreme Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 93-11 (1993) (deciding that if a lawyer obtains a copy of an inadvertently disclosed memorandum during a public records search, there is no ethical duty not to read the memo). The Ohio Commission stated it was not persuaded by the ABA Formal Opinion on inadvertent disclosures because the ABA's opinion did not address an inadvertent disclosure in the context of a public records search. *Id.* See Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Inquiry 94-3 (1994) (deciding that where an attorney received a misdirected fax containing a report prepared in anticipation of litigation describing opposing counsel's assessment of liability that the receiving attorney did not have to return the fax); Standing Comm. on Legal Ethics of the Virginia State Bar, Op. 1076 (1988) (relying on the Virginia Code of Professional Responsibility instead of the ABA Formal Opinion on inadvertent disclosures).

<sup>11</sup> See *infra* notes 152-67 and accompanying text.

explicitly address such concerns.<sup>12</sup> Considerably adding to the confusion is that some bar association and court opinions fail to distinguish an unsolicited disclosure of documents from an inadvertent disclosure of documents.<sup>13</sup> This Note proposes a Model Rule with commentary that provides a single framework to determine this type of disclosure and to specifically delineate professional responsibilities of the sending and receiving attorneys.<sup>14</sup> The effect of this Model Rule is to provide attorneys with clear guidelines. Clear guidelines will establish whether the materials are protected under the attorney-client privilege or, in certain situations, such as someone acting under a whistleblower statute, whether the documents may be used by the receiving attorney.<sup>15</sup> Clear guidelines will also decrease litigation in this area of the law, thereby preserving judicial resources.<sup>16</sup> The procedures presented in the Model Rule will address both the sending attorney's professional responsibilities and the receiving attorney's responsibilities.<sup>17</sup> This Note urges that all states adopt this Model Rule and Comment. Adoption of a single Model Rule will reduce forum shopping where a conflict of laws analysis applies.<sup>18</sup> Section II discusses the history and development of the Model Rules.<sup>19</sup> This Section also discusses the ABA Committee on Ethics and Professional Responsibility Formal Opinions on inadvertent

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<sup>12</sup> States generally following the ABA Formal Opinions on inadvertent and unsolicited disclosure are Florida, Kentucky, Montana, North Carolina, and Pennsylvania. See *infra* note 63 and accompanying text.

<sup>13</sup> See *infra* part III.B.

<sup>14</sup> See *infra* part IV.

<sup>15</sup> *Id.*

<sup>16</sup> See Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (discussing that increasing litigation has caused great cost to the nation). "America has suffered a hypertrophy of its legal institutions." *Id.* at 4.

<sup>17</sup> See *infra* part IV.

<sup>18</sup> See, e.g., ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT 11:12 (1995) (stating that "[n]o area of local rulemaking has been more fragmented than local rules governing attorney conduct"). The local ethical standards of the state where the district is located are usually adopted. *Id.* Additionally, the fragmentation of the local rules affect major federal agencies, including the Department of Justice, civil rights groups, and large law firms involved in multidistrict litigation. *Id.* Furthermore, legal malpractice suits have "led to subsidiary disputes about choice of law—often of mind numbing complexity." *Id.*

<sup>19</sup> See *infra* part II.A. This Note will not address situations where the receiving lawyer is involved in soliciting or procuring privileged or confidential materials from former employees of an adverse party. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991) (prohibiting a lawyer from seeking privileged information from former employees of an adverse party during *ex parte* interviews); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1998) (prohibiting a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation...[and engaging] in conduct that is prejudicial to the administration of justice.").

and unsolicited disclosure of privileged or confidential documents.<sup>20</sup> In addition, Section II also contains discussions of the attorney-client privilege.<sup>21</sup> Section III of this Note analyzes policy considerations of inadvertent and unsolicited disclosures.<sup>22</sup> Also analyzed are the state bar associations and the court opinions that failed to distinguish between an inadvertent disclosure and an unsolicited disclosure of privileged or confidential documents.<sup>23</sup> An additional factor analyzed is the different procedures promulgated by bar associations.<sup>24</sup> Also presented is an analysis of the different remedies fashioned by courts.<sup>25</sup> This Section highlights the need for a single Model Rule addressing inadvertent and unsolicited disclosure of privileged or confidential documents and procedures attorneys should follow.<sup>26</sup> Section IV proposes a Model Rule of Professional Conduct with commentary that provides a single framework addressing inadvertent and unsolicited disclosures of privileged or confidential documents.<sup>27</sup>

## II. HISTORY AND BACKGROUND OF MODEL RULES AND ETHICS OPINIONS

Before examining state and regional bar association and court opinions concerning inadvertent disclosure or unsolicited disclosure of documents, one must begin by briefly examining legal ethics. The first section traces the history of legal ethics in the context of the development of the ABA Model Rules of Professional Conduct. The second section presents two recent ABA Formal Opinions, one on inadvertent disclosure and the other on the unsolicited disclosure of privileged and confidential documents. The last section discusses the attorney-client privilege, including how courts examine the privilege in light of an inadvertent disclosure.

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<sup>20</sup> See *infra* part II.B.

<sup>21</sup> See *infra* part II.C.

<sup>22</sup> See *infra* part III.A.

<sup>23</sup> See *infra* part III.B.

<sup>24</sup> See *infra* part III.C.

<sup>25</sup> See *infra* part III.C.

<sup>26</sup> Additionally, the importance and need for a new Model Rule was highlighted by a recent ABA survey at the 1997 annual meeting where thirty-nine percent of lawyers said they had received a misdirected document and of this thirty-nine percent, less than seventy-five percent had returned the document to opposing counsel even though this is contrary to ABA Formal Opinion procedures. ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 13:15 (1997).

<sup>27</sup> See *infra* part IV.

A. *History and Development of the Model Rules of Professional Conduct*

The legal profession is unique from most other professions because it is defined by ethical considerations within a framework of what is legal.<sup>28</sup> Historically, in 1897, as part of a movement to establish standards of character, education, and training for lawyers, the Alabama Bar Association developed the first Code of Professional Ethics.<sup>29</sup> Eleven years later, in 1908, the ABA adopted its first ethical code, entitled the Canons of Professional Ethics.<sup>30</sup> In 1969, the ABA replaced these early Canons with the Model Code of Professional Responsibility.<sup>31</sup> Subsequently, almost every state adopted the Model Code of Professional Responsibility in one form or another.<sup>32</sup> Then in 1983, the

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<sup>28</sup> See DAVID E. SCHRADER, *ETHICS AND THE PRACTICE OF LAW* iv (1988). Professor Schrader contends that as compared to other professions "the purpose of the legal profession is bound up from the beginning with questions of social morality." *Id.* Furthermore, Professor Schrader states that ethical constraints on an attorney's behavior are determined by the roles that the attorney plays in the system. *Id.* See also Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987). However, Professor Shaffer explains that legal ethics is different from ethics because legal ethics is thinking about the morals of someone else over whom the attorney has power, whereas ethics is thinking about morals. *Id.* See also Don J. Young & Louise L. Hill, *Professionalism: The Necessity for Internal Control*, 61 TEMP. L. REV. 205, 207 (1988). Judge Young and Professor Hill discuss the philosophy that the pursuit of victory at all costs should never be entertained by the legal profession. *Id.* at 205. Also, the authors state that lawyers cannot strive only for their clients' victories because the end never justifies the means. *Id.*

<sup>29</sup> See CODE OF ETHICS, ALABAMA STATE BAR ASSOCIATION (1899), reprinted in HENRY S. DRINKER, *LEGAL ETHICS* 353 (1953) (stating "[t]he purity and efficiency of judicial administration, which, under our system, is largely government itself, depend as much upon the character, conduct, and demeanor of attorneys in this great trust, as upon the fidelity and learning of courts or the honesty and intelligence of juries").

<sup>30</sup> See MODEL RULES OF PROFESSIONAL CONDUCT, vii (1997) (stating that the Canons were largely based on the previous Alabama Bar Association's Code of Professional Ethics).

<sup>31</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1980). The Code consists of Canons, Ethical Considerations, and Disciplinary Rules. *Id.* The Canons are statements of norms expressed in general terms stating the standards of professional conduct expected of lawyers in their relationships with "the public, with the legal system, and with the legal profession." *Id.* The Ethical Considerations are aspirational objectives. *Id.* The Disciplinary Rules are mandatory. *Id.* See also Ronald D. Rotunda, *The Lawyer's Ethical Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 980 (stating that the ABA Code of Professional Responsibility was written in more statutory terms than the Canons). The ABA did not consider the Model Code as binding on its members after the Department of Justice brought antitrust charges against the ABA. *Id.* at 980-81. Furthermore, "the ABA withdrew the Model Code in 1983 and it is no longer official ABA policy." Letter from Peter Geraghty, Director, ETHICSearch, American Bar Association, to Gloria Kristopek, author (January 9, 1998) (on file with author).

<sup>32</sup> See MORTIMER D. SCHWARTZ ET AL., *PROBLEMS IN LEGAL ETHICS* 40 (1997) (stating that the ABA promulgated the Model Code as a model for states to adopt). *But see* Walter P.

ABA once again updated lawyers' ethical duties by enacting the Model Rules of Professional Conduct as developed by the Kutak Commission.<sup>33</sup> State and federal courts look to the ABA Model Code and Model Rules to provide guidelines for regulating the conduct of lawyers.<sup>34</sup> The ethical standards imposed upon attorneys in a federal court are a matter of federal law.<sup>35</sup> Federal courts rely on the Model Rules to provide an appropriate standard of ethical conduct for attorneys.<sup>36</sup> But, in state courts, the binding disciplinary rules are those adopted by the state supreme courts and are usually based on either the ABA Model Code or the ABA Model Rules.<sup>37</sup> Before examining some state ethical standards and opinions, some background on the ABA Formal Opinions is provided.

Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1069 (1978) (explaining that President Powell of the ABA indicated that the Model Code was inadequate because the areas of availability of legal services, trial publicity, and representation of unpopular causes were not addressed).

<sup>33</sup> See JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES* 3 (1997). "The model rules follow a UCC or restatement-like approach by placing the rule of professional responsibility in text and including elaborative material in the comments." *Id.* See also STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* xxii (1997) (stating that the Kutak Commission was named after Robert J. Kutak, who chaired the commission charged with preparing the Model Rules). Additionally, "the ABA Model Rules are advisory only. The ethics rules, laws and court decisions of the individual jurisdiction are controlling." Letter from Peter Geraghty, Director, ETHICSearch, American Bar Association, to Gloria Kristopek, author (January 9, 1998) (on file with author).

<sup>34</sup> See *Figueroa-Olmo v. Westinghouse Elec. Corp.*, 616 F. Supp. 1445, 1450 (D.P.R. 1985) (adopting ABA Model Rules of Professional Conduct); *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (invoking Model Rules of Professional Conduct, Rule 1.2, Rule 3.3 and Comment to Rule 3.3).

<sup>35</sup> See *In re Snyder*, 472 U.S. 634, 643-45 (1985) (stating that courts have long recognized an inherent authority to suspend or disbar lawyers and their power is derived from the lawyer's role as an officer of the court). See also *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (stating that an attorney appearing in federal court is acting as an officer of the court and it is that court that must judge his conduct).

<sup>36</sup> States and territories that have adopted a version of the Model Rules are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virgin Islands, Washington, West Virginia, Wisconsin, and Wyoming. ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 01:3 (1997).

<sup>37</sup> Telephone interview with Peter Geraghty, Director, ETHICSearch, American Bar Association, (March 11, 1998).



B. *ABA Formal Opinions on the Inadvertent and Unsolicited Disclosure of Documents*

The ABA Committee on Ethics and Professional Responsibility relies on Model Rules when providing nonbinding Formal Opinions.<sup>38</sup> In drafting the Formal Opinions concerning the inadvertent or unsolicited disclosure of privileged or confidential materials, the ABA Committee on Ethics and Professional Responsibility relied on Model Rule 1.6.<sup>39</sup> In the

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<sup>38</sup> See ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 37 (2d ed. 1991). The American Bar Association and state and regional bar associations have committees that render opinions on questions of legal ethics. *Id.* When new, significant, or recurring questions are posed, the committee may render a formal opinion. *Id.* at 38. See also MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 41 (1997) (stating that some ethics opinions are published and some are not). Also, the ABA and state and local bar associations provide telephone advice concerning ethical questions. *Id.*

<sup>39</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998). The text of Model Rule 1.6 is:

Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

*Id.*

See also CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 48 (1987) (explaining that much of the debate concerning Model Rule 1.6 focused on the conflicting interests of the lawyer, client, and the public); RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 113-177A (Proposed Final Draft No. 1, 1996) (permitting an attorney to reveal a client's confidential information where it will advance the client's interests, and if needed, to prevent death or serious bodily injury whether caused by a crime or other events and whether caused by the client or someone else); CODE OF ETHICS, ALABAMA STATE BAR ASSOCIATION (1899), reprinted in HENRY S. DRINKER, LEGAL ETHICS 352 (1953) (stating that one of the duties of attorneys is to "maintain inviolate the confidence, and, at every peril to themselves, to preserve the secrets of their clients"). See also James Podgers, *Model Rules Get the Once-over*, 83 A.B.A. J. 90 (1997) (discussing the Ethics 2000 Project which will review and study the current Model Rules). Chief Justice E. Norman Veasey of the Delaware Supreme Court has placed Model Rule 1.6 near the top of the list for the commission to review. *Id.*

Formal Opinion on the inadvertent disclosure of confidential materials, the ABA Committee examined the circumstances where it was clear that the materials were not intended for the receiving lawyer.<sup>40</sup> Generally, the ABA Committee has decided that when documents are inadvertently disclosed and the receiving attorney knows that the documents are privileged or confidential, the attorney should not review the disclosed materials or review them only to the extent required to determine how to proceed.<sup>41</sup> Also, the receiving attorney should notify opposing counsel of receipt of materials and follow opposing counsel's instructions.<sup>42</sup>

The ABA Committee stated that the procedure it has promulgated fosters the principle of confidentiality and avoids punishing the sending attorney's client who is innocent.<sup>43</sup> The ABA Committee distinguished its Formal Opinion on inadvertent disclosure of privileged or confidential materials from its Formal Opinion on unsolicited disclosure of privileged or confidential materials by stating that in the former, the sending party did not intend to transmit the privileged or confidential materials to the receiving lawyer.<sup>44</sup> In the situation of an unsolicited disclosure, the ABA Committee assumed that the unauthorized sender intended the receiving lawyer to receive and make use of the materials.<sup>45</sup>

Furthermore, in the unsolicited disclosure situation, the ABA Committee developed slightly different procedures because the person disclosing the documents is trying to rectify unjust or improper conduct, such as the failure to disclose the documents called for in a production

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<sup>40</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992). The ABA Committee discussed one situation where the sending lawyer had notified the receiving lawyer of the inadvertent transmission and had requested return of the materials sent. *Id.* In another situation, the ABA Committee discussed a fact pattern where the sending lawyer and his client did not know that the materials were missent. *Id.*

<sup>41</sup> *Id.* The ABA Committee also stated that the Model Rules require a positive view toward the importance of maintaining confidentiality. *Id.*

<sup>42</sup> *Id.* The ABA Committee also stated that its decision was not based on "a narrow, literalistic reading of the black letter of the Model Rules," but that in making its decision, it looked at the precepts underlying the Model Rules. *Id.* See also CODE OF ETHICS, ALABAMA STATE BAR ASSOCIATION (1899), reprinted in HENRY S. DRINKER, LEGAL ETHICS 353 (1953) (stating that no one rule will determine a lawyer's duty in every case).

<sup>43</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

<sup>44</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). In its opinion, the ABA Committee referenced state ethics opinions not following the ABA view. *Id.* These were the Maryland Bar Association, the Virginia Bar Association, and the Michigan Bar Association. See *supra* note 10 and accompanying text.

<sup>45</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

request.<sup>46</sup> In contrast to the inadvertent disclosure Formal Opinion, the Committee determined that in the unsolicited disclosure situation, the attorney may be able to use the documents even though the sender has no authority to disclose the documents.<sup>47</sup> The ABA Committee determined that an example of a legitimate claim where a lawyer may use such documents is where documents were received from someone acting under a whistleblower statute.<sup>48</sup> The inadvertent disclosure of privileged or confidential documents and whether the attorney-client privilege is waived is presented in the next section.

C. *Court Decisions Considering Waiver of Attorney-Client Privilege and Inadvertent Disclosures*

Before examining whether the attorney-client privilege has been waived in an inadvertent disclosure, the attorney-client privilege in general must be discussed. Privileges protect the privacy of certain relationships and encourage the free flow of information.<sup>49</sup> The policy consideration behind the attorney-client privilege is that without a privilege, clients may withhold information attorneys need to effectively represent his or her client.<sup>50</sup> The attorney-client privilege is an evidentiary rule protecting confidential communication between an

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<sup>46</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). However, the Committee said that a lawyer receiving such materials may not make unlimited use of the materials and may have some responsibilities when receiving such materials. *Id.*

<sup>47</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). *But see* *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) (prohibiting the receiving adverse party from using confidential documents belonging to an employer that were unauthorized to be disclosed by a current employee).

<sup>48</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). *See* Whistleblower Protection Act, 5 U.S.C. § 1201 (1988) (stating that the purpose of the Act "is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by...mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices.")

<sup>49</sup> *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.1 (1995). Also, in important professional relationships, privileges are justified to protect privacy, freedom, honor, and trust. *Id.*

*See also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 437 (1996) (stating that privileged communications are protected because society has deemed the principle or relationship worthy of preserving and fostering.)

<sup>50</sup> *See* *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the purpose of the attorney-client privilege is to encourage full and frank communication between lawyers and their clients). The Court further stated that recognition of the privilege must be done on a case-by-case basis. *Id.* *See also* MUELLER & KIRKPATRICK, *supra* note 49, at § 5.1 (stating that critics have said that the attorney-client privilege interferes with the fact-finding process).

attorney and client.<sup>51</sup> In contrast, the duty of confidentiality is an ethical duty enforced independently of the law of evidentiary privilege.<sup>52</sup> That is, the attorney-client privilege comes into place in the litigation context where the client seeks to exclude documents or testimony on the basis that it is privileged.<sup>53</sup> Confidentiality applies to all situations, such as a lawyer discussing a case with his family or friends. This type of violation can expose the lawyer to professional discipline such as disbarment.<sup>54</sup>

Courts are split as to whether the attorney-client privilege is waived by an inadvertent disclosure of privileged or confidential documents.

<sup>51</sup> See MUELLER & KIRKPATRICK, *supra* note 49, at § 5.1 (stating that privileges are unique in evidence law because they impede the search for truth by excluding evidence that may be highly probative.) There is wide variation from jurisdiction to jurisdiction concerning the scope of privileges. *Id.* See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1983) ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."); CODE OF ETHICS, ALABAMA STATE BAR ASSOCIATION (1899), reprinted in HENRY S. DRINKER, LEGAL ETHICS 356 (1953) (stating that the confidence and communications between a lawyer and attorney are "the property and secrets of the client, and can not be divulged, except at his instance").

<sup>52</sup> See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt 5 (1983) (stating that the principle of confidentiality is found in two bodies of law). The first is the attorney-client privilege in the law of evidence which applies to judicial or other proceedings where an attorney may be called as a witness or the attorney may be required to produce evidence concerning a client. *Id.* The second is that the confidentiality rule applies to matters communicated in confidence by the client and all information relating to the representation. *Id.* An attorney may not disclose confidential information except as required or authorized by law or the Rules of Professional Conduct. *Id.*

<sup>53</sup> See David S. Smallman, *The Purloined Communications Exception to Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 TORTS & INS. L.J. 715, 720 (1997).

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his [or her] subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*Id.*

<sup>54</sup> See MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 42 (1997) (discussing that discipline is a punishment or penalty imposed by a disciplinary agency on an attorney who has breached a professional ethics rule). Disbarment is the most serious type of discipline and can mean permanent removal from the practice of law. *Id.*

There are three views regarding whether the privilege continues after an inadvertent disclosure occurs.<sup>55</sup> The first view is that the privilege is automatically lost upon disclosure.<sup>56</sup> The courts following this view hold that the attorney-client privilege is waived by any voluntary disclosure even though there was no intent to waive the attorney-client privilege.<sup>57</sup> The rationale behind this view is that once a privileged communication is in a third party's possession, the confidentiality is lost and cannot be restored.<sup>58</sup> The second view is that the attorney-client privilege is not waived by an inadvertent disclosure of documents.<sup>59</sup> The reasoning behind this view is that the client is the holder of the privilege and that an act by his or her attorney cannot constitute a waiver.<sup>60</sup> Furthermore, a

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<sup>55</sup> See John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—State Law*, 51 A.L.R.5th 603 (1997) (compiling a comprehensive state-by-state analysis of waiver of attorney-client privilege with an inadvertent release of privileged information). See also Thomas J. Leach, *Loss of Attorney-Client Privilege Through Inadvertent Disclosure of Privileged Documents*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 119 (Vincent S. Walkowiak ed., 2d. ed. 1997). Inadvertent disclosure of privileged documents is most common during the pretrial production of documents. *Id.* at 119. See also *Suburban Sew 'N Sweep, Inc. v. Swiss-Bermina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) (discussing that privileged documents that were taken from a trash dumpster were no longer privileged).

<sup>56</sup> See Leach, *supra* note 55, at 124 (discussing that some courts favor this test because the privilege acts as an obstacle to the discovery of the truth). Also, courts favor this strict view because mistake is a euphemism for negligence and one is expected to pay for one's negligence. *Id.* Additionally, some courts favor a strict view because it forces self-regulatory behavior. *Id.* at 125. See also *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970) (stating that when the document was produced for inspection, it entered the public domain.) The confidentiality was breached and there was no continuing basis for the privilege. *Id.* See also *Int'l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449 (D. Mass 1988) (stating that the privilege was waived for inadvertently disclosed documents because the disclosing party failed to take adequate precautions to preserve the privilege).

<sup>57</sup> See, e.g., *In re Sealed Case*, 877 F.2d 976, 980 (D.D.C. 1989) (holding that the privilege was waived by an inadvertent disclosure whether or not the waiver was voluntary or inadvertent).

<sup>58</sup> See, e.g., *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546 (D.D.C. 1970) (stating that once the document was produced for inspection, the confidentiality was breached and the privilege was destroyed).

<sup>59</sup> See, e.g., *Connecticut Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1995) (stating that there was no waiver of the privilege in an inadvertent disclosure because only the client can waive the privilege); *Mendenhall v. Barber-Green Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982) (stating that waiver must be an intentional abandonment or relinquishment of a right and courts should require more than just negligence by an attorney before it can be said that the client has given up the privilege).

<sup>60</sup> See Thomas J. Leach, *Loss of Attorney-Client Privilege Through Inadvertent Disclosure of Privileged Documents*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 119, 129 (Vincent S. Walkowiak ed., 2d. ed. 1997) (stating that the practical advantage of this approach is that it is easy to apply).

client must intentionally abandon or relinquish a known right.<sup>61</sup> The third view presents several factors courts use to determine whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege.<sup>62</sup> The factors are the reasonableness of the precautions taken by the sending party to prevent the disclosure, the time the sending party took to rectify the error, the scope of discovery, the extent of the disclosure by the sending party, and the overriding issues of fairness.<sup>63</sup> Even though many modern courts generally follow the third view, courts have fashioned different remedies when applying these same factors to inadvertent disclosure cases.<sup>64</sup>

Thus, this conflict and confusion between different state and regional bar associations, the ABA, and courts shows the need for a single Model Rule. One Model Rule will clearly establish the difference between an inadvertent and unsolicited disclosure and delineate an attorney's professional responsibilities.<sup>65</sup> An analysis of the ABA and state and court opinions presented in the next section will show the shortcomings of the two ABA Formal Opinions and the need for a single Model Rule.

### III. LEGAL ANALYSIS

This Section analyzes ABA, state bar associations, and court opinions concerning inadvertent and unsolicited disclosures. Competing legal principles concerning inadvertent and unsolicited disclosures are compared first. Next, state bar association opinions and cases failing to distinguish between an inadvertent and unsolicited disclosure are discussed. Finally, procedures of bar associations and remedies fashioned by courts are analyzed.

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<sup>61</sup> See *Mendenhall*, 531 F. Supp. at 954 (stating that an inadvertent production of documents is the antithesis of a waiver).

<sup>62</sup> See Patricia M. Worthy, *The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-client Privilege*, 39 HOW. L.J. 437, 461 (1996) (stating that the privilege is waived only if the disclosing party failed to take reasonable precautions to maintain confidentiality of the documents).

<sup>63</sup> See *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) (stating that inadvertent disclosure of a privileged document is one of the factors to be considered in an inadvertent disclosure of documents).

<sup>64</sup> See *infra* notes 168-86 and accompanying text.

<sup>65</sup> See generally part IV.

A. *Competing Legal Principles*

Competing legal principles and underlying policy issues must be examined by bar associations and courts when determining professional responsibilities of attorneys regarding inadvertent or unsolicited disclosure of documents.<sup>66</sup> In an inadvertent disclosure situation, a tension exists between protecting confidences of the sending attorney's client versus promoting zealous representation of a client by the receiving attorney.<sup>67</sup> The ABA, in its Formal Opinion on inadvertent disclosure, strongly supports the interests of the sending attorney's client.<sup>68</sup> The ABA promotes the underlying policy of protecting the

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<sup>66</sup> In an Advisory Opinion, the South Carolina Bar Ethics Advisory Committee stated that with electronic mail, there exists a reasonable expectation of privacy when sending confidential information. See South Carolina Bar Ethics Advisory Comm., Op. 97-08 (1997). The Committee also noted that the lawyer owes a duty of reasonable care to keep the information confidential. *Id.* The Committee went on to state that the attorney should discuss with the client options, such as encryption, to safeguard against the inadvertent disclosure of sensitive or privileged information sent by electronic mail. *Id.* See, e.g., AMERICAN BAR ASSOCIATION ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (discussing that with the advent of new technology, ideas about privacy are changing). The Committee also discussed is that the popularity of the internet, facsimile machines, cellular telephone, cordless phones, and other devices will challenge an attorney's ability to maintain confidentiality of client's confidences. *Id.* Furthermore, in the future, an attorney's professional responsibilities may expand to include protection of storage of electronic communication. *Id.*

<sup>67</sup> See Joseph S. Stuart, Comment, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know?*, 37 SANTA CLARA L. REV. 547, 577 (1997) (stating that even though lawyers perform in an adversarial setting and are required to zealously represent their client, lawyers should still behave with integrity). The author further makes the point that attorneys should consider ethics because society is skeptical of the legal profession. *Id.* In contrast, zealous representation of clients is promoted by the District of Columbia Bar Association. See *infra* notes 138-151 and accompanying text.

<sup>68</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992). See also Comm. on Professional Ethics Florida State Bar Ass'n, Op. 93-3 (1994) (stating that an attorney who receives confidential documents inadvertently disclosed is obliged to notify the sender). The sender then can decide whether to take further action. *Id.* The Committee described situations in which an inadvertent disclosure might take place, including during a document production, a misdirected electronic mail transmission or facsimile transmission, an envelope switched during mailing, or instructions concerning distribution that are misunderstood. *Id.* See also Kentucky Bar Ass'n Ethics Comm., Op. E-374 (1995) (stating that lawyers should follow the ABA Formal Opinion on inadvertent disclosure). However, the Kentucky Committee then stated that in the absence of controlling case law, a lawyer may, at risk of disqualification, notify the sending attorney that the receiving attorney intends to claim the inadvertent waiver. *Id.* The Committee further opined that the materials should be returned to the sending attorney. *Id.* See also North Carolina State Bar, Op. RPC 252 (1997) (stating that the receiving attorney should refrain from examining inadvertently disclosed materials and return the materials to the sending attorney). See also Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal

client's confidences because this allows the client to disclose all necessary information to his or her attorney.<sup>69</sup> This in turn allows the attorney to best represent his or her client.<sup>70</sup> Also, by preserving the client's confidences, the client is not paying a penalty for a mere slip by his or her attorney mistakenly releasing confidential information.<sup>71</sup>

In contrast, state bar associations promote the zealous representation of the client by the receiving attorney over a duty of confidentiality to the sending attorney and client.<sup>72</sup> Zealous representation is promoted by state bar association ethics committees because these committees advise receiving attorneys that they can examine and use the disclosed documents.<sup>73</sup> Furthermore, some ethics

Op. 95-101A (1995) (stating that the attorney should follow procedures outlined in the ABA Formal Opinion on inadvertent disclosure).

<sup>69</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992). *But see* Joanne Pitulla, *Return to Sender*, 79 A.B.A. J 110 (1993) (criticizing the ABA Formal Opinion on inadvertent disclosure because it does not address situations where the lawyer's own client intentionally intercepts confidential documents and gives them to his or her attorney); William T. Barker, *What About Inadvertently Disclosed Documents or Information?*, 60 DEF. COUNSEL J. 613, 615 (1993) (stating that in most situations, the receiving attorney has read to some extent the privileged or confidential information before realizing that the material is privileged).

<sup>70</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. (1992). *See also* MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 87 (1990) (stating that in order to effectively represent a client, an attorney must know all relevant facts and a client is not likely to disclose these facts unless the client is assured that the attorney will maintain the information in confidence). *See also* *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1980) (stating that the broader public interest in observance of the law and administration of justice is promoted by observing the attorney-client privilege).

<sup>71</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. (1992). *See also* Stuart, *supra* note 67, at 569 (stating that if the attorney-client privilege is waived by an inadvertent disclosure, the client then becomes "lost in the shuffle"). By waiving the privilege, the receiving attorney receives a substantial benefit from a mere clerical error. *Id.*

<sup>72</sup> *See infra* notes 138-151 and accompanying text. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 71 (1990) (stating that the Model Code promotes more of an obligation for an attorney to act zealously in representing his or her client as compared to the Model Rules). An example of extreme zealous representation by an attorney is chronicled in *re McAlevy*, 354 A.2d 289, 290 (N.J. 1976). In this case, after exchanging words, one attorney flew into a rage and attacked another attorney in the courtroom. *Id.*

<sup>73</sup> *See infra* notes 138-151 and accompanying text. *See* State Bar Ass'n of North Dakota, Op. 95-14 (1995) (deciding that an inadvertently disclosed document may be used by opposing counsel in a personal injury action.). *See also* State Bar of Michigan, CI-970 (1983) (deciding that an attorney who came into possession of an internal document of the opposing party could use the document while deposing an officer of the opposing party to impeach the credibility of a witness.) The Michigan Committee determined that the attorney would not violate the Code of Professional Responsibility by using the document as long as it was admissible as evidence. *Id.* *Compare* Standing Comm. on Legal Ethics of the Virginia State



committees advise the receiving attorney that they need not notify the sending attorney that he or she received the documents.<sup>74</sup> This advice raises the issue that the receiving attorney is given an unfair strategic advantage over the sending attorney.<sup>75</sup>

In contrast, in a different Formal Opinion on unsolicited disclosures, the ABA decided that in limited circumstances, the receiving attorney may have a legitimate claim to the documents.<sup>76</sup> In this situation, the ABA Committee decided that the public policy considerations of protecting the public welfare and safety may outweigh confidentiality.<sup>77</sup>

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Bar, Op. 1076 (1988) (stating that there was nothing in the Code of Professional Responsibility requiring return of unsolicited materials or prohibiting the receiving attorney from reading and using the materials to his or her client's advantage) with Standing Comm. on Legal Ethics of the Virginia State Bar, Op. 1583 (1994) (deciding that where a judge had mailed back a letter to a lawyer and had inadvertently included a document concerning a court record of a putative conviction, the subject of the inquiry, that the attorney must immediately return the document to the judge). The Virginia Committee further opined that failure to do so would violate the Disciplinary Rules and applicable Virginia statutes. *Id.*

<sup>74</sup> See Alaska Bar Ass'n Ethics Comm., Op. 97-1, (1997) (deciding that where a party in a divorce case intentionally mailed a copy of a confidential letter from her attorney to the opposing attorney, the opposing attorney has no obligation to notify opposing counsel because there is no Alaska Rule of Professional Conduct controlling this situation); Ethics Comm. for the Maryland State Bar Ass'n, Ethics Op. 89-53 (1989) (deciding that where an attorney had received copies of documents from an anonymous source concerning business records of the opponent, that it was not the obligation of the receiving attorney to notify the court, opposing party, or any other third parties of receipt of the documents). However, the Maryland Committee further stated that if the documents were requested from the receiving attorney during discovery, the receiving attorney may have an obligation to produce copies of the documents. *Id.*

<sup>75</sup> See Daniel DeVito, *Oops!: Dealing with the Inadvertent Disclosure of Privileged Documents in a High-Tech World*, 9 J. OF PROPRIETARY RIGHTS 2 (1997) (stating that misdirected information may be "the single most important factor influencing the ultimate outcome of the case").

<sup>76</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). Also, the Committee noted that under state law, there may be situations such as criminal activity likely to result in imminent death or substantial bodily harm where the receiving attorney probably should not notify opposing counsel. *Id.* In this instance, the attorney may have to consult law enforcement authorities or a court. *Id.* Also, the Committee noted that an attorney under state law may have to contact law enforcement authorities or a court where the disclosed documents appear to reveal ongoing crime or fraud that opposing counsel may be assisting. *Id.* See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1998) (providing instances when a lawyer may reveal confidential information such as preventing a client from committing a criminal act likely to result in substantial bodily harm or imminent death); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1998) (providing that a lawyer shall not assist a client to engage in criminal or fraudulent conduct).

<sup>77</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994).

State bar associations have failed to address these considerations.<sup>78</sup> Therefore, because of this incongruency and failure of the states to address competing policy concerns, a Model Rule is needed to take these competing policies into consideration. As an effort to respond to this incongruency, it is essential to examine state bar associations and court opinions.

*B. State Bar Association Opinions and Cases Failing to Distinguish Between Inadvertent and Unsolicited Disclosure of Documents*

The Massachusetts Bar Association and the Montana Bar Association are two examples of state bar associations failing to distinguish between the inadvertent disclosure and unsolicited disclosure of documents.<sup>79</sup> Additionally, the federal district court for the District of Columbia also failed to distinguish between an inadvertent or unsolicited disclosure of privileged or confidential documents.<sup>80</sup> The following Subsections discuss these opinions and then analyze the same facts presented in these opinions using the ABA Formal Opinions. Further, these examples illustrate the shortcomings of having two ABA Formal Opinions instead of one Model Rule providing a single framework for guidance.

1. Bar Association Opinions

The Ethics Committee of the Massachusetts Bar Association discussed a situation where a former corporate manager without authorization took or copied corporate documents apparently covered by the attorney-client privilege, and provided these documents to a government regulatory body.<sup>81</sup> The regulatory body then provided the

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<sup>78</sup> See *infra* notes 81-113, 138-167 and accompanying text.

<sup>79</sup> See Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994); Ethics Comm. of the State Bar of Montana, Op. 951229 (1995). See *infra* notes 81-113 and accompanying text.

<sup>80</sup> *United Mine Workers of Am. v. Arch Mineral Corp.*, 145 F.R.D. 3 (D.D.C. 1992). See *infra* notes 114-120 and accompanying text.

<sup>81</sup> Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994). See also *International Digital Sys. Corp. v. Digital Equip.*, 120 F.R.D. 445 (D. Mass. 1988) (showing that part of the Committee's analysis was based on this case where the court decided that the inadvertently disclosed documents did not have to be returned). The court did not issue a protective order to prohibit the defendant from using the documents because the court stated that the order would not restore the confidential nature of the documents. *Id.* at 449. The court found that the inadvertent disclosure waives the attorney-client privilege because the purpose of the privilege, to protect confidentiality, has been lost. *Id.* at 450. See also *NLRB v. Monfort, Inc.* reported in ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 8:15 (1993) (where a special federal master ruled that a lawyer who had inadvertently faxed a memo to an internal federal agency need not return the memo to the agency).

documents to a government attorney.<sup>82</sup> Significantly, the Massachusetts Committee stated that even though the documents were not inadvertently disclosed by the informant, that the Committee would follow an inadvertent disclosure analysis.<sup>83</sup> The Massachusetts Committee opined that the result of its analysis was the same.<sup>84</sup>

Suprisingly, even though the Massachusetts Committee analyzed the facts as an inadvertent disclosure, the Committee distinguished its opinion from the ABA Formal Opinion on inadvertent disclosure.<sup>85</sup> The Massachusetts Committee did not follow the ABA Formal Opinion on inadvertent disclosure in its analysis because the Committee stated that important countervailing principles outweighed the importance of confidentiality.<sup>86</sup> The countervailing principles that the Massachusetts Committee cited were that regulatory and law enforcement agencies protect important public interests, and government lawyers are under a duty to investigate possible violations of the law.<sup>87</sup> Moreover, the Massachusetts Committee stated that once the agency personnel had read the documents, the information was no longer confidential.<sup>88</sup>

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<sup>82</sup> Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994). See also *In re Sealed Case*, 877 F.2d 976, 981 (1989) (finding that the company's inadvertent disclosure of one memo to a government agency constituted a waiver of the attorney-client privilege). The court left open the question of whether the waiver of the attorney-client extended to other documents of the same subject matter. *Id.*

<sup>83</sup> Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994).

<sup>84</sup> However, in the opinion, the Massachusetts Committee failed to state why the analysis was the same. *Id.*

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

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* But see *infra* notes 95-98 and accompanying text.

<sup>88</sup> Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994). See also *Ray v. Cutter Lab.*, 746 F. Supp. 86 (D. Fla. 1990) (stating that even though a memo is protected by the attorney-client privilege, disclosure, either inadvertent or intentional waives the privilege); John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—State Law*, 51 A.L.R.5th 603 (1997) (discussing that where governmental agencies have encouraged submission of information that is privileged, the person or company submitting the information has some expectation of leniency and the confidential nature of the information will be protected). However, if the government must bring an enforcement action against the disclosing company, the privilege may be lost except as against private plaintiffs. *Id.* See also *Ares-Serono, Inc. v. Organon Int'l B.V.*, 160 F.R.D. 1, 4 (D. Mass. 1994) (stating that disclosure of documents operates as a waiver to the attorney-client privilege where the documents are disclosed inadvertently). The court applied this reasoning in finding that an alleged infringer waived confidentiality of foreign patent application by an inadvertent disclosure. *Id.* See also *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 388 (S.D. Ind. 1997) (finding waiver of attorney-client privilege where the letter was inadvertently

Alternatively, if the Massachusetts Committee had modeled its analysis on the ABA Formal Opinions concerning inadvertent disclosures and unsolicited disclosures, the first pertinent inquiry the Massachusetts Committee should have made was whether the facts lent themselves to an inadvertent disclosure or an unsolicited disclosure analysis.<sup>89</sup> Based on the facts of the situation, the Massachusetts Committee should have determined that this was an unsolicited disclosure situation rather than an inadvertent disclosure because the corporate manager acted as an informant.<sup>90</sup> The corporate manager provided copies of documents to a government regulatory agency that were later given to a government attorney.<sup>91</sup>

In this situation, if the Massachusetts Committee had followed the ABA Formal Opinion on unsolicited disclosure, the Committee would have examined the important issue of whether the receiving attorney had a legitimate claim to the documents under a whistleblower statute.<sup>92</sup> Under the ABA Formal Opinion, the Massachusetts Committee could have determined that the informant was acting under the authority of a whistleblower statute and was thus protected by a state or federal whistleblower statute.<sup>93</sup> Had the Massachusetts Committee relied on the ABA Formal Opinion on unsolicited disclosure, the Massachusetts Committee may have found that the attorney had a right to use the materials even though the sender had no authority to disclose the documents.<sup>94</sup>

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disclosed). The court found that the privilege was waived because the letter was disclosed to persons who had no duty to maintain confidentiality. *Id.*

<sup>89</sup> See generally part IV.

<sup>90</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994); James Podgers, *Privileged Materials need Discussion*, 81 A.B.A. J. 79 (1995) (discussing that receipt of unsolicited materials protected by opposing counsel's attorney-client privilege is not an ethics violation).

<sup>91</sup> Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994).

<sup>92</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994).

<sup>93</sup> Massachusetts has recently adopted the ABA Model Rules with amendments that are effective January 1, 1998. ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 13:11 (1997). Massachusetts has a whistleblower statute stating that an employer cannot take retaliatory action against an employee because the employee discloses to a supervisor or public official a policy or practice that the employee reasonably believes is a violation of the law. MASS. GEN. LAWS ch. 149 § 185 (1997). The facts are unclear whether the government attorney was a federal or state attorney. Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994).

<sup>94</sup> See generally part IV.

However, because the Massachusetts Committee determined that it did not have to distinguish between an inadvertent disclosure and an unsolicited disclosure, the Committee failed to address these important issues in its analysis.<sup>95</sup> Instead, the Massachusetts Committee cited countervailing public interests in determining that the government attorney could examine the confidential documents, thus failing to address the third party's right to protection under a whistleblower act.<sup>96</sup> Also, because the Massachusetts Committee determined that it was not a violation of the Disciplinary Rules for a government lawyer to possess and use the disclosed documents, and that the government lawyer did not have to notify opposing counsel that the government lawyer had received the documents, the Massachusetts Committee may have given the government attorney an unfair strategic advantage.<sup>97</sup> Likewise, by failing to follow the ABA Formal Opinion on unsolicited disclosure, the Massachusetts Committee did not recommend that the parties petition a court to make a definitive resolution on the proper disposition of the documents.<sup>98</sup>

In contrast, under the ABA Formal Opinion on unsolicited disclosure, the ABA recommends that the sending party be notified that

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<sup>95</sup> Massachusetts Bar Ass'n Ethics Comm., Ethics Op. 94-6 (1994).

<sup>96</sup> *Id.*

<sup>97</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (describing other situations where opposing counsel may have a chance to "take advantage" of confidential information, such as an attorney examining another attorney's briefcase during a lunch break or one attorney reading a file inadvertently left behind by opposing counsel). See also *Kondakjian v. Port Authority of N.Y. and N. J.*, No. 94Civ8013(AGS)(DEF), 1996 WL 139782, at \*4 (S.D.N.Y. 1996) (concurring with the approach taken by the ABA Committee on inadvertent disclosures and discussing an unwillingness to permit attorneys to capitalize on errors such as one attorney reviewing another attorney's notes inadvertently left in a conference room during a break). The court further stated that the receiving attorney should notify the sending attorney of an inadvertent fax because obligations to do so arise out of the disciplinary rules prohibiting attorneys from engaging in conduct involving fraud, dishonesty, deceit, or misrepresentation. *Id.* at \*6. See also Heidi L. McNeil & Christopher J. Littlefield, *The Inadvertent Disclosure of Privileged Documents*, 30 ARIZ. ATT'Y 10, 11 (1993) (stating that many times, the attorney only becomes aware that documents have been inadvertently disclosed when opposing counsel begins to question the attorney's client during a deposition); Jeff Barge, *Law Firms Take Document Blooper Battles to Court*, 81 A.B.A. J. 22 (1995) (discussing a case where Baltimore Circuit Judge Marshall A. Levin required selection of a new jury because a secretary had accidentally faxed papers about juror selection strategy to opposing counsel).

<sup>98</sup> See, e.g., Comm. on Rules of Professional Conduct of the State Bar of Arizona, Op. 93-14 (1993) (stating in a dissent that in a situation where it was unclear how an inadvertently disclosed tape was found, the matter should be pursued through proper motion to a court).

the opposing attorney has received such documents.<sup>99</sup> Therefore, one attorney is not given an unfair strategic advantage.<sup>100</sup> The ABA also recommends that if a dispute exists about the proper resolution of the documents, a court should give a definitive resolution.<sup>101</sup> Therefore, the Massachusetts Bar Association opinion highlights the need for one Model Rule discussing both inadvertent disclosure and unsolicited disclosure of privileged and confidential documents so that all pertinent issues are analyzed and appropriate recommendations are made accordingly.

Another instance of a bar association failing to distinguish between an inadvertent disclosure and an unsolicited disclosure is a Montana Bar Association opinion.<sup>102</sup> The Ethics Committee of the State Bar of Montana discussed a situation where an attorney hired a private detective to conduct activity checks on the plaintiffs.<sup>103</sup> The attorney specifically instructed the detective not to contact the plaintiffs under a pretext.<sup>104</sup>

Nonetheless, the detective did contact the plaintiffs under a pretext and passed information he gathered to the attorney.<sup>105</sup> In its analysis, the Montana Committee relied on a modified version of the ABA Formal Opinion on unsolicited disclosure.<sup>106</sup> Unfortunately, the Montana

<sup>99</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994).

<sup>100</sup> See *supra* note 97 and accompanying text.

<sup>101</sup> See generally part IV.

<sup>102</sup> Ethics Comm. of the State Bar of Montana, Op. 951229 (1995). The attorney presenting the ethical questions was defending a personal injury suit. *Id.*

<sup>103</sup> See also *Stagg v. New York Health and Hosp. Corp.*, 556 N.Y.S.2d 779, 780 (2d Dept. 1990) (finding that in this personal injury case, because there was no proof that counsel for the defendant either directly or through communications with the detective agency instructed the detective to speak with the plaintiff, the plaintiff failed to sustain his claim of ethical violations against the defense attorney); *Barham v. Turner Constr. Co. of Tex.*, 803 S.W.2d 731, 739 (Tex. App. 1990) (finding that the attorney did not violate a disciplinary rule because the attorney did not instruct the investigator to contact the plaintiffs).

<sup>104</sup> Ethics Comm. of the State Bar of Montana, Op. 951229 (1995).

<sup>105</sup> *Id.* However, the Montana Committee stated that had the attorney directed the detective to talk with the plaintiffs, Rules 4.2 and 8.4 would have been violated. *Id.* See MONT. CT. RULES OF PROFESSIONAL CONDUCT Rule 4.2 (providing in part “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter”); MONT. CT. RULES OF PROFESSIONAL CONDUCT Rule 8.4 (providing in part “[i]t is professional misconduct for a lawyer to... violate or attempt to violate the Rules of Professional Conduct”).

<sup>106</sup> Ethics Comm. of the State Bar of Montana, Op. 951229 (1995). The Montana Committee also relied on *Stagg* and *Barham*. See *supra* note 103 and accompanying text. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). The State Bar of Montana petitioned the Supreme Court of Montana to adopt the ABA Model Rules of

Committee incorrectly discussed the situation as an inadvertent disclosure.<sup>107</sup> The Montana Committee stated that “based loosely on the inadvertent disclosure procedure, and considering the factual situation before us” the attorney must notify opposing counsel that he has received the information and that judicial review is needed to determine the extent of the use of the information.<sup>108</sup> Fortunately, the Montana Committee determined that the attorney must refrain from using such information until a court decides the disposition of the materials.<sup>109</sup> The Montana Committee limited the procedure discussed in its opinion to situations where, an investigator contacts an opposing party and then gives this information to the hiring attorney against an attorney’s express instruction.<sup>110</sup>

In this situation, even though the Montana Committee followed the ABA Formal Opinion it failed to correctly identify the situation as an unsolicited disclosure. Thus, other attorneys practicing in Montana who encounter the same situation may misapply the Committee’s opinion to their situation.<sup>111</sup> Similarly, Montana courts may incorrectly apply an inadvertent disclosure analysis to similar facts instead of an unsolicited disclosure as promulgated by the ABA Formal Opinions and therefore, a court may fail to consider that the receiving attorney may have a legitimate claim to the documents.<sup>112</sup> However, because there are two ABA Formal Opinions on closely related topics, an attorney, bar

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Professional Conduct on July 12, 1984. *Ethics Committee* (March 8, 1998) <<http://www.montanabar.org/directory/committee/ethics.htm>> The Rules were adopted August 2, 1984. *Id.*

<sup>107</sup> The Committee wrote “[r]esearch in the area of law known as inadvertent disclosure has revealed a procedure...we adopt here.” *Ethics Comm. of the State Bar of Montana*, Op. 951229 (1995). The Committee then cited the ABA Formal Opinion on unsolicited disclosure and quoted the procedure to follow in the case of an unsolicited disclosure. *Id.*

<sup>108</sup> *Ethics Comm. of the State Bar of Montana*, Op. 951229 (1995). The Montana Committee stated that the receiving attorney at his or her discretion may or may not disclose to opposing counsel the substance of the information. *Id.* Also, the Committee determined that the attorney need not disclose the information to his or her client. *Id.* However, if the attorney does inform the client, and the client does not allow the lawyer to go to court, the lawyer may withdraw from representation. *Id.*

<sup>109</sup> *Ethics Comm. of the State Bar of Montana*, Op. 951229 (1995). See *supra* notes 102-108 and *infra* notes 110-113 and accompanying text

<sup>110</sup> *Ethics Comm. of the State Bar of Montana*, Op. 951229 (1995).

<sup>111</sup> See CONST. OF THE ST. BAR OF MONT. , art. III (stating that the purpose of the State Bar of Montana is to aid the courts in maintaining the administration of justice); *Ethics Committee* (March 8, 1998) <<http://www.montanabar.org/attorneyinfo/rulesandregs/constitution.htm>>

<sup>112</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). See also *infra* part II.B.

association, or court may have difficulty determining which opinion to follow. Thus, the Montana opinion illustrates the need for one Model Rule instead of two ABA Formal Opinions. A single Model Rule provides one clear framework for distinguishing between an inadvertent disclosure and an unsolicited disclosure.<sup>113</sup>

## 2. Court Opinion

As with bar associations, courts have failed to distinguish between an inadvertent and unsolicited disclosure. In *United Mine Workers of America, International Union v. Arch Mineral Corporation*,<sup>114</sup> the District Court for the District of Columbia did not distinguish between an inadvertent disclosure of documents and an unsolicited disclosure of documents. The court refused to speculate on how the documents came into the plaintiff's hands.<sup>115</sup> The court decided that the attorney-client

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<sup>113</sup> See *infra* part IV.

<sup>114</sup> 145 F.R.D. 3 (D.D.C. 1992). *Id.* See *In re Sealed Case*, 877 F.2d 976, 981 (D.C. 1998) (finding that disclosure of one memorandum waives the attorney-client privilege). The court reasoned that courts will give no greater protection to those who assert the attorney-client privilege than what his or her own precautions warrant. *Id.* at 980. See also *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) (finding that the attorney-client privilege could not be applied to documents recovered from a garbage dumpster by a third party). The court stated that :

Though this case presents a very close question, the court concludes that consideration of these factors requires that the privilege not be applied to these documents. The likelihood that third parties will have the interest, ingenuity, perseverance and stamina, as well as risk possible criminal and civil sanctions, to search through mounds of garbage in hopes of finding privileged communications, and that they will be successful, is not sufficiently great to deter open attorney-client communication. Furthermore, if the client or attorney fear such disclosure, it may be prevented by destroying the documents or rendering them unintelligible before placing them in a trash dumpster.

*Id.* at 261.

<sup>115</sup> *United Mine Workers of Am., Int'l Union v. Arch Mineral Corp.*, 145 F.R.D. 3, 5 (D.D.C. 1992). The disclosed documents were memoranda that the corporate attorney had prepared for the corporation that included an analysis of the corporate structure that was relevant to allegations made by a union against the corporation. *Id.* The first page of each document was stamped that it was confidential and an attorney-client communication. *Id.* The corporation suggested that the documents were misappropriated. *Id.* The union stated that they had received the documents anonymously and by mail. *Id.* The court stated that the record is consistent with the court's conclusion that the documents were leaked. *Id.* The court determined that the documents were within the attorney client privilege before the disclosure. *Id.* The court then stated that where documents are inadvertently disclosed, that the attorney-client privilege was waived. *Id.* The court denied that motion to strike the privileged documents and disqualify counsel. *Id.*



privilege was waived because the holder of the documents failed to maintain confidentiality.<sup>116</sup>

In this case, if the court would have followed the ABA Formal Opinion on inadvertent disclosure, the attorney-client privilege probably would not have been waived because the Committee has opined that keeping a client confidence is virtually absolute.<sup>117</sup> However, if the court followed the ABA Formal Opinion on unsolicited disclosure, and if there was a legitimate claim that the documents were disclosed under a whistleblower statute, then opposing counsel could have made use of the documents.<sup>118</sup> Therefore, this court opinion highlights the need for one Model Rule establishing that courts should closely examine the facts to determine if a disclosure is inadvertent or unsolicited.<sup>119</sup> In addition, if the receiving attorney had clear guidelines concerning his or her

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<sup>116</sup> *Id.* at 6. The court stated that the proponent of the claim of privilege has the burden to show that the documents were confidential and that the proponent took all possible precautions to maintain confidentiality. *Id.* See also *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 156 F.R.D. 507, 508 n.2 (D.D.C. 1994) (noting that attorneys receiving inadvertently disclosed documents discussed their obligations under the case law and ethical rules). The attorneys concluded that even though their actions were contrary to the ABA Formal Opinion on inadvertent disclosure, they would investigate the inadvertently disclosed files. *Id.* The court noted that this case was unlike the *Arch* case because there was no allegation in this case that the documents were "misappropriated". *Id.* at 512. The court stated that "[i]t is unfortunate that counsel seek to take advantage of opposing counsel's mistake and disregard the ABA Formal Ethics Opinion." *Id.* The court further stated that the case law in the Circuit compelled the court to rule in favor of the receiving attorneys even though the ruling directly conflicted with the ABA Formal Opinion on inadvertent disclosure. *Id.* at 512. The court added that it recognized "the magnitude of plaintiff's discovery error is unprecedented and far exceeds other 'inadvertent disclosures' courts of this Circuit have considered in prior cases." *Id.*

<sup>117</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (opining that confidentiality should be maintained even where the receiving attorney looks at the documents before discovering that the documents have been mistakenly sent). But see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (stating in part that a lawyer may reveal information to prevent a client from committing a criminal act that is likely to result in substantial bodily harm or imminent death); Kevin M. Ryan, *Reforming Model Rule 1.6: A Brief Essay From the Crossroads of Ethics and Conscious*, 64 *FORDHAM L. REV.* 2065, 2066 (1996) (proposing an addition to Model Rule 1.6 that a lawyer may reveal information to prevent a minor client from engaging in acts likely to result in substantial bodily harm or death to the client). The addition to the Model Rule 1.6 further proposed that the attorney should reveal information only to the extent needed to prevent the harm and the information should be revealed only to people who need to know. *Id.*

<sup>118</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994) (stating that under a whistleblower statute, the receiving attorney may have a legitimate claim to use the documents).

<sup>119</sup> See generally part IV.

professional responsibilities, then this issue may not have been litigated, thereby preserving judicial resources.<sup>120</sup>

C. *Procedures Recommended by Bar Associations and Remedies Fashioned by Courts*

Once a distinction is made whether a disclosure is inadvertent or unsolicited, the next step is to provide procedures that attorneys should follow in each situation. In developing procedures concerning the inadvertent disclosure of privileged or confidential documents, the ABA relied on the overarching ethical considerations of the principles of confidentiality and the attorney-client privilege, the law governing bailments and misapprehended property, and the considerations of common sense, professional courtesy, and reciprocity.<sup>121</sup> The ABA Committee weighed the competing considerations of maintaining the confidentiality of the attorney-client privilege existing between the sending attorney and his or her client against a receiving attorney's obligation to zealously represent his or her client.<sup>122</sup> The Committee decided not to promote uncontrolled zealous advocacy when an attorney represents a client.<sup>123</sup> However, in formulating its procedures, the Committee failed to plan for a situation where the parties' dispute whether the materials inadvertently disclosed were in fact subject to the attorney-client

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<sup>120</sup> See *supra* note 16 and accompanying text.

<sup>121</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 129 (Tentative Draft No. 2, 1989) (discussing that courts should find no waiver in inadvertent disclosure cases). See also BLACK'S LAW DICTIONARY 141-42 (6th ed. 1990) (defining a bailment as a delivery in trust of personal property or goods by a bailor to a bailee). The bailee is responsible to exercise due care and must redeliver the goods. *Id.* But see William T. Barker, *What About Inadvertently Disclosed Documents or Information?*, 60 DEF. COUNSEL J. 613, 614 (1993) (criticizing the ABA basing the inadvertent disclosure opinion on the law of bailment because the intent of the parties creating the bailment cannot be determined).

<sup>122</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992). Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) (stating in part that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law") with MODEL RULES OF PROFESSIONAL CONDUCT (1997) (containing no such provision).

<sup>123</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992). See also CODE OF ETHICS, ALABAMA STATE BAR ASSOCIATION (1899), reprinted in HENRY S. DRINKER, LEGAL ETHICS 358 (1953) (stating that an attorney should not have the reputation of a "rough tongue"). Another duty that the Alabama Code promulgated was that "the attorneys should try the merits of the cause, and not try each other." *Id.* See also GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 133 (1978) (discussing the adversary system and that the system can work, but that the system is sick in its present form).

privilege. Therefore, the proposed Model Rule will provide such a procedure.<sup>124</sup>

Concerning unsolicited disclosures, the ABA Committee opined that the lawyer receiving unsolicited privileged or confidential documents has some responsibilities upon receiving such materials.<sup>125</sup> These professional responsibilities are consistent with the professional responsibilities embodied in the Model Rules.<sup>126</sup> Because the receiving attorney may have a legitimate claim to the disclosed documents, the Committee stated that its procedure would allow the receiving attorney time to resort to judicial remedies to determine his or her legal rights to the documents.<sup>127</sup> However, the ABA Committee failed to provide procedures to resolve a dispute where it is unclear whether the documents disclosed were inadvertent or unsolicited. Again, it is necessary for a Model Rule to provide such a procedure.<sup>128</sup>

Surprisingly unlike the ABA, state bar associations opinions fail to analyze and weigh complex policy issues when developing procedures

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<sup>124</sup> See generally part IV.

<sup>125</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). See also CODE OF ETHICS, ALABAMA STATE BAR ASSOCIATION (1899), reprinted in HENRY S. DRINKER, LEGAL ETHICS 355 (1953) (stating that "[t]he attorney's office does not destroy the man's accountability to the Creator, or loosen the duty to obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law").

<sup>126</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997). See, e.g., Dondi Properties Corp. v. Com. Savings and Loan Ass'n, 121 F.R.D. 284, 287 (N.D. Tex. 1988) (adopting standards of practice based on the Dallas Bar Association's "Guidelines of Professional Courtesy" and "Lawyers Creed"). The standards state in part that "a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client." *Id.* Also, "[a] lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity." *Id.*

<sup>127</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994). The ABA Committee further opined that courts may grant injunctive relief to the sending party restraining disclosure to protect trade secrets or other privileged materials. *Id.* See also American Motors Corp. v. Huffstutler, 575 N.E.2d 116, 119 (Ohio 1991) (enjoining defendant from disclosing trade secrets, confidential information, matters of attorney-client privilege, or work product). The car company retained the defendant as an attorney and the company contended that the defendant took confidential and privileged materials without authority. *Id.* at 118. See also DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 695 (1973) (discussing factors necessary to determine whether information is secret, such as whether the information is confidential and whether the information is sufficiently unique to warrant protection). A trade secret is valuable because it is secret. *Id.* If an employee divulges a trade secret, the employee or his or her new employer may be liable for profits made from using the trade secret, possibly under the theory of a constructive trust. *Id.* at 696.

<sup>128</sup> See generally part IV.

that attorneys should follow when an inadvertent or unsolicited disclosure occurs.<sup>129</sup> Instead, state bar associations promote zealous representation of a client and fail to analyze the competing principle of confidentiality.<sup>130</sup> Thus, the resulting procedures promulgated by these state bar associations allow attorneys to examine and use the disclosed documents.<sup>131</sup> Additionally, state bar associations analyze inadvertent and unsolicited disclosure situations using a formalistic interpretation of the disciplinary rules adopted by the state.<sup>132</sup> State bar associations using such an interpretation have generally concluded that if the adopted rules do not specifically address an inadvertent or unsolicited disclosure of documents, then the attorney has not violated any rule by looking at or using a disclosed document.<sup>133</sup> Thus, these bar associations also promulgate procedures that allow attorneys to examine or use the disclosed documents.<sup>134</sup> Significantly in contrast, state bar associations

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<sup>129</sup> See, e.g., Alaska Bar Ass'n Ethics Comm., Op. 97-1 (1997) (citing no case law in its analysis); Maryland State Bar Ass'n, Op. 89-53 (1989) (showing where the opinion written in the form of a letter does not cite case law and provides no policy analysis).

<sup>130</sup> See *infra* notes 138-151 and accompanying text. See also Standing Comm. on Professional and Judicial Ethics State Bar of Michigan, Op. CI-970 (1983) (referencing disciplinary rules dealing with relevance and admissibility of evidence in a situation where an attorney came into possession of an internal private memorandum).

<sup>131</sup> See Edward A. Carr & Allan Van Fleet, *Professional Responsibility Law in Multijurisdictional Litigation: Across the Country and Across the Street*, 36 S. TEX. L. REV. 859, 863-67 (1995) (stating that in an adversary system, zealous representation is the defining characteristic in the system). However, this can present problems in multijurisdictional litigation where there may be intrajurisdictional differences of a lawyer's professional responsibilities). *Id.* at 863-69. See also DAVID E. SCHRADER, *ETHICS AND THE PRACTICE OF LAW* 208 (1988) (discussing that because lawyers have a great store of highly useful information provided by their clients due to a guarantee of confidentiality, a question arises whether this should be disclosed to opposing parties). Professor Schrader then contends that the reason that this information is given to attorneys in the first place is because of the attorney-client privilege and rules protecting confidentiality. *Id.* at 109.

<sup>132</sup> See *infra* notes 152-167 and accompanying text.

<sup>133</sup> See, e.g., Maryland State Bar Ass'n, Op. 89-53 (1989) (stating that where an attorney received a copy of a document from an unknown person dealing with a case he was working on, the receiving attorney had no duty to disclose to the court or defendant receipt of the document); Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Inquiry 91-19 (1991) (deciding that where an attorney's client provided the attorney with a copy of a letter from opposing counsel that was mixed in with other documents, the receiving attorney did not have to inform opposing counsel of receipt of the document); Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Inquiry 94-3 (1994) (deciding that where an attorney had inadvertently received a fax, failure to return the document was not a violation of the disciplinary rules); Philadelphia Bar Ass'n Professional Guidance Comm., Guidance Inquiry 94-15 (1994) (deciding that where a corporate attorney had received a confidential document inadvertently produced, the attorney could photocopy the documents and only had to disclose receipt of the document to their client and no one else).

<sup>134</sup> See *supra* note 133 and accompanying text.

following the ABA Formal Opinions or a modified form of the ABA Formal Opinions look beyond the black letter law of the adopted disciplinary rules.<sup>135</sup> These state bar associations consider underlying policy issues not specifically addressed in the rules and usually adopt procedures similar to the ABA procedures.<sup>136</sup>

The following Subsection presents an analysis of state bar association opinions failing to follow the ABA's Formal Opinions procedures. Using the same facts that were presented to the state bar association, another analysis will be presented using the ABA's Formal Opinions procedures. This analysis will show the need for a new Model Rule that addresses the shortcomings of the ABA's Formal Opinions procedures even if the state bar associations had followed the ABA's Formal Opinions procedures.<sup>137</sup>

### 1. State Bar Association Opinions Promoting Zealous Representation

An instance of a bar association failing to follow the ABA Formal Opinion procedure is the District of Columbia Bar Legal Ethics Committee.<sup>138</sup> The District of Columbia Committee emphasized the zealous representation of a client over the duty to protect confidential or privileged documents.<sup>139</sup> The situation before the Committee was a

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<sup>135</sup> See, e.g., Kentucky Bar Ass'n Ethics Committee, Op. E-374 (1995) (relying on the ABA Formal Opinion, stating that lawyers who receive inadvertently disclosed privileged materials are not subject to discipline for receiving the materials, but should return the materials); North Carolina State Bar, Op. RPC 252 (1997) (concluding that because an attorney has a duty of honesty and courtesy to all persons involved in the legal process, the attorney is required to return an inadvertently disclosed file); Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Op. 94-11B (1994) (stating that where a government attorney has inadvertently sent a privileged document to opposing counsel, the attorney-client privilege of the sending attorney was not waived and that opposing counsel can be precluded by a motion in limine from using the documents as evidence); Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 95-57 (1995) (deciding that the privilege is not waived where a fax was inadvertently transmitted to opposing counsel because the interest of protecting the privileged communication outweighed the receiving lawyer's interest in retaining such documents); Pennsylvania Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 95-101A (1995) (following procedures outlined in the ABA Formal Opinion on inadvertent disclosure).

<sup>136</sup> See *supra* note 130 and accompanying text.

<sup>137</sup> See generally part IV.

<sup>138</sup> District of Columbia Bar Legal Ethics Comm., Op. 256 (1995).

<sup>139</sup> *Id.* See also *Wichita Land & Cattle Co. v. Am. Fed. Bank*, 148 F.R.D. 456 (D.D.C. 1992) (relied on by the District of Columbia Committee in making their decision). The court in *Wichita* said it was not important whether the attorney-client privilege was waived

securities arbitration matter where the claimant's lawyer provided the respondent's lawyer with unrestricted access to a substantial number of documents.<sup>140</sup> After the respondent's attorney identified documents, the claimant's lawyer copied and delivered the documents.<sup>141</sup> The claimant's lawyer then informed the respondent's lawyer that some of the handwritten documents contained privileged attorney-client communications.<sup>142</sup>

In its analysis of the facts, the Committee stated that once the documents were read, the disclosed information was part of the body of knowledge of the receiving attorney.<sup>143</sup> The Committee determined that the receiving attorney could use the information to the advantage of his or her client.<sup>144</sup> Thus the Committee's resulting procedure promoted the zealous representation of the receiving attorney's client over protecting

voluntarily or inadvertently. *Id.* at 458. The court stated that "liberal application of waiver discourages organizations from broadly labeling materials 'privileged.'" *Id.* at 462. The court granted the motion to compel production of the documents. *Id.* Other case law the District of Columbia Committee relied on was *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217 (W.D. Mich. 1994). District of Columbia Bar Legal Ethics Comm., Op. 256 (1995). See *infra* notes 172-178 and accompanying text. The District of Columbia Committee also relied on the Rules of Professional Conduct. District of Columbia Bar Legal Ethics Comm., Op. 256 (1995). See also D.C. R. Rules of Professional Conduct Rule 1.1 (stating that "[a] lawyer shall provide competent representation to a client"). The District of Columbia Committee discussed this rule in relationship to a lawyer's obligation to protect a client's confidential documents from an inadvertent disclosure. District of Columbia Bar Legal Ethics Comm., Op. 256 (1995). The District of Columbia Committee stated that if a lawyer inadvertently disclosed documents during a document production, that that may violate Rule 1.1. *Id.* See also D.C. R. Rules of Professional Conduct Rule 1.15(a) (stating that "property...shall be safeguarded" that is held by the lawyer). The District of Columbia Committee relied on this rule and stated that this rule included safeguarding inadvertently disclosed property. District of Columbia Bar Legal Ethics Comm., Op. 256 (1995). Under Rule 8.4(c) the District of Columbia Committee stated that if the attorney learns before looking at the document that the release was inadvertent, that the attorney should return the document unread. *Id.* See also D.C. R. Rules of Professional Conduct Rule 8.4 (stating that "[i]t is professional misconduct for a lawyer...to engage in conduct involving dishonesty, fraud, deceit or misrepresentation"). For a discussion of Rule 1.6 see *infra* note 39 and accompanying text.

<sup>140</sup> District of Columbia Bar Legal Ethics Comm., Op. 256 (1995).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* But see *C.P. Smith v. Armour Pharm. Co.*, 838 F. Supp 1573 (S.D. Fla. 1993) (finding that where an inadvertently disclosed memorandum prepared by counsel for a pharmaceutical company concerning litigation of inevitability of litigation regarding allegations that a hemophiliac had contracted human immunodeficiency virus, that the attorney-client privilege was not waived). The memo was publicly distributed and published in "a variety of newspapers from Alaska to Florida". *Id.* at 1575.

<sup>144</sup> District of Columbia Bar Legal Ethics Comm., Op. 256 (1995).

the confidentiality of the sending attorney's client. The Committee stated that protection of the confidentiality of the sending attorney's client places too much of a burden on the receiving attorney.<sup>145</sup> Additionally, the Committee decided that the sending attorney's mistake did not violate Rule 1.6.<sup>146</sup> The Committee further stated that if the attorney was under an ethical restraint regarding use of the information, this may pose a prohibited conflict of interest and could require withdrawal of the attorney.<sup>147</sup>

Alternatively, if the District of Columbia Committee had adopted the ABA Formal Opinion on inadvertent disclosure, the Committee would have analyzed the facts differently and promulgated a different procedure.<sup>148</sup> In this situation, the Committee would have decided that the principle of confidentiality outweighed the principle of representing a client zealously.<sup>149</sup> Therefore, under the ABA Formal Opinion, the receiving attorney should have abided by the instructions of the sending attorney as to the disposition of the materials.<sup>150</sup> However, even if the Committee had adopted the ABA Formal Opinion for its analysis, the opinion would have failed to provide a recommended procedure for parties to follow if there was a dispute between the parties concerning whether the materials were protected by the attorney-client privilege. Once again, this shows the need for a new Model Rule defining procedures an attorney should follow if there is a dispute about whether materials are protected by the attorney-client privilege.<sup>151</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> See D.C. R. Rules of Professional Conduct Rule 1.6(a) (providing in part that "[e]xcept when permitted...a lawyer shall not knowingly...[r]eveal a confidence or secret of the lawyer's client"). The District of Columbia Committee, discussing the ethical obligations of the sending attorney to protect the client's confidential documents from inadvertent disclosure, stated that where the disclosure was truly inadvertent, and the attorney did not know that privileged material was contained in the disclosure, there was no violation of the rule. See also District of Columbia Bar Legal Ethics Comm., Op. 256 (1995). See also D.C. R. Rules of Professional Conduct Rule 1.6(e) (stating in part "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client"). See also District of Columbia Bar Legal Ethics Comm., Op. 256 (1995) (stating that if the receiving attorney failed to exercise reasonable caution to prevent employees from disclosing confidences, this would violate Rule 1.6(e)).

<sup>147</sup> See District of Columbia Bar Legal Ethics Comm., Op. 256 (1995).

<sup>148</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See generally part IV.

## 2. State Bar Associations Following a Formalistic Rule-Based Analysis

A state bar association not following the ABA Formal Opinions procedure is the Professional Ethics Commission of Maine (hereinafter Maine Commission).<sup>152</sup> The Maine Commission followed a formalistic rule-based approach in its analysis of a receiving lawyer's obligations concerning an inadvertently disclosed document.<sup>153</sup> The situation before the Maine Commission was that during pretrial discovery, one attorney received a number of documents including one document that was clearly privileged.<sup>154</sup> According to the facts, the receiving attorney knew or should have known that the disclosure was inadvertent.<sup>155</sup>

Following a rule-based approach in its analysis, the Maine Commission used the Maine Bar rules as the standard for ethical conduct in Maine, and therefore the Commission was not allowed to add ethical limitations not expressed in the Rules, because the purpose of the Rules was to establish a codified set of standards for attorneys.<sup>156</sup> Furthermore,

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<sup>152</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). In correspondence from the Board of Overseers of the Bar to the author, it was noted that "Maine's advisory opinions describe minimally accepted conduct for attorneys under the Maine Bar Rules for a given fact pattern without the benefit of an adversary process. Different facts may result in an entirely different finding. Thus, I suggest the enclosed opinion be used with an awareness of its rule and source." Letter from Geoffrey S. Welsh, Assistant Bar Counsel, Board of Overseers of the Bar to Gloria Kristopek, author (Dec. 29, 1977) (on file with author).

<sup>153</sup> The Maine Commission determined that the applicable Maine Bar Rules were 3.2(f)(3) and 3.2(f)(4). Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). See ME. R. CPR Rule 3.2(f)(3) (providing in part "[a] lawyer shall not...engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); ME. R. CPR Rule 3.2(f)(4) (providing in part "[a] lawyer shall not...engage in conduct that is prejudicial to the administration of justice"). The Maine Commission stated that there was nothing in the history of Rule 3.2(f)(3) indicating that this rule should prohibit an attorney from using and retaining a document mistakenly but voluntarily sent by opposing counsel. Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). The Commission further stated that if the receiving attorney used and retained the inadvertently disclosed document, it was not deceitful, dishonest, or fraudulent "to take advantage of the mistake of opposing counsel." *Id.* Also, the Maine Commission determined that there was nothing in the history of 3.2(f)(4) that suggested that this rule should apply to the situation that was before the Maine Commission. *Id.* The Maine Commission determined that as long as the use of the document was permitted by the Rules of Evidence of Procedure, use of the document was not prejudicial to the adversary system of litigation. *Id.*

<sup>154</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* See also ME. R. BAR Rule 11 (b)(1), (b)(2) (providing in part that the Professional Ethics Commission "[s]hall render advisory opinions to the Court, Board, Bar Counsel and to the Grievance Commission on matters involving the interpretation and application of



the Maine Commission opined that while the approach and interpretation taken by the ABA concerning the inadvertent disclosure of documents was theoretically appealing, they concluded that this approach was not appropriate for the Maine Commission.<sup>157</sup> The Commission concluded that the receiving attorney may use the documents.<sup>158</sup> The Maine Commission advised the receiving lawyer to notify the sending lawyer of receipt of the inadvertently disclosed document and to send a copy of the document to the sending lawyer if requested.<sup>159</sup> The Commission found no support under the Maine Bar Rules for the sending attorney to return the original inadvertently disclosed document.<sup>160</sup>

In contrast, three dissenting members of the Maine Commission took a less black letter law approach to an analysis of the facts.<sup>161</sup> The dissent stated that even though no specific disciplinary rule requiring the return of inadvertently disclosed documents exists, the privileged documents should be returned in cases where it was clear from the

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the Code of Professional Responsibility...[and]...[m]ay render advisory opinions on ethical questions posed by attorneys involving the Code of Professional Responsibility"). See also *Board of Overseers v. Rodway*, 470 A.2d 790, 791 (Me. 1984) (stating "in fairness to attorneys who look to them for guidance, the Rules must provide a clear and consistent articulation of what constitutes appropriate professional standards").

<sup>157</sup> The Maine Commission also relied on *Aerojet General Corporation v. Transport Indemnity Ins.*, 18 Cal.App. 4th 996 (Cal.App.) (concluding that the receiving attorney could not be sanctioned for receiving inadvertently disclosed documents). See also *FDIC v. Singh*, 140 F.R.D. 252 (D. Me. 1992) (finding waiver of privilege when a document was inadvertently produced and reviewed by opposing counsel).

<sup>158</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). The Maine Commission also criticized the ABA Committee because it did not base its Formal Opinion on inadvertent disclosure "on any 'black letter of the Model Rules.'" *Id.* But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (stating in part that "a satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules").

<sup>159</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

<sup>160</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). See also ME. REV. STAT. ANN. tit. 17, § 356 (West 1998) (providing that "[a] person is guilty of theft if...[h]e obtains or exercises control over the property of another which he knows to have been lost or mislaid or to have been delivered under a mistake as to the identity of the recipient.") The Maine Commissions also discussed that under the theft of property statute, § 356 may apply in an inadvertent disclosure situation. Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). However, the Maine Commission then stated that the jurisdiction of the Commission was expressly limited to an interpretation of the Maine Bar Rules and not an interpretation of statutes. *Id.* Therefore, the Maine Commission advised the receiving attorney to notify the sending attorney of receipt of the privileged documents. *Id.*

<sup>161</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994).

circumstances that the disclosure was unintended.<sup>162</sup> Moreover, the dissent stated that an attorney should request a court for instruction on how to proceed where it was unclear whether an opponent's inadvertent disclosure gave rise to an ethical duty to keep the information confidential.<sup>163</sup>

If the Maine Commission had relied on the ABA Formal Opinion on inadvertent disclosure, the Commission's recommendations would have differed in that the receiving attorney clearly should not have examined the documents because the receiving attorney knew that the documents were not intended for him or her.<sup>164</sup> Because the Maine Commission took a black letter law approach to the analysis, the sending attorney and the sending attorney's client have paid a high penalty for a mere slip; if the Maine Commission had followed the ABA Formal Opinion, both the sending attorney and sending attorney's client would not have paid such a high penalty.<sup>165</sup> Therefore, this emphasizes the need for a Model Rule delineating a procedure that fairly weighs the interests of the sending attorney's client.<sup>166</sup> The Model Rule should preserve the attorney-client privilege so that the client of the sending attorney is not unfairly punished because their attorney has made a mistake.<sup>167</sup> In order to

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<sup>162</sup> *Id.* The dissent noted that several Maine Commission members indicated that they would return the inadvertently disclosed documents if requested. *Id.* However, the dissent further noted that because there were no disciplinary rules specifically requiring otherwise, the same members felt that they should follow their client's wishes regarding retention of the documents. *Id.* But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (recommending that the receiving attorney notify the sending attorney of receipt of the documents and that the sending lawyer should abide by the instructions of the sending lawyer, not the instruction of the receiving lawyer's client).

<sup>163</sup> Maine Professional Ethics Comm'n, Advisory Op. 146 (1994). This recommendation goes beyond the ABA Formal Opinion on inadvertent disclosure and is more in line with the recommendations of the ABA Formal Opinion on unsolicited disclosure. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-382 (1994) (stating that the procedures suggested in an unsolicited disclosure situation would allow opposing counsel reasonable time and opportunity to resort to judicial remedies to determine legal rights).

<sup>164</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

<sup>165</sup> See Maine Professional Ethics Comm'n, Advisory Op. 146 (1994) (stating that the rules also do not prohibit an attorney from taking advantage of any other mistake of opposing counsel such as a failure to plead an affirmative defense, assert a counterclaim, argue a theory of law, assert an evidentiary objection at trial, introduce an essential piece of evidence or demand an important provision during contract negotiations). But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992) (stating that loss of confidentiality is a high penalty to pay for a slip made by opposing counsel).

<sup>166</sup> See *infra* part IV.

<sup>167</sup> See *supra* notes 68-71 and accompanying text.

further understand why a new Model Rule is needed, one must next examine court opinions and the remedies fashioned.

### 3. Court Opinions

Courts examine waiver of the attorney-client privilege in an inadvertent disclosure situation as an evidentiary question.<sup>168</sup> Remedies fashioned by courts, where the privilege was not waived, comprise ordering destruction of the documents, ordering return of the documents, and issuing protective orders.<sup>169</sup> The cases *Resolution Trust*

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<sup>168</sup> See *supra* part II. C.

<sup>169</sup> A remedy is a means by which a right is enforced or the violation of a right is compensated, redressed, or prevented. See BLACK'S LAW DICTIONARY 1294 (6th ed. 1990). The law of remedies is concerned with "the nature and scope" of relief that the plaintiff should receive once the plaintiff has followed the proper procedure in court and has a substantive right. See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 1 (1973). See also John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—State Law*, 51 A.L.R.5th 603 (1997) (stating that once the opposing counsel has received privileged information that some courts find that unless counsel is disqualified from the case, they may use the information to his or her client's advantage). However, other courts have found that opposing counsel should not be disqualified unless there is some culpability on the receiving attorney's part). *Id.* See *supra* note 63 and accompanying text. See *Aerojet General Corp. v. Transp. Indem. Ins.*, 18 Cal. App. 4th 996, 1006 (Cal.Ct.App. 1 1993) (stating that once the receiving attorney received the information that his professional obligation demands that he use the information on his client's behalf). The court also stated that the attorney-client privilege "is not an insurer against inadvertent disclosure." *Id.* at 1004. See *American Express v. Accu-Weather, Inc.*; No.91 Civ. 6485, 1996 WL 346388, at \*3 (S.D.N.Y. 1996) (showing where the attorney was sanctioned for reading a privileged document inadvertently sent by opposing counsel after opposing counsel had notified the receiving lawyer of the mistake and opposing counsel asked for return of the document); *General Accident Ins. Co. v. Borg-Warner Acceptance Corp.*, 483 So. 2d 505, 506 (Fla. Dist. Ct. App. 1986) (disqualifying an attorney because lower the court trial judge had inadvertently forwarded documents to the attorney). The receiving attorney had reviewed the file not realizing that the file had been sent inadvertently. *Id.* The court stated that even though disqualification of the attorney is an extraordinary remedy that perceptions are of the utmost importance. *Id.* The court further stated that it could not measure the advantage the inadvertent disclosure gave one party, but that such an advantage warranted resort to the extraordinary remedy for the "sake of the appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process." *Id.* See *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 401 (N.Y. App. Div. 1987) (deciding that a bank inadvertently disclosing documents did not waive the attorney-client privilege). However, the court rejected the view that an attorney may never waive the privilege in an inadvertent disclosure because an attorney may possess authority to bind his or her client. *Id.* at 400. See *ICI Americas, Inc. v. Wanamaker*, CIV. A No. 88-1346, 1989 WL 38647, \* 4 (E.D. Pa. 1989) (finding that an attorney can waive the attorney-client privilege on behalf of the client by an inadvertent disclosure of documents during pre-trial discovery). The court granted the plaintiff's motion seeking return of the original documents. *Id.* However, the court also decided that the defendants could keep exact copies of the documents. *Id.* See *Wichita Land & Cattle Co. v. American Fed. Bank*, 148

*Corporation v First of America Bank*<sup>170</sup> and *Transportation Equipment Sales Corporation v. BMY Wheeled Vehicles*<sup>171</sup> illustrate examples of remedies fashioned by courts.

Notably, in *Resolution Trust Corporation v. First of American Bank*, the District Court for the Western District of Michigan ordered destruction of an original letter and all copies and notes of the original letter.<sup>172</sup> The court stated that the attorney sending the letter did everything reasonably required to protect the attorney-client privilege that attached to document.<sup>173</sup> The court essentially agreed with the ABA Formal Opinions on inadvertent disclosure and unsolicited disclosure.<sup>174</sup> Significantly, even though the court adopted the State of Michigan rules as its formal rule of ethics, the court declined to follow the Michigan Bar Association Opinion.<sup>175</sup> The Michigan Opinion states that a receiving lawyer has no obligation to disclose to the court or to an adverse party

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F.R.D. 456, 462 (D.D.C. 1992) (granting the motion to compel production of documents). The court reasoned that once the documents were disclosed, that any privilege that the documents may have had was waived. *Id.* at 461. See *Ranney-Brown Distrib., Inc. v. E.T. Barwick Indus., Inc.*, 75 F.R.D. 3 (S.D. Ohio 1997) (ordering an in camera review of inadvertently disclosed documents to determine whether the documents were privileged); *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 450 (D. Mass. 1988) (denying the plaintiff's motion for a protective order compelling defendant to return copies of inadvertently disclosed documents subject to the attorney-client privilege). See *Farm Credit Bank of St. Paul v. Huether*, 454 N.W.2d 710 (N.D. 1990) (deciding that the attorney-client privilege was not waived where the document was inadvertently disclosed).

<sup>170</sup> 868 F. Supp. 217 (W.D. Mich. 1994).

<sup>171</sup> 930 F. Supp. 1187 (N.D. Ohio 1996).

<sup>172</sup> See *Resolution Trust Corp.*, 868 F. Supp. at 221. The court stated that even though it ordered that the original letter and all copies of the letter be destroyed that the remedy may be ineffective because opposing counsel and the client had already read the document. *Id.* The court further stated that the remedy fashioned will at least prevent the document from being used at depositions and trial. *Id.* The court denied the plaintiff's motion for sanctions. *Id.*

<sup>173</sup> *Id.* at 220. The court stated that in this case, the document was clearly marked as privileged and was sent by the attorney, not the client. *Id.* The court further stated that as soon as the sending attorney knew of the inadvertent disclosure, the sending attorney immediately took steps to rectify the disclosure. *Id.*

<sup>174</sup> *Id.* The court stated that common sense, the importance of the attorney-client privileged, and ethics should have caused the receiving attorney to notify the sending attorney of the mistake. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992).

<sup>175</sup> See *Resolution Trust Corp.*, 868 F. Supp. at 220. See also Michigan Standing Comm. on Professional and Judicial Ethics, Op. CI-970, (1993) (deciding one of the first ethics opinions on misdirected documents.) The Michigan Bar Association has coded its opinions. See also State Bar of Michigan, *Common Citations* (Sept. 16, 1997) <<http://www.michbar.org/opinions/ethics/>> "CI" is an informal ethics opinion interpreting the Michigan Code of Professional Responsibility. *Id.*

that he or she possesses the opposing party's confidential or privileged documents.<sup>176</sup> Moreover, in this case the court went beyond the ABA Formal Opinion on inadvertent disclosure by ordering destruction of the original letter, all copies and notes.<sup>177</sup> This case represents the need for a Model Rule not allowing destruction of documents, but allowing a party to petition a court for an *in camera* review of the documents, and if necessary, place the documents under seal.<sup>178</sup>

In another significant court opinion, the District Court for the Northern District of Ohio in *Transportation Equipment Sales Corporation v. BMY Wheeled Vehicles*,<sup>179</sup> relied in part on the ABA Formal Opinion on inadvertent disclosure in ordering the return of an inadvertently disclosed document during pre-trial discovery. Even though the sending attorney only asked for return of the inadvertently disclosed document, the court ordered no further use of the document and ordered all persons aware of the contents of the document to deliver all copies of the document to the court to be kept under seal.<sup>180</sup> Also, the court ordered

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<sup>176</sup> See Michigan Standing Comm. on Professional and Judicial Ethics, Op. CI-970, (1993) (deciding that the mere possession of opposing counsel's internal document does not require the receiving attorney to withdraw from the representation of the client).

<sup>177</sup> See *Resolution Trust Corp.*, 868 F. Supp. at 221. See also *Hebert v. Anderson*, 681 So. 2d 29 (La. Ct. App. 1996) (ordering destruction of inadvertently disclosed document subject to attorney work product privilege). But see *Dyson v. Amway Corp.*, 1990 WL 290683, \*3 (W.D. Mich. 1990) (finding in an inadvertent disclosure of privileged documents that the privilege was waived). In determining if the privilege was waived, the court used a five factor analysis of reasonableness of precautions taken to prevent disclosure, how much time was taken by the sending attorney to rectify the situation, the scope of the discovery, the extent of the disclosure, and the interests of justice. *Id.* But see *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653 (E.D. Mich. 1995) (finding that the privilege was waived in an inadvertent disclosure based the factors of the reasonableness of precautions taken, the number of inadvertent disclosures, the magnitude of the disclosure, measures taken to mitigate the damage of the disclosures, and the overriding interests of justice).

<sup>178</sup> See generally part IV.

<sup>179</sup> 930 F. Supp. 1187 (N.D. Ohio 1996). The court stated that disclosure of the document was not willful, but resulted from oversight and mistake. *Id.* The court stated that many courts have held that an inadvertent disclosure waives the attorney-client privileged, but that this approach would only condone distrust and animosity among lawyers. *Id.* See also *Milford Power Ltd. Partnership v. New England Power Co.*, 896 F. Supp. 53, 60 (D. Mass. 1995) (finding that inadvertent production of documents did not waive the attorney-work product privilege). The court ordered return of copies of documents to the sending attorney, and ordered the receiving attorney to destroy all copies of notes and other materials containing information derived from the privileged documents). *Id.*

<sup>180</sup> *Transportation Equip. Sales Corp.*, 930 F. Supp. at 1189. The court stated that the remedy the sending attorney asked for did not go far enough to protect the receiving attorney's interests. *Id.* at 1188. The court stated that it wanted to guard against continuing disclosure or misuse of the information. *Id.*

that a list of all people who knew of the document be kept under seal with the court.<sup>181</sup> The court stated that it fashioned such a remedy to deter others from using inadvertently disclosed documents protected by the attorney-client privilege.<sup>182</sup> Thus, the remedy fashioned by this court went beyond the ABA Formal Opinion procedures.<sup>183</sup>

In this case, the court's remedy was almost punitive in nature, and thus the court may not have fairly weighed the interest of the defendant because the defendant's culpability should have been proven beyond a reasonable doubt.<sup>184</sup> Also, the plaintiff received a windfall-type remedy.<sup>185</sup> Once more, this shows the need for a new Model Rule providing a framework that fairly weighs the interests of all parties.<sup>186</sup>

As they stand, the ABA Formal Opinions on inadvertent disclosure and unsolicited disclosure provide some guidance to other bar associations and courts. However, the two separate ABA opinions fail to provide a single framework for bar associations and courts to first determine whether a disclosure is inadvertent or unsolicited. Thus, confusion and controversy have resulted. Also, because the ABA Formal Opinion on inadvertent disclosure fails to address how parties should proceed if they dispute whether a document is protected under the attorney-client privilege, additional confusion has resulted. Therefore, the next Section provides a single Model Rule addressing these issues.

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<sup>181</sup> *Id.* The court stated that no unsealing of the documents shall occur without notice to the sending attorney and an opportunity to be heard. *Id.*

<sup>182</sup> *Id.* The court stated that it must fashion a remedy that avoids prejudice to the sending attorney. *Id.*

<sup>183</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992) (failing to list destruction of documents in its list of procedures.)

<sup>184</sup> See also DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 219-20 (1973) (stating that a punitive award is criminal in nature and liability should be denied for punitive damages unless the defendant's culpability is proven beyond a reasonable doubt and punitive damages have not been shown to have any effect on deterrence). See also Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 498 (1998) (stating that the deterrent effect of punitive damages probably is not great); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 875 (1998) (stating that punishment is one of the goals of punitive damages, but in the case of corporations this goal may not be achieved because blameworthy individuals in a corporation are not punished.)

<sup>185</sup> See also DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 219-20 (1973) (discussing that judges may feel uncomfortable about punitive awards because the plaintiff receives a windfall).

<sup>186</sup> See generally part IV.

#### IV. PROPOSED MODEL RULE AND COMMENT

A single Model Rule defining and differentiating inadvertent and unsolicited disclosure of documents that can be adapted by each state is needed, because bar associations and courts have failed to distinguish between these two types of disclosures.<sup>187</sup> The distinction is important because if the disclosure was unsolicited by the receiving attorney, the receiving attorney may have a legitimate claim to the documents.<sup>188</sup> Moreover, the distinction is significant because if the attorney has received unsolicited, privileged, or confidential documents and believes that the opposing counsel is assisting in an ongoing crime or fraud, the receiving attorney should not notify the sending attorney that he or she has received such documents.<sup>189</sup> Instead, the receiving attorney should notify the proper authorities such as a law enforcement agency or court.<sup>190</sup>

One rule adopted by all states governing misdirected documents will reconcile inconsistencies between various bar associations and various courts.<sup>191</sup> Furthermore, an explicit rule is needed because of the wide variety of the interpretations of the ABA Formal Opinions by bar associations and courts.<sup>192</sup> A consistent Model Rule between courts will reduce forum-shopping in cases where a conflict of law analysis is applicable.<sup>193</sup> Moreover, lawyers will have a consistent set of rules to apply in order to clearly determine what procedures they should follow and what their resulting responsibilities are in such situations.

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<sup>187</sup> For a discussion of state bar associations and courts failing to distinguish between an inadvertent and unsolicited disclosure, see *supra* part III.B.

<sup>188</sup> The ABA has distinguished between these two types of disclosures and has stated that in an unsolicited disclosure situation, the receiving attorney may have a legitimate claim to the documents. See *supra* notes 44-48 and accompanying text. See *supra* notes 93-94 and accompanying text for a discussion of a state whistleblower statute.

<sup>189</sup> See *supra* note 76 and accompanying text for a discussion of the ABA exception to disclosing to the receiving attorney that the documents have been received. See also *supra* note 39 and accompanying text (stating that Model Rule 1.6 also provides exceptions to an attorney keeping information confidential).

<sup>190</sup> For other exceptions where the authorities should be notified even though the information is purported as confidential, see *supra* note 39 and accompanying text.

<sup>191</sup> A single rule governing an attorney's conduct is needed for multidistrict litigation, Department of Justice cases, and civil rights cases. See *supra* note 18 and accompanying text.

<sup>192</sup> See *supra* notes 10, 63, 114-130, 164-186 and accompanying text.

<sup>193</sup> For examples of conflicts of rules, see *supra* notes 7-10 and accompanying text.

Therefore, the interests of judicial economy are served because litigation is less likely where clear procedures have been established.<sup>194</sup>

This Section proposes a Model Rule providing a single framework for distinguishing between an inadvertent and unsolicited disclosure. Once the receiving attorney makes the distinction, the attorney can then determine which procedure under the Model Rule he or she should follow and his or her resulting responsibilities.<sup>195</sup> The Comment to the Model Rule explains and illustrates each type of disclosure.<sup>196</sup> Additionally, the Comment explains reasonable precautions that the sending attorney should take to prevent an inadvertent disclosure.<sup>197</sup> The Comment addresses when an attorney should ask for an *in camera* review of the documents by a court.<sup>198</sup> Future rights of the parties concerning the destruction of documents are discussed in the Comment.<sup>199</sup> Also, the Comment discusses situations where the receiving attorney should ask the court to order full disclosure of the inadvertently disclosed documents.<sup>200</sup>

A. *Proposed Model Rule: Distinguishing Between Inadvertent and Unsolicited Disclosure and Resulting Professional Responsibilities of the Receiving Attorney.*<sup>201</sup>

*(a) When an attorney receives misdirected documents appearing on their face privileged or confidential, the attorney shall use his or her best professional judgment to determine whether the documents were an inadvertent disclosure or an unsolicited disclosure based on the totality of the circumstances. If there is a dispute whether there is an inadvertent or unsolicited disclosure of documents, the disputing party shall petition the court for an in camera review of the documents.*

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<sup>194</sup> See *supra* note 16 and accompanying text.

<sup>195</sup> See *infra* part IV.A.

<sup>196</sup> See *infra* part IV.B.

<sup>197</sup> See *infra* part IV.B.

<sup>198</sup> See *infra* part IV.B.

<sup>199</sup> See *infra* part IV.B.

<sup>200</sup> See *infra* part IV.B.

<sup>201</sup> This Section is based on ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992), ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-382 (1994), and ABA Model Rule of Professional Conduct 1.6. See *supra* notes 179-186 and accompanying text discussing a case where the court fashioned a punitive like remedy. If the court would have followed the proposed Model Rule, the court may have only ordered return of the documents.



*(b) Inadvertently disclosed documents are confidential or privileged documents received from opposing counsel that are clearly not intended for the receiving lawyer and apparently sent to the receiving attorney by mistake. Therefore, the receiving attorney can reasonably determine that such documents are inadvertently disclosed. If an inadvertent disclosure occurs, the receiving attorney is precluded from using the information disclosed in the documents to the receiving attorney's client's advantage unless a court determines otherwise as discussed in paragraph eight. Furthermore, the receiving attorney has a professional responsibility to:*

*(1) stop examining the documents upon realizing that the documents were not intended for the receiving attorney,*

*(2) notify the sending attorney that the documents were received, and*

*(3) follow the sending attorney's instructions concerning return of the original documents.<sup>202</sup>*

*(c) Unsolicited documents are privileged or confidential documents that a lawyer has received from an anonymous source or a third party who is not the opposing counsel or the opposing counsel's client. Thus, the receiving attorney can reasonably determine that this is an unsolicited disclosure of documents, not an inadvertent disclosure of documents. In this situation, the receiving attorney has a professional responsibility to:*

*(1) refrain from reviewing the documents or review the documents only to the extent necessary to determine how to proceed,*

*(2) notify opposing counsel that such materials were sent except as stated in paragraph (d),*

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<sup>202</sup> Michael Alband had inadvertently received documents because the documents clearly were not intended for him. Michael now has a professional responsibility to stop examining the documents, notify the sending attorney, and follow the sending attorney's instructions. However, if there is a dispute concerning whether the documents are protected by the attorney-client privilege, he should petition a court for an in camera review of the documents. If Michael believes that the documents contain information where the sending attorney's client is likely to commit an act resulting in imminent death or substantial bodily harm, Michael should petition a court for full disclosure of the documents. See *supra* notes 164-167. In the Maine situation, the sending attorney's client's confidences would have been protected unless the receiving attorney had reason to believe that the sending client was going to commit an act likely to result in imminent death or substantial bodily harm.

(3) follow the instructions of opposing counsel unless there is a dispute concerning whether the receiving attorney has a legitimate claim to the documents,

(4) and refrain from using the documents except as stated in paragraph (e).

(d) An attorney who has received unsolicited documents disclosed by a third party should not notify opposing counsel of receipt of the documents, but should consult a court or a law enforcement authority where the receiving attorney has reason to believe that the documents disclose:

(1) criminal activity that is likely to result in substantial bodily harm or imminent death, or

(2) ongoing crime or fraud that opposing counsel is assisting.

(e) An attorney who has received unsolicited documents disclosed by a third party may have a legitimate claim to the documents where:

(1) the third party was acting under a state or federal whistleblower statute, or

(2) the documents were improperly withheld and should have been disclosed by opposing counsel in response to a discovery request.<sup>203</sup>

## B. Comment

### Illustrations

[1] The attorney must use his or her best professional judgment to determine whether an inadvertent disclosure or an unsolicited disclosure has taken place. This judgment is based upon his or her comprehensive understanding of the

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<sup>203</sup> See *supra* notes 89-101, 113 and accompanying text. Based on the text of the proposed Model Rule and illustrations, the Massachusetts Committee and the Montana Committee would have correctly identified the situations as unsolicited disclosures and would have correctly determined professional responsibilities for unsolicited disclosures. Having both types of disclosures in one rule would have helped the Massachusetts Committee and Montana Committee correctly distinguish between the two types of disclosures. The same reasoning applies for the court case discussed *supra*. See *supra* notes 114-117. See *supra* note 2. Anne Brown's situation is an unsolicited disclosure case because the investigator was acting as a third party and gave the documents to Anne unsolicited. Anne may have a legitimate claim to the documents because she had asked for the documents during discovery and did not receive them. Also, if the investigator is acting to rectify a wrong because opposing counsel did not disclose the documents, he may be protected under a state or federal whistleblower statute. Currently because there is no Model Rule concerning inadvertent or unsolicited disclosures, an attorney must check his or her jurisdiction's law carefully.

*complex nature of the attorney-client privilege. An instance of an inadvertent disclosure of documents is where an attorney receives a fax that has opposing counsel's name on the cover sheet as the intended recipient of the fax. Another example of an inadvertent disclosure is where an attorney receives a fax that is addressed to opposing counsel's client and the fax is from opposing counsel. Further, an inadvertent disclosure may occur where a large number of documents are produced and sent to the receiving attorney during pretrial discovery and documents that are communications between the opposing attorney and his or her client are included with documents that are not privileged or confidential.*

*[2] An illustration of an unsolicited disclosure is where the receiving attorney did not ask for the documents, but a third party delivered documents to the receiving attorney. Here the third party may be acting under a whistleblower statute and is seeking to rectify unjust or improper conduct. For example, the documents may contain information concerning government fraud. The disclosure of these documents promotes the furtherance of the public good where illegal or unsafe practices are stopped or prevented. Another illustration of an unsolicited disclosure is where the receiving attorney asked for the documents during a production request and opposing counsel did not deliver the documents. Again, the third party delivered the documents to the receiving attorney to rectify unjust or improper conduct on the part of opposing counsel. In this situation, the underlying policy of promoting the full development of the facts essential to a court finding a fair remedy to a controversy is promoted by disclosing the unsolicited documents that were improperly withheld.*

#### *Reasonable Precautions*<sup>204</sup>

*[3] To prevent an inadvertent disclosure, the sending attorney shall take reasonable precautions to ensure that the documents are not inadvertently disclosed to an unauthorized person. Reasonable precautions are clearly marking privileged or confidential materials as such; educating support staff to treat confidential or privileged materials with due care; and having a mechanism in place separating confidential and privileged documents from other documents. The sending attorney should also place a disclaimer on all outgoing documents stating that if the documents have been inadvertently sent, the attorney-client privilege has not been waived at this time and the receiving attorney shall notify the sending attorney that the document was sent.*

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<sup>204</sup> See Thomas J. Leach, *Loss of Attorney-Client Privilege Through Inadvertent Disclosure of Privileged Documents*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 119 (Vincent S. Walkowiak ed., 1997).

*Dispute of Attorney-Client Privilege*<sup>205</sup>

[4] *Where there is a dispute between the sending attorney and the receiving attorney whether documents are subject to the attorney-client privilege, the party asserting the privilege should petition the court for an in camera review of the documents. Documents inadvertently disclosed should remain confidential where the client intended to keep the communication confidential. However, disclosure should take place as discussed in paragraph eight.*

[5] *An in camera review of the documents allows both parties to present his or her case and allows a court to make a fair determination whether or not the documents are subject to the attorney-client privilege.*

[6] *If the attorney-client privilege is not waived by an inadvertent disclosure, then the underlying policy of the attorney-client privilege is promoted because the client is more likely to seek early legal assistance and disclose fully all facts pertinent to his or her case. Moreover, the client is not punished for a mere mistake made by his or her attorney. Nevertheless, where the information reveals that the sending attorney's client is likely to commit an act likely to result in imminent death or substantial bodily harm, the public's interest outweighs the client's interest in protecting the client's confidentiality of information.*

*Inadvertent Disclosure and Sealing Documents*<sup>206</sup>

[7] *When an inadvertent disclosure takes place, the receiving attorney should not ask the court to order the destruction of the documents. Instead, the receiving attorney can ask the court for an in camera review and for the court to order the documents to be sealed. Such documents should not be destroyed because these documents may be needed in future litigation. By ordering destruction of the documents, the court may be interfering with future rights of one of the parties.*

*Protective Order and Full Disclosure*

[8] *When an inadvertent disclosure has occurred, the sending attorney should ask the court to order return of the documents and issue a protective order. The receiving attorney should ask the court to order full disclosure of the*

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<sup>205</sup> See *supra* notes 138-151 and accompanying text. By promoting the zealous representation of the receiving attorney's client, the District of Columbia Committee failed to even mention that the parties should seek a court resolution if there is a dispute if the materials are protected by the attorney-client privilege.

<sup>206</sup> See *supra* notes 168-178 and accompanying text for a discussion of a court ordering the destruction of documents.

*inadvertently disclosed documents only in extraordinary circumstances such as when the receiving attorney has reason to believe that the documents contain information that would prevent the sending attorney's client from committing an act likely to result in imminent death or substantial bodily harm*

## V. CONCLUSION

Advanced technology and increasingly complex litigation involving up to millions of pages of documents have posed many unanswered questions concerning an attorney's ethical obligations. The ABA has taken serious steps to begin to answer some of these questions by examining policy considerations and issuing Formal Opinions on inadvertent and unsolicited disclosure of privileged and confidential documents. Yet, many state bar associations have responded differently to the challenge by taking a formalistic rule-based approach to these complex problems. Thus, many state bar associations have failed to consider an attorney's ethical duties in light of preserving confidential communications between an attorney and client except in rare instances. This Note seeks to restore protection of confidential or privileged communications except in limited circumstances where there is an overriding public policy interest. Effective and ethical representation of the client is promoted by preserving protection of confidential or privileged communications. Likewise, the sending attorney's client is not unjustly punished because his or her attorney has made a mistake. Additionally, this Note seeks to provide a single framework of procedures for attorneys to follow should they receive such documents. Thus, when adopted, the proposed Model Rule and comment can decrease some of the confusion present in this emerging area of the law.

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