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Articles

THE FUTURE OF INADVERTENT DISCLOSURE: THE LINGERING NEED TO REVISE PROFESSIONAL CONDUCT RULES

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Attorneys receive inadvertent disclosures of confidential information in various forms—a misdirected e-mail containing a conversation between opposing counsel and her client; privileged and work product protected documents mistakenly included in documents produced in discovery; notes between an opposing attorney and his client embedded in the metadata of a draft contract. With high-speed communication and a staggering volume of electronically stored information, the risks of inadvertent disclosure are greater today than ever before. These disclosures create a dilemma for both sending and receiving attorneys: The sender wants to mitigate the damage, while the recipient wants to use the information to the extent doing so does not violate any legal or professional conduct obligations.

Certainly one risk of inadvertent disclosure is privilege waiver. This issue has been the primary focus of commentators and lawmakers in recent years, resulting in amendments to the Federal Rules of Civil Procedure in 2006 and the enactment of Federal Rule of Evidence

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* Associate Professor of Law, University of Tennessee College of Law. I am indebted to my colleagues who read and commented on early drafts of this Article: Carl Pierce, Joan Heminway, Judy Cornett, and Jennifer Hendricks. Thank you also to Lawton Cummings, Andrew Perlman, Gregory Sisk, and participants in the Scholarship Roundtable at the 2009 ABA Center for Professional Responsibility Conference for providing helpful suggestions as the Article neared completion. I am grateful for the research assistance provided by George B. Green, Jr., Lindsey Vaughan, and John F. Weaver, Jr.

502 in 2008.¹ But these changes in the law do not address many of the problems associated with inadvertent disclosure. Transactional attorneys have no practical means to obtain the return of an inadvertently disclosed document; litigators are often unable to protect the content of a privileged document pending a waiver ruling; and litigators and non-litigators alike face uncertainty in dealing with confidential metadata. Adding to these problems, the new rule of evidence incentivizes little or no pre-production privilege review even though there is a continuing risk of waiver under the rule.²

In most jurisdictions, professional conduct rules provide limited guidance in addressing these questions. In states that have adopted American Bar Association Model Rule of Professional Conduct 4.4(b), a recipient of an inadvertent disclosure is only required to notify sending counsel of the mistake.³ Comments to the rule add that whether counsel should do more is “a matter of law beyond the scope of these Rules.”⁴ Determining the appropriate response can be even more difficult in states that have not adopted Model Rule 4.4(b). Attorneys in those jurisdictions must determine if a different professional conduct rule, ethics opinion, or case provides guidance. Further, Model Rule 1.6—the Confidentiality of Information rule—does not address two emerging confidentiality issues, which include confidential information in metadata and the disclosure of confidential information pursuant to a clawback or quick peek agreement or order (as contemplated by the new federal rules).⁵

This Article will consider the full breadth of the inadvertent disclosure problem and explain that professional conduct rules are an essential part of a solution. Part I will open by discussing inadvertent disclosure in modern practice. This Part will explain that inadvertent disclosure is an issue for all lawyers, not just litigators. Part II will then provide the history of the professional conduct rules and ethics opinions addressing inadvertent disclosure. Part III will outline other pertinent sources of law, including recent revisions to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Part IV will then explain how all sources of authority work together to address various circumstances of inadvertent disclosure. This discussion will reveal numerous questions and developing problems that remain unanswered.

1. FED. R. CIV. P. 16, 26; FED. R. EVID. 502.

2. *See* FED. R. EVID. 502.

3. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2009).

4. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) cmt. 2 (2009).

5. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

It is against this backdrop that the remaining Parts will consider the appropriateness of a professional conduct solution. Part V will discuss confidentiality and other interests that would be furthered by revising professional conduct rules to address inadvertent disclosure. Unlike federal rules, professional conduct rules can address the bar's interests in all contexts (not just discovery), in all courts (not just federal), and for all attorneys (not just litigators). Part VI will propose revisions to the current Confidentiality of Information rule to clarify counsel's obligation in two contexts: (1) seeking client consent to quick peek and clawback agreements and orders; and (2) proactively preventing disclosure in metadata. Finally, Part VII will outline a new "inadvertent disclosure" professional conduct rule that purposely, but perhaps ironically, contains no reference to the term "inadvertent." Instead, the proposal requires counsel to provide defined protections to an opponent's privileged or work product protected information. This Part will consider how the proposed rule would create a better framework for dealing with inadvertent disclosure in litigation, answer the problems of transactional lawyers, and provide guidance to litigators and non-litigators who might send or receive confidential information in metadata.

I. INADVERTENT DISCLOSURE OF CONFIDENTIAL INFORMATION IN MODERN PRACTICE

A. Terminology

This Article uses the phrase "inadvertent disclosure" in its broadest sense to describe a disclosure of confidential⁶ client information to opposing counsel with no intent to reveal confidential information or to waive attorney-client privilege or work product protection.⁷ This definition is intended to encompass the full range of mistaken, negligent, grossly negligent, and reckless disclosures.⁸

6. An attorney is required to maintain the confidentiality of "information relating to the representation of a client," unless the client authorizes the attorney to disclose. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009).

7. The attorney-client privilege provides that a communication between attorney and client made in confidence for the purpose of obtaining or providing legal assistance cannot be compelled in discovery or introduced in evidence. See FED. R. CIV. P. 26(b)(1); FED. R. EVID. 501, 502(g)(1); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Similarly, an attorney's work product—materials prepared in anticipation of litigation by or for a party or its representative—can generally be protected against discovery. See FED. R. CIV. P. 26(b)(3); FED. R. EVID. 502(g)(2); *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

8. This definition excludes an intentional disclosure when counsel did not intend to waive privilege or work product protection, such as under terms of a quick peek agreement. See *infra* text accompanying note 103.

Some courts have adopted a similar definition, treating disclosures as “inadvertent” if the sending attorney asserts waiver was not intended.⁹ In other jurisdictions, inadvertence turns on the care or lack of care by disclosing counsel (such as the precautions taken to prevent disclosure, extent of the mistake, and timeliness of corrective measures).¹⁰ Accordingly, such jurisdictions might conclude that a grossly negligent or reckless disclosure is not inadvertent, but a negligent disclosure is inadvertent.¹¹

This definitional issue creates an unexpected problem. The problem does not lie in how *courts* utilize these definitions; two courts may define the term differently, yet apply identical tests to determine waiver.¹² The problem is that *attorneys* are frequently required to determine “inadvertence” by professional conduct rules, ethics opinions, case law, agreements, or court orders, and they often define the term narrowly to avoid any obligation to the opponent.

This is exemplified by counsel’s conduct in *Holland v. Gordy Co.*¹³ When reviewing thirteen boxes of documents produced by defense counsel, plaintiff’s lawyer, Thomas Bishoff, found that one box contained confidential attorney memoranda and other litigation files.¹⁴ Precedent existed in the jurisdiction regarding receiving counsel’s ob-

9. *See, e.g.*, *Bensel v. Air Line Pilots Ass’n*, 248 F.R.D. 177, 180 (D.N.J. 2008) (determining that disclosure was “inadvertent” because there was no evidence indicating that the documents were produced intentionally, and then considering five factors to determine whether the “inadvertent” disclosure resulted in waiver); *Minatronics Corp. v. Buchanan Ingersoll, P.C.*, No. GD92-7496, 1995 WL 520686, at *7–*9 (Pa. Ct. Com. Pl. Allegheny County Feb. 14, 1995) (citing *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), as representative of these jurisdictions).

10. *See Minatronics Corp.*, 1995 WL 520686, at *6–*7 (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985), as representative of these jurisdictions); *see also* *Lightbourne v. McCollum*, 969 So. 2d 326, 333–34 n.6 (Fla. 2007) (explaining that the five-factor test is used to determine *if* the disclosure is inadvertent).

11. *See VLT, Inc. v. Lucent Techs., Inc.*, 54 Fed. R. Serv. 3d (West) 1319, 1321–22 (D. Mass. 2003) (noting that some jurisdictions do not consider grossly negligent or reckless disclosures inadvertent, but that others consider anything other than a deliberate decision to waive the privilege inadvertent).

12. In jurisdictions that use the five-factor balancing test to determine waiver, one camp uses the five-factor test to determine if it is fair for the “inadvertent disclosure” to result in waiver; the other camp uses the five-factor test to determine *if* the disclosure is in fact inadvertent, which does not result in waiver. *See Minatronics Corp.*, 1995 WL 520686, at *9. Regardless of the definition of “inadvertent,” the test theoretically should produce the same result. The fact that it does not is a result of the flexibility of the test rather than the definition given to “inadvertent.” *See infra* note 93 and accompanying text (discussing uncertainty in balancing jurisdictions).

13. Nos. 231183–85, 2003 WL 1985800 (Mich. Ct. App. Apr. 29, 2003).

14. *Id.* at *1. Bishoff would later testify that “he was somewhat excited to find” a confidential memorandum prepared by opposing counsel. *Id.* (internal quotation marks omitted).

ligations upon receipt of an inadvertent disclosure.¹⁵ While it is not clear whether Bishoff or the colleagues he consulted were aware of that precedent, they discussed whether the disclosure was inadvertent and concluded that it was not because “the documents were intentionally produced by defendants.”¹⁶ One of Bishoff’s colleagues directed him to write down in detail the contents of one particular memorandum in case it “would never see the light of day again.”¹⁷ Bishoff made handwritten notes that were a verbatim copy of the most significant memorandum, had the entire litigation file copied, and provided copies of the documents to co-counsel.¹⁸

B. Inadvertent Disclosure in Modern Practice

Clients and their attorneys are creating and maintaining ever-increasing volumes of electronically stored information and have the means to communicate that information to third parties with great ease.¹⁹ By 2011, experts estimate that the world will create, capture, or replicate nearly 1800 exabytes of information²⁰: This is ten times more information than created in 2006, which was roughly the equivalent of “3 million times the information in all the books ever written.”²¹ For the first time in 2007, there was more information than permanent storage available for that information.²² For an attorney representing a business client, the amount of data can be stagger-

15. *Id.* at *7 (citing *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 220–21 (W.D. Mich. 1994)).

16. *Id.* at *1 n.8.

17. *Id.* at *1 (internal quotation marks omitted).

18. *Id.* at *2.

19. See Emily Burns et al., *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 201–02 (2008) (describing the recent information explosion, including a comparison of the five exabytes of data created by the world in 2002 with the 161 exabytes created in 2006); Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing With the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 RICH. J.L. & TECH. 15, 3–6 (2006) (describing the increase in electronic information, including business information potentially subject to discovery); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 5–6 (2007) (describing the recent “evolutionary burst in writing technology” that includes “digitization; real time computing; the microprocessor; the personal computer; e-mail; local and wide-area networks leading to the Internet; the evolution of software, which has ‘locked in’ seamless editing as an almost universal function; [and] the World Wide Web”).

20. JOHN F. GANTZ ET AL., *THE DIVERSE AND EXPLODING DIGITAL UNIVERSE: AN UPDATED FORECAST OF WORLDWIDE INFORMATION GROWTH THROUGH 2011* 3 (2008), <http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf>.

21. JOHN F. GANTZ, *THE EXPANDING DIGITAL UNIVERSE: A FORECAST OF WORLDWIDE INFORMATION GROWTH THROUGH 2010* 1 (2007), <http://www.emc.com/collateral/analyst-reports/expanding-digital-ic-white-paper.pdf>.

22. GANTZ ET AL., *supra* note 20, at 2.

ing. A company with five hundred employees, each of whom conservatively average twenty e-mails per day, will produce at least 2,500,000 e-mail messages per year.²³ By one estimate, today's "small" business likely has the equivalent of two thousand four-drawer file cabinets of records—all in the form of electronically stored information.²⁴

When attorneys are charged with handling this information for their clients, it is now more difficult than ever to prevent the inadvertent disclosure of confidential information. In only the past twenty years, inadvertent disclosure has evolved from the slim possibility of misaddressing an envelope, which seemed preventable, to a substantial risk faced by every practicing attorney regardless of the care taken to prevent it.²⁵ The prospect of inadvertent disclosure strikes fear and sometimes pain in the hearts of attorneys.²⁶

23. Thomas V. Laprade, *Can—Should—FDIC v. Singh Survive the Amendments to the Federal Rules of Civil Procedure?*, 22 ME. B.J. 86, 88 (2007).

24. Paul & Baron, *supra* note 19, at 10.

25. Titles, subjects, and dates of articles shed some light on how communication technology and formats of the information communicated have changed rapidly in recent years, creating new issues of inadvertent disclosure. See, e.g., Anna G. Bruckner-Harvey, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 BAYLOR L. REV. 385, 386 (1994) (considering whether the attorney-recipient of a missent facsimile has a duty to his client to use the information or a duty to notify the sender and return the document); Amy M. Fulmer Stevenson, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 CAP. U. L. REV. 347, 357 (1997) ("Laurie realizes that she inadvertently sent [a highly sensitive, confidential] . . . document to opposing counsel. . . . Laurie's confidential document is transiting the twisty passages of the Internet labyrinth."); Joseph W. Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 BROOK. L. REV. 361, 362 (2000) ("[I]t is not just e-mail that raises . . . concerns regarding confidentiality. With the advent of online document repositories, cellular phones, handheld wireless computers, and instant messaging, lawyers have all sorts of new and exciting ways in which they can inadvertently breach their clients' confidences."); Joseph L. Paller Jr., *"Gentlemen Do Not Read Each Other's Mail": A Lawyer's Duties upon Receipt of Inadvertently Disclosed Confidential Information*, 21 LAB. LAW. 247, 247 (2006) (discussing a scenario that illustrates the hazards of inadvertent disclosure when a large volume of documents is produced in an electronic format); David Hricik, *I Can Tell When You're Telling Lies: Ethics and Embedded Confidential Information*, 30 J. LEGAL PROF. 79, 82 (2006) (providing an example of how forwarding electronic documents containing metadata can disclose confidential client information).

26. See *Fed. Deposit Ins. Co. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479–80 (E.D. Va. 1991) ("The inadvertent production of a privileged document is a specter that haunts every document intensive case."); Laprade, *supra* note 23, at 86. Mr. Laprade shares the following:

If you've never experienced the sudden loss of the ability to inhale or exhale, if you've never felt your heart beat 120 times in a minute while sitting still, if you've never fought to hold a look of sangfroid while every muscle in your face is aching to twitch, then you've never inadvertently disclosed privileged documents in a

Litigators face two unique inadvertent disclosure problems—the risk that inadvertent disclosure will occur during discovery²⁷ and the possibility that the judge presiding over a case will rule that an inadvertent disclosure waived the attorney-client privilege or work product protection.²⁸ Beyond these distinctive issues of litigation, inadvertent disclosure is a problem for all attorneys. Litigators and transactional attorneys²⁹ alike use e-mail, facsimile, and mail to communicate with opposing counsel.³⁰ There are numerous examples of inadvertent disclosures occurring in situations such as these—all outside the discovery context.³¹ Further, transactional attorneys provide large volumes

Maine federal court case that surface for the first time during your client's deposition.

Id.

27. See, e.g., *Koch Foods of Ala., LLC v. Gen. Elec. Capital Corp.*, 303 F. App'x 841, 846 (11th Cir. 2008) (stating that plaintiff's counsel inadvertently disclosed a privileged e-mail during discovery); *Bensel v. Air Line Pilots Ass'n*, 248 F.R.D. 177, 179 (D.N.J. 2008) (discussing how allegedly privileged documents were produced in plaintiff's initial disclosures pursuant to Rule 26 of the Federal Rules of Civil Procedure); *Grand River Enter. Six Nations, Ltd. v. Pryor*, No. 02 Civ. 5068 (JFK) (DFE), 2008 WL 1826490, at *1 (S.D.N.Y. Apr. 18, 2008) (noting that the sending attorney produced a privileged memorandum in response to requests for production of documents); see also FED. R. CIV. P. 26(f) advisory committee's note on 2006 amendment (explaining that costs of preventing privilege disclosure and risks of waiver are often "more acute when discovery of electronically stored information is sought").

28. See, e.g., *Bobbitt v. Acad. of Court Reporting, Inc.*, No. 07-10742, 2008 WL 4056323, at *9-*10 (E.D. Mich. Aug. 26, 2008) (finding defendants waived privilege by disclosing e-mail messages in discovery); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006) (explaining that work product waiver is appropriate if disclosure "substantially increases the opportunity for potential adversaries to obtain the information" (citations omitted)).

29. This Article borrows Professor Steven L. Schwarcz's description of transactional lawyers: "[C]ounsel to parties in the negotiating, contract drafting, and opinion-giving process leading to 'closing' a commercial, financing, or other business transaction." Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 486 (2007).

30. See Robert A. Barrer, *Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents*, N.Y. ST. B. ASS'N J., Nov.–Dec. 2005, at 35, 35 (describing scenarios outside of discovery in which inadvertent disclosure can occur); Kathleen Maher, *Don't Fax, Don't Tell: Differing Opinions about ABA Opinions 92-368 and 94-382*, 12 NO. 4 PROF. LAW. 2, 2 (2001) (discussing inadvertent disclosure scenarios including misaddressed letters, incorrectly dialed fax numbers, and misdirected e-mail); Annie Dike, Comment, *A Lucky Break or an Ethical Dilemma?: Assessing the Appropriate Response in the Face of Inadvertent Disclosure*, 31 J. LEGAL PROF. 279, 282–83 (2007) (considering various uses of e-mail by counsel that may lead to inadvertent disclosure).

31. See, e.g., *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 218 (W.D. Mich. 1994) (stating that defense counsel inadvertently sent a privileged letter intended for his client to plaintiff's counsel); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 638 (W.D.N.Y. 1993) (noting that privileged documents that were to be delivered to court for an *in camera* review were mistakenly delivered to opposing counsel); *Robertson v. Yamaha Motor Corp.*, 143 F.R.D. 194, 195–96 (S.D. Ill. 1992) (stating that counsel, apparently

of client documents and electronically stored information to other attorneys in non-discovery contexts, such as when completing due diligence for a business transaction.³² Attorneys inside and outside of litigation may provide confidential client information in metadata of an electronic document.³³ There are many other dealings between opposing attorneys that may lead one to become the recipient of an inadvertent disclosure.³⁴

Whether a client's confidences are disclosed in litigation or otherwise, the client and counsel have an interest in containing the damage. Even if the issue of privilege waiver seems irrelevant, such as when there is no pending litigation, a disclosing lawyer has created a host of other problems for his or her client and self. An attorney has an ethical and fiduciary obligation to maintain confidentiality of client communications.³⁵ If the consequences of the disclosure are sufficiently severe, the client may file an ethics complaint or sue the attorney for professional negligence. Further, the client has an interest in preventing the information from being used to the client's disadvantage, both inside and outside the courtroom, in the present case or transaction, and in any future litigation. Disclosing counsel wants the

through clerical error, attached privileged documents to a letter sent to opposing counsel). Also, in Dike, *supra* note 30, the author, without a reported decision on the issue, relies on the court filings in *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003), to describe how plaintiff's lead counsel accidentally faxed a litigation strategy letter to opposing counsel, who in turn retained a copy of the letter, filed it with the court, and provided it to the Alabama Christian Coalition, which posted the letter on its website. Dike, *supra* note 30, at 279–80. Plaintiff's counsel filed a motion for protective order and sanctions, asking the court to find that the work product privilege had not been waived by the inadvertent disclosure, but the case concluded prior to the court ruling on the motion. *Id.* at 280–81; *see also* *Glassroth*, 347 F.3d 916, 917 (describing facts where plaintiffs filed an application for fees and expenses, but no other motions).

32. In this context, attorneys also may disclose confidential information intentionally. *See* Anne King, Comment, *The Common Interest Doctrine and Disclosures during Negotiations for Substantial Transactions*, 74 U. CHI. L. REV. 1411, 1411–13 (2007) (discussing whether an intentional disclosure of privileged or confidential information during the negotiation of business transactions results in a waiver). This is not unlike disclosure in litigation pursuant to a quick peek agreement. *See* FED. R. CIV. P. 26(f) advisory committee's note on 2006 amendment (describing quick peek agreements).

33. *See, e.g.*, Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 773–74 (2005) (suggesting a hypothetical in which metadata reveals that the opposing party considered conceding an important point in the contract negotiation).

34. *See, e.g.*, *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1094–95 (Cal. 2007) (explaining that inadvertent disclosure occurred when counsel left work product protected material in a conference room after a deposition).

35. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009) (noting the ethical obligation to keep confidential all information learned in the representation of the client); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000) (explaining that the fiduciary duty of loyalty encompasses the obligation of confidentiality).

receiving attorney to stop reading the document and return it, without disseminating it or keeping notes about it, at least until a court rules that any protection was waived. The following Parts discuss the professional conduct rules and other sources of law that govern whether the recipient may, must, should, or should not take these steps or others.

II. PROFESSIONAL CONDUCT RULES GOVERNING INADVERTENT DISCLOSURE OF CONFIDENTIAL INFORMATION

A. *History of Professional Conduct Rules, Ethics Opinions, and Case Law*

Early formulations of professional conduct rules contained no rule specifically addressing inadvertent disclosure of confidential information.³⁶ When the Model Rules of Professional Conduct were adopted in 1983, the only provision that touched upon inadvertent disclosure concerned the sending attorney's obligation to prevent it: Model Rule 1.6(a) requires an attorney to keep information learned in the representation of the client confidential.³⁷ This obligation encompasses the duty to prevent inadvertent disclosure.³⁸

In 1992, the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-368, providing that a lawyer who receives an inadvertent disclosure of privileged or confidential materials should do the following: (1) refrain from examining the materials; (2) notify the sending attorney; and (3) abide by the sending attorney's instructions.³⁹ The committee acknowledged that a "narrow, literalistic" reading of the Model Rules did not spell out this result.⁴⁰ The committee explained that its opinion was informed by the importance of confidentiality under the Model Rules and the absence of a more important compet-

36. See generally MODEL RULES OF PROF'L CONDUCT (1983) (containing no reference to inadvertent disclosure when adopted in 1983); MODEL CODE OF PROF'L RESPONSIBILITY (1969) (containing no reference to inadvertent disclosure from its adoption in 1969 to the end of its effectiveness); CANONS OF PROF'L ETHICS (1908) (containing no reference to inadvertent disclosure when first adopted in 1908 or during its lifespan).

37. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009).

38. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 (2009) (stating that a lawyer must act competently to prevent inadvertent disclosure of a client's confidential information).

39. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992), *withdrawn by* Formal Op. 05-437 (2005).

40. *Id.*

ing policy,⁴¹ the law governing waiver of the attorney-client privilege,⁴² the law governing misstent property,⁴³ the fact that analogous behavior is condemned by the profession,⁴⁴ and the attorney's obligations to his or her client.⁴⁵

ABA Formal Opinion 92-368 received a mixed reaction. Some jurisdictions were critical that the opinion was not based on any explicit requirements found in the Model Rules.⁴⁶ Others asserted that it was inconsistent with an attorney's duty of zealous advocacy and that it inappropriately required the receiving attorney to fix an opponent's mistake.⁴⁷ Despite such criticism, several states relied upon ABA Formal Opinion 92-368 in their own ethics opinions⁴⁸ and case law.⁴⁹

41. *Id.* (considering and rejecting competing interests in punishing carelessness, encouraging greater care, resignation to the fact that the harm cannot be undone, and zealous advocacy).

42. *Id.* (explaining that disclosure does not necessarily result in privilege waiver in litigation, so, likewise, ethics rules should be able to dictate that disclosure does not result in a document losing its confidential character).

43. *Id.* (arguing that the sending lawyer did not intend to relinquish title to the confidential documents and might be considered to have created a bailment, which requires the receiving lawyer to return the documents).

44. *Id.* (discussing another ethics opinion requiring an attorney to inform opposing counsel of an inadvertent omission of a contract provision and hypothetical situations in which it would be inappropriate for a lawyer to take advantage of an opportunity to review an opponent's confidential information).

45. *Id.* (explaining that although being a zealous representative may be thought to include capitalizing on the mistake of an opponent, there are limits to the extent that the lawyer should "go 'all out'" for the client).

46. *See, e.g., In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 698 (N.D. Ga. 1998) ("Opinion 92-368 does not create a reasonable possibility that Plaintiffs' counsel violated a specifically identifiable ethical rule . . ."); Me. Prof'l Ethics Comm'n, Op. 146 (1994) (refusing to follow ABA Formal Opinion 92-368 because it is not based on a specific provision of the Model Rules), *rev'd*, Me. Prof'l Ethics Comm'n, Op. 172 (2000); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 94-3 (1994) (opining that an attorney's failure to follow ABA Formal Opinion 92-368 is not unethical behavior); *see also* American Bar Association Center for Professional Responsibility, Model Rule 4.4: Reporter's Explanation of Changes, <http://www.abanet.org/cpr/e2k/e2k-rule44rem.html> (last visited Feb. 13, 2010) ("Formal Opinion 92-368 . . . has been criticized, in part because there is no provision of the Model Rules directly on point.").

47. *See, e.g., Ill. State Bar Ass'n*, Op. 98-04 (1999) (stating that Opinion 92-368 "places the burden on the wrong party, asking the receiving lawyer to act contrary to the interests of that lawyer's client in order to protect the interests of the careless lawyer and that lawyer's client"); *see also* Maher, *supra* note 30, at 26 ("The judiciary, the bar, and commentators have criticized [ABA Formal Opinion 92-368] for devaluing a lawyer's duty to zealously represent a client and for placing the burden on the receiving lawyer to protect the confidentiality of a careless lawyer and his or her client.").

48. *See, e.g., Or. State Bar Bd. of Governors*, Formal Op. 1998-150 (1998) (presumably overruled by Formal Op. 2005-150 (2005) and OR. RULES OF PROF'L CONDUCT R. 4.4(b) (2009)); Sup. Ct. of Tenn. Bd. of Prof'l Responsibility, Formal Op. 2004-F-150 (2004) (adopting the holding and rationale of ABA Formal Opinion 92-368); Va. State Bar Standing Comm. on Legal Ethics, Op. 1702 (1997) ("ABA Formal Opinion 92-368 correctly

Other jurisdictions required attorneys to follow the requirements of ABA Formal Opinion 92-368 only if they knew the document was inadvertently disclosed prior to reading it.⁵⁰ In still other jurisdictions, receiving attorneys were told that their foremost duty was to their own client; thus, an inadvertent disclosure should be utilized to the advantage of the receiving lawyer's client.⁵¹

In 2002, the Model Rules were amended to add Model Rule 4.4(b), providing that a receiving lawyer who "knows or reasonably should know that [a] document was inadvertently sent shall promptly notify the sender."⁵² Comments to the rule provide that the rule is intended to allow the sending lawyer to take protective measures, but whether the receiving lawyer "is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."⁵³ The comments close by noting that a lawyer may return an inadvertently disclosed document unread, even if he or she has no legal obligation to do so.⁵⁴

states the ethical duties of a lawyer who receives inadvertently transmitted confidential documents from opposing counsel or opposing counsel's client.").

49. *See, e.g.*, *Am. Express v. Accu-Weather, Inc.*, Nos. 91 CIV. 6485 (RWS) & 92 CIV. 705 (RWS), 1996 WL 346388, at *2-*3 (S.D.N.Y. June 25, 1996) (granting sending attorney's motion for sanctions based on ABA Formal Opinion 92-368 when receiving counsel reviewed and refused to return sender's privileged document); *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 219, 221 (W.D. Mich. 1994) (ordering inadvertently sent letter to be destroyed based on ABA Formal Opinion 92-368); *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1094 (Cal. 2007) (holding that recipient of inadvertent disclosure may not read the document beyond what is necessary to determine it is privileged and must notify sending counsel); *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807-08 (Cal. Ct. App. 1999) (fashioning a rule based on ABA Formal Opinion 92-368); *Corey v. Norman, Hanson & DeTroy*, 742 A.2d 933, 941 (Me. 1999) (adopting the rule set forth in ABA Formal Opinion 92-368).

50. *See, e.g.*, D.C. Bar Legal Ethics Comm., Op. 256 (1995); Ill. State Bar Ass'n, Op. 98-04 (1999).

51. *See, e.g.*, *Aerojet-Gen. Corp. v. Transp. Indem. Ins.*, 22 Cal. Rptr. 2d 862, 867-68 (Cal. Ct. App. 1993) (stating that an attorney has a professional obligation to his client to utilize information learned through an opponent's inadvertent disclosure); Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 1999-4 (1999) (finding that the duty to zealously represent an attorney's own client requires the receiving attorney to reject a request that a privileged letter be returned).

52. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2009).

53. MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2009).

54. MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 3 (2009) (explaining that some lawyers may decide to return a document without reading it, "for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address," and that "the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer" when the lawyer is not legally required to do so (citing MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4 (2009))).

Following the adoption of Model Rule 4.4(b), the ABA Ethics Committee issued its Formal Opinion 05-437 withdrawing ABA Formal Opinion 92-368.⁵⁵

Thirty-two states have adopted Model Rule 4.4(b) or a substantially similar provision.⁵⁶ Eight states and the District of Columbia have adopted their own professional conduct rules that require receiving counsel to take one or more steps beyond notification.⁵⁷ In thirty-

55. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).

56. ALASKA RULES OF PROF'L CONDUCT R. 4.4(b) (2009); ARK. RULES OF PROF'L CONDUCT R. 4.4(b) (2005); CONN. RULES OF PROF'L CONDUCT R. 4.4(b) (2009); DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 4.4(b) (2009); FLA. RULES OF PROF'L CONDUCT R. 4-4.4(b) (2009); IDAHO RULES OF PROF'L CONDUCT R. 4.4(b) (2003); ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010); IND. RULES OF PROF'L CONDUCT R. 4.4(b) (2005); IOWA RULES OF PROF'L CONDUCT R. 32:4.4(b) (2009); KAN. RULES OF PROF'L CONDUCT R. 4.4(b) (2007); MINN. RULES OF PROF'L CONDUCT R. 4.4(b) (2007); MISS. RULES OF PROF'L CONDUCT R. 4.4(b) (2005); MO. RULES OF PROF'L CONDUCT R. 4-4.4(b) (2007); MONT. RULES OF PROF'L CONDUCT R. 4.4(b) (2005); NEB. RULES OF PROF'L CONDUCT R. 3-504.4(b) (2008); NEV. RULES OF PROF'L CONDUCT R. 4.4(b) (2006); N.M. RULES OF PROF'L CONDUCT R. 16-404(b) (2009); N.Y. RULES OF PROF'L CONDUCT R. 4.4(b) (2009); N.C. RULES OF PROF'L CONDUCT R. 4.4(b) (2005); N.D. RULES OF PROF'L CONDUCT R. 4.5(a) (2006); OHIO RULES OF PROF'L CONDUCT R. 4.4(b) (2007); OKLA. RULES OF PROF'L CONDUCT R. 4.4(b) (2008); OR. RULES OF PROF'L CONDUCT R. 4.4(b) (2009); PA. RULES OF PROF'L CONDUCT R. 4.4(b) (2006); R.I. RULES OF PROF'L CONDUCT R. 4.4(b) (2008); S.C. RULES OF PROF'L CONDUCT R. 4.4(b) (2009); S.D. RULES OF PROF'L RESPONSIBILITY R. 4.4(b) (2004); UTAH RULES OF PROF'L CONDUCT R. 4.4(b) (2009); VT. RULES OF PROF'L CONDUCT R. 4.4(b) (2009); WASH. RULES OF PROF'L CONDUCT R. 4.4(b) (2006); WIS. RULES OF PROF'L CONDUCT FOR ATTORNEYS R. 20:4.4(b) (2009); WYO. RULES OF PROF'L CONDUCT R. 4.4(b) (2009).

57. ALA. RULES OF PROF'L CONDUCT R. 4.4(b) (2008) (stating that a lawyer, who "knows or reasonably should know that the document was inadvertently sent, should promptly notify the sender" as well as "(1) abide by the reasonable instructions of the sender regarding the disposition of the document; or (2) submit the issue to an appropriate tribunal for a determination of the disposition of the document"); ARIZ. RULES OF PROF'L CONDUCT R. 4.4(b) (2004) ("A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures."); COLO. RULES OF PROF'L CONDUCT R. 4.4(b) (2008) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."); COLO. RULES OF PROF'L CONDUCT R. 4.4(c) (2008) (explaining that unless a court permits otherwise, "a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition"); D.C. RULES OF PROF'L CONDUCT R. 4.4(b) (2007) (stating that a lawyer who receives any "writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing"); KY. RULES OF PROF'L CONDUCT R. 4.4(b) (2009) (stating that a lawyer who "knows or reasonably should know that the document was inadvertently sent shall: (1) refrain from reading the document, (2) promptly notify the sender, and (3) abide by the instructions of the sender regarding its disposition"); LA. RULES OF PROF'L CONDUCT R. 4.4(b) (2008) (stating that a lawyer who

nine of these forty-one jurisdictions with a professional conduct rule addressing the issue, the receiving attorney has no obligation unless he or she determines opposing counsel sent the document “inadvertently.”⁵⁸ In the remaining ten states, no professional conduct rule addresses the recipient’s ethical obligations. Regardless of whether a state has or has not adopted an inadvertent disclosure rule, recipients of inadvertent disclosure should research the jurisdiction’s ethics opinions and case law that may provide additional authority, conflicting authority, or the only authority regarding counsel’s obligations.⁵⁹

receives any writing that appears “on its face . . . to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing”); ME. RULES OF PROF’L CONDUCT R. 4.4(b) (2009) (explaining that “a lawyer who receives a writing and has reasonable cause to believe the writing may have been inadvertently disclosed and contain confidential information or be subject to a claim of privilege or of protection as trial preparation material” means that the lawyer “(1) shall not read the writing or, if he or she has begun to do so, shall stop reading the writing; (2) shall notify the sender of the receipt of the writing; and (3) shall promptly return, destroy or sequester the specified information and any copies”; furthermore, “[t]he recipient may not use or disclose the information in the writing until the claim is resolved, formally or informally,” and “[t]he sending or receiving lawyer may promptly present the writing to a tribunal under seal for a determination of the claim”); N.H. RULES OF PROF’L CONDUCT R. 4.4(b) (2009) (“A lawyer who receives materials relating to the representation of the lawyer’s client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender’s instructions or seek determination by a tribunal.”); N.J. RULES OF PROF’L CONDUCT R. 4.4(b) (2009) (“A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.”); *see also* Petition of the Tennessee Bar Association for the Adoption of Amended Tennessee Rules of Professional Conduct (May 13, 2009), *available at* http://www.tba.org/ethics/amends_051309/2009_rules_petition_withallexhibits.pdf (explaining that proposed rule 4.4(b) would impose obligations beyond notice on recipients of inadvertent and unauthorized disclosures of confidential information).

58. *See supra* notes 56–57 and accompanying text. In Louisiana, the receiving lawyer’s duty is triggered by his or her determination that the document appears to be privileged or otherwise confidential and was produced “under circumstances where it is clear that the writing was not intended for the receiving lawyer.” LA. RULES OF PROF’L CONDUCT R. 4.4(b) (2008). Maine’s rule is triggered by either the receiving attorney’s reasonable belief that the document is subject to a claim of privilege or work product or the reasonable belief the document was inadvertently disclosed. *See* ME. RULES OF PROF’L CONDUCT R. 4.4(b) (2009).

59. Ethics opinions concerning receiving counsel’s obligations fall into one of four categories. The first category requires only that a receiving attorney give notice. *See, e.g.*, Or. State Bar Bd. of Governors, Formal Op. 2005-150 (2005); Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 2007-200 (2007); Utah State Bar Ethics Advisory Opinion Comm., Op. 99-01 (1999). The second category imposes obligations that are similar to or identical to those found in ABA Formal Opinion 92-368. *See, e.g.*, Ky. Bar Ass’n, Op. KBA E-374 (1995); Md. State Bar Ass’n Comm. on Ethics, Op. 2000-04 (2000); N.Y. County Lawyers’ Ass’n Comm. on Prof’l Ethics, Formal Op. 730 (2002); Ass’n

Finally, attorneys should proceed with caution when practicing in a jurisdiction that has not definitively addressed the issue,⁶⁰ as their case may be the one in which the jurisdiction announces its expectations for counsel.⁶¹

B. Professional Conduct Obligations of Recipients of Confidential Information Embedded in Metadata

Metadata adds an additional wrinkle to these professional conduct questions.⁶² Some common metadata examples include information regarding the author, the time a document was last saved, redlining showing revisions by specific authors, and embedded com-

of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2003-04 (2003); N.C. State Bar, Op. 252 (1997); Sup. Ct. of Tenn. Bd. of Prof'l Responsibility, Formal Op. 2004-F-150 (2004); Va. State Bar Standing Comm. on Legal Ethics, Op. 1702 (1997). The third category does not impose any ethical duty on the receiving attorney. *See, e.g.*, Alaska Bar Ass'n, Op. 97-1 (1997); Mass. Bar Ass'n, Op. 99-4 (1999) (explaining that the committee does not answer a question it was not asked, which is whether receiving counsel is obligated to inform sending counsel that he had received and read the letter). The fourth category distinguishes between duties depending on whether the receiving counsel knew that the document was inadvertently disclosed prior to reading it or the receiving attorney learned the document was privileged or work product protected after reading it. *See, e.g.*, Colo. Bar Ass'n Ethics Comm., Op. 108 (2000); D.C. Bar Legal Ethics Comm., Op. 341 (2007); Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct, Op. 98-04 (1999).

60. For example, in an ethics opinion concerning metadata, West Virginia cautioned that review and use of an opponent's privileged information, including privileged information in metadata, "could be" a violation of its Rule 8.4(c)—which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation"—if the lawyer knows the information was inadvertently sent. W. Va. Lawyer Disciplinary Bd., Op. 2009-01 (2009).

61. *See* Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 330-31 (1996) ("Because ABA opinions are sometimes followed and sometimes rejected by state authorities, lawyers in a particular jurisdiction cannot know whether to rely on a published ABA opinion until the subject that it addresses is taken up by that state's ethics committee or the courts of that state.").

62. This Article defines metadata as encompassing all forms of data that may be embedded in electronically stored information. In the strictest sense, though, metadata is "data about data," which includes information such as who edited a document, how many times a document has been opened and closed, and how many minutes a document was left open. Hricik, *supra* note 25, at 81, 84. Additional types of embedded information would include information about the following functions used in Microsoft Word, a word processing program: Track Changes, Fast Saves, Comments, and Versions. *Id.* at 85-86; *see also* Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (defining metadata); THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 33 (CONOR R. CROWLEY et al. eds., 2d ed. 2007) (defining metadata as describing "how, when and by whom [electronically stored information] was collected, created, accessed, modified and how it is formatted" and defining seven other "metadata" terms).

ments.⁶³ Metadata may contain facts relevant to matters in dispute in litigation;⁶⁴ thus, discovery requests may properly encompass requests for metadata.⁶⁵ Metadata may also reveal confidential communications between attorney and client.⁶⁶ Confidential metadata may be revealed in two contexts: (1) in documents that are produced in discovery; and (2) in other communications between opposing attorneys in the current matter—such as when they exchange draft settlement proposals in litigation or as they negotiate a contract for a proposed transaction.⁶⁷

The disclosure of confidential metadata raises professional conduct issues for sending and receiving attorneys. Model Rule 1.6(a) requires an attorney to protect confidential information,⁶⁸ and comments to the rule generally discuss the need to act “competently” to protect confidences and to take “reasonable precautions” to prevent confidences from being disclosed when “transmitting a communica-

63. See Hricik, *supra* note 25, at 84–86; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) [hereinafter ABA Formal Op. 06-442].

64. See *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 359–63 (S.D.N.Y. 2008) (balancing the cost of production of various documents' metadata against the possible benefit in determining whether to require production); ABA Formal Op. 06-442, *supra* note 63, at 3 (“[W]hen a party to a lawsuit is attempting to establish ‘who knew what when,’ the date and time that a critical document was created or who drafted it may be a critical piece of information.”); see also Thomas Spahn, *Metadata: A Case Study in the Nature of Ethics Rules*, EXPERIENCE, Summer 2007, at 44, 44 (discussing how the Wichita, Kansas, police were able to learn the identity of the “BTK Killer” by reviewing the metadata of a document sent by the serial killer).

65. Metadata is discoverable and often requested in litigation. See FED. R. CIV. P. 34 (allowing a party to serve a request on another party to “inspect, copy, test, or sample any designated documents or electronically stored information—including . . . data or data compilations stored in any medium from which information can be obtained”); Paul W. Grimm, *Ethical Issues Associated with Preserving, Accessing, Discovering, and Using Electronically Stored Information*, SP003 A.L.I.-A.B.A. 693, 695, 719–24 (2008) (noting that under FED. R. CIV. P. 34, lawyers can request information be produced in “native format,” which would include metadata, and also urging attorneys who scrub metadata from electronically stored information in discovery, such as when the information has not been requested in native format, to inform opposing counsel and to maintain a copy of the electronically stored information with the metadata). For information regarding a producing party's obligations in this regard and best practices, see THE SEDONA CONFERENCE, *supra* note 62, at 60–66.

66. See ABA Formal Op. 06-442, *supra* note 63, at 3 (“If a payment amount is being negotiated, then a redlined change or a comment in a draft agreement that suggests how much more the opposing party is willing to pay or how much less they might take likely is of the highest importance.”).

67. See, e.g., Hricik, *supra* note 25, at 80 n.8, 82. Professor Hricik discusses an example where an attorney who searched for embedded information in a contract he was negotiating with opposing counsel was able to use Microsoft Word and a few clicks of the mouse to find comments from business people on the other side to their counsel regarding contract terms, negotiating positions, and bottom lines. *Id.* at 82.

68. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009).

tion.”⁶⁹ The comments do not specifically address an issue that is confusing to many attorneys, that issue being *how* to prevent disclosure of confidences in metadata.⁷⁰

In twelve jurisdictions, ethics opinions address a sending attorney’s obligation to prevent disclosure of confidential information in metadata.⁷¹ These opinions stress the need for attorneys to obtain education, training, and professional assistance in removing metadata,⁷² provide links to resources about metadata creation and removal,⁷³ and suggest methods that can be utilized to lessen the risk of metadata disclosure.⁷⁴ Similarly, in its Formal Opinion 06-442, the ABA provides suggested methods for sending attorneys to use to avoid metadata disclosure.⁷⁵ While specific guidance is likely more helpful

69. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmts. 16–17 (2009).

70. See generally MODEL RULES OF PROF’L CONDUCT R. 1.6 cmts. (2009). See also Hrick, *supra* note 25, at 91–92 (asserting that in 2005, many lawyers were still not aware of metadata; thus, a failure to prevent disclosure of confidences in 2005 may not have been a breach of the duty of care).

71. Ala. State Bar Office of the Gen. Counsel, Op. RO-2007-02 (2007); Ariz. State Bar Ethics Comm., Op. 07-03 (2007); Colo. Bar Ass’n Ethics Comm., Formal Op. 119 (2008); D.C. Bar Legal Ethics Comm., Op. 341 (2007); Fla. Bar, Op. 06-2 (2006); Me. Prof’l Ethics Comm’n of the Bd. of Overseers of the Bar, Op. 196 (2008); Md. State Bar Ass’n Comm. on Ethics, Docket No. 2007-09 (2007); N.H. Bar Ass’n Ethics Comm., Op. 2008–2009/4 (2009); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 782 (2004); Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 2009-100 (2009); Vt. Bar Ass’n Prof’l Responsibility Section, Op. 2009-1 (2009); W. Va. Lawyer Disciplinary Bd., Op. 2009-01 (2009).

72. See, e.g., Colo. Bar Ass’n Ethics Comm., Formal Op. 119 (2008) (noting that it may be appropriate to retain persons with expertise in computer software and hardware to set up systems to control or prevent transmission of metadata); D.C. Bar Legal Ethics Comm., Op. 341 (2007) (“[L]awyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures.”); Fla. Bar, Op. 06-2 (2006) (noting that the duty to protect confidential client information in metadata “may necessitate a lawyer’s continuing training and education in the use of technology”).

73. See, e.g., D.C. Bar Legal Ethics Comm., Op. 341 n.2 (2007); Fla. Bar, Op. 06-2 n.2 (2006); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 782 n.2 (2004).

74. See, e.g., Colo. Bar Ass’n Ethics Comm., Formal Op. 119 (2008) (suggesting that attorneys scrub metadata, print documents in circumstances where it is vital that no metadata be transmitted, and avoid redline or hidden comments); N.H. Bar Ass’n Ethics Comm., Op. 2008–2009/4 (2009) (asserting that lawyers do not have to purchase software to scrub metadata from documents, but may instead take steps to avoid creating metadata, delete metadata, or send a hard copy, faxed, or scanned version of a document); W. Va. Lawyer Disciplinary Bd., Op. 2009-01 (2009) (explaining methods to protect confidences in metadata, including sending hard copies, sending only images through scanning or creating a Portable Document Format file, faxing, and using software programs to scrub metadata).

75. ABA Formal Op. 06-442, *supra* note 63, at 4–5 (suggesting that counsel could avoid creating metadata, delete metadata—such as comments in a document—scrub metadata from documents, transmit hard copy, facsimile, or scanned image versions of documents, or enter a confidentiality agreement).

for less technology-savvy attorneys, some of the ethics opinion advice may be of questionable utility. For example, some opinions encourage attorneys to avoid creating metadata, remove metadata themselves, or convert documents to a Portable Document Format (“PDF”) file.⁷⁶ It is almost certain, however, that attorneys often fail in attempts to avoid creating metadata or in efforts to remove it manually.⁷⁷ Further, many forms of metadata are not removed by conversion to PDF.⁷⁸ While it may be helpful to provide links to information about software programs that can remove metadata (such as software programs that scrub metadata), many jurisdictions are hesitant to do so for fear that the references will become dated.⁷⁹

Another question is the professional obligations of an attorney who receives an opponent’s confidential metadata. In its Formal Opinion 06-442, the ABA opines that the issue of inadvertent disclosure may be relevant to deciding a recipient’s duties upon receipt of confidential metadata.⁸⁰ The opinion refuses to characterize the transmission of confidential metadata as inadvertent, however, explaining that the question of inadvertence “may be fact specific.”⁸¹ ABA Formal Opinion 06-442 further provides that even if the metadata disclosure is inadvertent, the receiving attorney’s only obligation under Model Rule 4.4(b) is to notify sending counsel that the information was sent.⁸² With no other professional conduct rule

76. See *supra* note 74 and accompanying text.

77. See Hricik, *supra* note 25, at 91 (explaining an example where an attorney either creates a file without knowing it contains metadata or tries but fails to remove metadata); *id.* at 91–92 (noting that after speaking to nearly one thousand attorneys, it was “apparent that the vast majority had never heard of embedded data, let alone how to avoid creating it or how to remove it”); Adam K. Israel, Note, *To Scrub or Not to Scrub: The Ethical Implications of Metadata and Electronic Data Creation, Exchange, and Discovery*, 60 ALA. L. REV. 469, 474–75 (2009) (observing the “potential for oversight or user error” associated with do-it-yourself metadata removal techniques).

78. See Hricik, *supra* note 25, at 88–89 (explaining that document images, such as Portable Document Format, saved as “.pdf” files, and Rich Text Format, saved as “.rtf” files, may still contain metadata); Israel, *supra* note 77, at 473–74 (listing numerous categories of metadata that may still be contained in PDF files).

79. Colo. Bar Ass’n Ethics Comm., Formal Op. 119 n.1 (2008) (noting that any primer on controlling metadata would become obsolete almost immediately and would not be included in the ethics opinion).

80. ABA Formal Op. 06-442, *supra* note 63, at 3.

81. *Id.* at 3 n.7. The opinion further states the following:

Whether the receiving lawyer knows or reasonably should know that opposing counsel’s sending, producing, or otherwise making available an electronic document that contains metadata was “inadvertent” within the meaning of Rule 4.4(b), and is thereby obligated to provide notice of its receipt to the sender, is a subject that is outside the scope of this opinion.

Id. at 4.

82. *Id.* at 3.

prohibiting review and use of confidential metadata, the ABA observes that the receiving attorney would thus be permitted to review and use the information.⁸³

Only one state's professional conduct rule explicitly addresses the obligations of a recipient of confidential metadata. Comments to Maine's recently adopted Rule 4.4(b) provide that confidential metadata "may be deemed to be inadvertently disclosed, and thus subject to [the protections of Rule 4.4(b)]."⁸⁴ Six jurisdictions have adopted ethics opinions that allow a receiving attorney to search an opponent's metadata, though five of these impose additional obligations if the recipient determines the information was sent inadvertently.⁸⁵ Opinions in six states prohibit any review of an opponent's metadata.⁸⁶

83. *See id.*

84. ME. RULES OF PROF'L CONDUCT R. 4.4 cmt. 4 (2009). *But cf.* Me. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 196 (2008) (prohibiting receiving attorney from searching an opponent's metadata in an effort to find confidential information).

85. Colo. Bar Ass'n Ethics Comm., Formal Op. 119 (2008) (allowing a receiving attorney to review metadata, but requiring the receiving attorney to presume that any confidential information was inadvertently sent, which triggers an obligation of notice to the sending attorney under the state's version of Model Rule 4.4(b)); D.C. Bar Legal Ethics Comm., Op. 341 (2007) (permitting the review of metadata unless the recipient "has actual knowledge that the metadata was inadvertently sent"); Md. State Bar Ass'n Comm. on Ethics, Docket No. 2007-09 (2007) ("Subject to any legal standards or requirements . . . this Committee believes that there is no ethical violation if the recipient attorney . . . reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata."); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2009-100 (2009) (allowing review and use of an opponent's metadata, but noting that if the receiving lawyer determines the disclosure was inadvertent, notice is required under the state's Rule 4.4(b)); Vt. Bar Ass'n Prof'l Responsibility Section, Op. 2009-1 (2009) (opining that lawyers are not prohibited from reviewing opponent's metadata but reminding attorneys that they must notify the sender if they know or reasonably should know the document was inadvertently disclosed); W. Va. Lawyer Disciplinary Bd., Op. 2009-01 (2009) (opining that if an attorney has "actual knowledge" that the metadata was inadvertently sent, the attorney should consult with the sending lawyer before reviewing the metadata and adding that it is "always safer to notify the sender before searching electronic documents for metadata").

86. Ala. State Bar Office of the Gen. Counsel, Op. RO-2007-02 (2007) (opining that the unauthorized deliberate search for metadata by a receiving attorney is prohibited); Ariz. State Bar Ethics Comm., Op. 07-03 (2007) (prohibiting searching metadata unless authorized to do so by law, rule, order, or court procedure, but providing that if an attorney innocently or inadvertently discovers metadata that the attorney knows or reasonably should know is confidential or privileged, he or she must notify the sender and "preserve the status quo for a reasonable period of time"); Fla. Bar, Op. 06-2 (2006) (providing that a recipient of an electronic document must not try to review that document's metadata, but if the lawyer inadvertently does so, then he or she must promptly notify the sender); Me. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 196 (2008) ("[W]e find that an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is

III. OTHER SOURCES OF LAW ADDRESSING INADVERTENT DISCLOSURE, INCLUDING RECENT AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

The law of privilege waiver is the key doctrine used to address the consequences of inadvertent disclosure. The question of waiver is not focused solely on a document's admissibility at trial and is rarely reserved until the eve of trial. Rather, sending attorneys seek a waiver ruling to regain control of the document, to prevent adverse use, and to request other relief.⁸⁷ Historically, federal and state courts have followed one of three tests to determine if an unintentional disclosure

legally confidential and is or should be reasonably known not to have been intentionally communicated.”); N.H. Bar Ass’n Ethics Comm., Op. 2008–2009/4 (2009) (“Receiving lawyers have an ethical obligation not to search for, review, or use metadata Receiving lawyers necessarily know that any confidential information contained in the electronic material is inadvertently sent, triggering the obligation under Rule 4.4(b) not to examine the material.”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 749 (2001) (prohibiting the use of computer technology to “surreptitiously ‘get behind’ visible documents” because the data may contain attorney-client privileged or work product protected information); *see also* N.Y. County Lawyers’ Ass’n Comm. on Prof’l Ethics, Op. 738 (2008) (“A lawyer who receives from an adversary electronic documents that appear to contain inadvertently produced metadata is ethically obligated to avoid searching the metadata in those documents.”).

87. *See, e.g.*, *Kumar v. Hilton Hotels Corp.*, No. 08-2689, 2009 WL 1683479, at *1 (W.D. Tenn. June 16, 2009) (granting Hilton’s “Emergency Motion for Return of Privileged Documents and Non-Waiver of Privilege”); *Figueras v. P.R. Elec. Power Auth.*, 250 F.R.D. 94, 95 (D.P.R. 2008) (describing case in which disclosing party sought protective order directing receiving party to “return the inadvertently disclosed document” and prohibiting receiving party from “inquiring into matters discussed in the document”); *Transp. Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187, 1188–89 (N.D. Ohio 1996) (finding privilege was not waived and ordering the receiving party to not use the document, to provide a copy of the order to all recipients of the document, and to file with the court a description of efforts made to ensure no improper use of document); *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 218, 221 (W.D. Mich. 1994) (requiring, upon a motion for a protective order, plaintiff’s counsel to destroy a confidential seven page letter that an assistant at defendant’s law firm accidentally mailed to plaintiff’s counsel); *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, No. 2921–VCN, 2008 WL 1851790, at *5–*6 (Del. Ch. Apr. 18, 2008) (ruling during discovery phase of case that inadvertent disclosure did not result in waiver and that privileged documents must be returned to disclosing party); *Atlas Air, Inc. v. Greenberg Taurig, P.A.*, 997 So. 2d 1117, 1118–19 (Fla. Dist. Ct. App. 2008) (disqualifying law firm when one of its attorneys reviewed opposing counsel’s privileged documents that were inadvertently delivered to the firm by a third party contractor hired to copy and produce documents); *Campbell v. Aerospace Prods. Int’l*, 830 N.Y.S.2d 416, 417 (N.Y. App. Div. 2007) (affirming trial court’s grant of plaintiffs’ motion for protective order directing defendants to return inadvertently disclosed document on ground that it was privileged); *see also* John T. Hundley, “*Inadvertent Waiver*” of Evidentiary Privileges: *Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 281 & n.78 (1995) (citing cases in which courts, finding no waiver by inadvertent disclosure, entered rulings that attempted to “‘put the genie back into the bottle’ of confidentiality from which she sprang”).

of privileged information results in waiver.⁸⁸ In jurisdictions that follow the “strict” approach, any disclosure of confidential information waives the privilege.⁸⁹ Jurisdictions following the “lenient” approach find no waiver for any disclosure when the client did not intend to waive the privilege.⁹⁰ Finally, the most popular test is the “balancing” approach, also known as the “modern” or “middle” approach. Jurisdictions applying this approach consider the following five factors to determine waiver: “(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the ‘overriding issue of fairness.’”⁹¹ While many consider the balancing test the fairest approach,⁹² the standard creates substantial uncertainty regarding whether a court will ultimately determine that a particular disclosure waived the privilege.⁹³

88. In addressing the consequences of inadvertent disclosure, many courts have analyzed work product waiver under the same rubric as privilege waiver. See EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 1086–87 (Am. Bar Ass’n ed., 5th ed. 2007) (citing *Fleet Nat’l Bank v. Tonneson & Co.*, 150 F.R.D. 10, 11 (D. Mass. 1993)); 6 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 26.70(6)(c) (3d ed. 2009). In other courts, waiver of work product protection is found if an inadvertent disclosure creates a significant likelihood that an adversary will obtain the information. See, e.g., *Cont’l Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 764, 772–73 (D. Md. 2008) (finding work product waiver where work product was “inadvertently” posted on a website, because the disclosure created a significant likelihood that an adversary would obtain the information). But see *Nutramax Labs., Inc. v. Twin Labs, Inc.*, 183 F.R.D. 458, 464 n.10 (D. Md. 1998) (“The work product doctrine . . . is both broader and more robust than the attorney client privilege, as it does not appear that it can be waived by inadvertent disclosure in the same way that the attorney client privilege can.”). With the enactment of Federal Rule of Evidence 502, federal courts are required to apply the same test to determine waiver for inadvertent disclosure of work product as for inadvertent disclosure of attorney-client privileged information. FED. R. EVID. 502(b).

89. See, e.g., *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *Fed. Deposit Ins. Corp. v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992).

90. See, e.g., *Stratagem Dev. Corp. v. Heron Int’l N.V.*, 153 F.R.D. 535, 543–44 (S.D.N.Y. 1994); *Mendenhall v. Barber-Green Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982).

91. See *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (quoting and applying the five elements used in *Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985), to support a holding of waiver).

92. See, e.g., *Hydraflow, Inc. v. Enid Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (“To the extent that fairness is also a value, the approach taken by federal courts [applying the balancing test] . . . is, for that reason, preferred.”).

93. See *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933, 942 (Me. 1999) (agreeing with criticism that the balancing approach “creat[es] an uncertain, unpredictable privilege, dependent on the proof of too many factors concerning the adequacy of the steps taken to prevent disclosure”); Julie Cohen, Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 637–40 (2008) (comparing two applications of the balancing test from different courts to show the inconsistencies and unpredictability of the test).

An inadvertent disclosure can have consequences beyond waiver for a single document. A court may rule that the disclosure results in privilege waiver for all documents concerning the same subject matter.⁹⁴ Further, a court could find that an inadvertent disclosure made under a nonwaiver agreement may result in waiver in unrelated litigation against third parties.⁹⁵ These concerns have led to costly pre-production privilege review that still may not detect every privileged document.⁹⁶ Further, the volume of information and discovery schedule in some cases can make a document-by-document pre-production privilege review impossible⁹⁷ or impractical.⁹⁸

The risk of waiver under various sources of law applied by federal courts and the high cost of avoiding waiver were of primary concern for the committees that recommended changes to the Federal Rules

94. See *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (applying waiver of privilege to all attorney-client communications relating to the subject matter in the context of an advice-of-counsel defense); *Texaco P.R., Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 883–84 (1st Cir. 1995) (finding that the disclosure of “four carelessly unveiled documents” relating to the same topic as fourteen other documents in the same group constituted waiver as to all eighteen disclosures); see also *Hundley*, *supra* note 87, at 280 n.76 (citing cases where an inadvertent disclosure resulted in subject matter waiver). For work product, subject matter waiver is less likely to result from a single disclosure, inadvertent or otherwise. See *Cont'l Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 773–74 (D. Md. 2008) (citing various authorities for the proposition that neither intentional nor inadvertent disclosure of work product will necessarily result in subject matter waiver).

95. See, e.g., *Hopson v. Mayor of Balt.*, 232 F.R.D. 228, 235 (D. Md. 2005) (discussing risk of waiver in a subsequent case against a different party, even when parties in prior case agreed that inadvertent disclosure would not result in waiver).

96. See FED. R. EVID. 502 advisory committee's note (explaining that the Rule's second purpose is to “respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure . . . will operate as a subject matter waiver”).

97. See, e.g., Paul & Baron, *supra* note 19, at 13. The authors explain the following: Take then, for example, litigation in which the universe subject to search stands at one billion e-mail records, at least 25% of which have one or more attachments of varying length (1 to 300 pages). Generously assume further that a model “reviewer” (junior lawyer, legal assistant, or contract professional) is able to review an average of fifty e-mails, including attachments, per hour. Without employing any automated computer process to generate potentially responsive documents, the review effort for this litigation would take 100 people, working ten hours a day, seven days a week, fifty-two weeks a year, over fifty-four years to complete.

Id. (footnote call numbers omitted).

98. See, e.g., *Hopson*, 232 F.R.D. at 244 (explaining that in a case with millions of documents, a “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”); see also John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2 FED. CTS. L. REV. 57, 59 (2007) (explaining that the high cost of pre-production privilege review “threatens to make the federal courts the exclusive litigation playground of the super rich”).

of Civil Procedure (“FRCP”)⁹⁹ and the Federal Rules of Evidence (“FRE”).¹⁰⁰ In 2006, the federal civil procedure rules were amended to encourage litigants to agree on the consequences of producing, intentionally or unintentionally, a client’s privileged or work product protected information. In Rule 26(f), attorneys are urged to agree on a procedure to assert claims of privilege after production of documents; these agreements are referred to in this Article as “Privilege Disclosure Agreements” because they allow the parties to agree on the consequences of privileged document disclosure.¹⁰¹ Committee notes explaining the amendments describe one such agreement as a “clawback agreement,” which is an agreement that if a party discloses a privileged document without intent to waive the privilege, then the party may request the document’s return without waiver.¹⁰² The notes

99. See FED. R. CIV. P. 26(b)(5) advisory committee’s note on 2006 amendment (“The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery.”); FED. R. CIV. P. 26(f) advisory committee’s note on 2006 amendment (“Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.”).

100. FED. R. EVID. 502 advisory committee’s note (explaining two purposes for the Rule: (1) to resolve longstanding disputes about whether inadvertent disclosure results in waiver; and (2) to address prohibitive costs associated with pre-production privilege review needed to avoid subject matter waiver); S. REP. NO. 110-264, at 1–2 (2008) (“Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation cost increases.”); see also Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 240 (2006). Professors Broun and Capra argue that a congressional enactment is necessary:

If a statute or rule governing inadvertent waiver, scope of waiver, and selective waiver of an evidentiary privilege is to effectively eliminate the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, then the provision must be binding on all persons, whether or not they are parties to the litigation in which the disclosure takes place, and in all courts, state and federal.

Id.

101. FED. R. CIV. P. 26(f)(3)(D) (providing that the discovery plan must contain the parties’ views and proposals on “any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order”).

102. FED. R. CIV. P. 26(f) advisory committee’s note on 2006 amendment; see also FED. R. CIV. P. 16 advisory committee’s note on 2006 amendment (referring to and describing clawback agreements, though not by name); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (“[M]any parties to document-intensive litigation enter into so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents.”); THE SEDONA CONFERENCE, *supra* note 62, at 8 (defining “clawback agreement” as “[a]n agreement outlining procedures to be followed to protect against waiver of privilege or work product protection due to inadvertent production of documents or data”).

also describe a “quick peek” agreement as one that contemplates intentional disclosure of privileged documents—disclosure without pre-production privilege review—under an agreement that the quick peek does not waive the privilege.¹⁰³ The rules also provide that federal courts may enter orders implementing these agreements; this Article terms these orders “Privilege Disclosure Orders.”¹⁰⁴

Further, FRCP 26(b)(5)(B) provides that if a party discloses a document in discovery and wishes to assert that the document is privileged or protected as trial-preparation material, the party should notify the recipient and explain the basis of the privilege claim.¹⁰⁵ The rule directs the recipient of such notice to “return, sequester, or destroy” the information, to retrieve information that has already been disseminated, and to not use or disclose the information.¹⁰⁶ The receiving party may submit the sequestered document to the court for a determination of whether the information is privileged, and the producing party must preserve the information until the claim is resolved.¹⁰⁷

On September 19, 2008, FRE 502 was enacted.¹⁰⁸ FRE 502(b) provides that a disclosure does not waive the privilege if three standards are satisfied: “(1) the disclosure is inadvertent; (2) the holder of

103. FED. R. CIV. P. 26(f) advisory committee’s note on 2006 amendment; *see also* FED. R. CIV. P. 16 advisory committee’s note on 2006 amendment (referring to and describing quick peek agreements without officially referring to them as such); THE SEDONA CONFERENCE, *supra* note 62, at 42 (defining “quick peek” as “[a] production whereby documents and/or [electronically stored information] are made available to the opposing party before being reviewed for privilege, confidentiality or privacy, requiring stringent guidelines and restrictions to prevent waiver”).

104. *See* FED. R. CIV. P. 16(b)(3)(B)(iv) (providing that a scheduling order may include party agreements for asserting claims of privilege or work product protection after information is produced). Such orders and related party agreements are given various names by courts, commentators, and rulemakers; they may be referred to as nonwaiver agreements, inadvertent disclosure agreements, confidentiality orders, and “502(d) orders,” or they may be referenced in terms of a broader order in which they are incorporated, such as a “scheduling order” or a “protective order.” *See, e.g.*, FED. R. CIV. P. 16(b)(1) (“scheduling order”); FED. R. EVID. 502 advisory committee’s note (“confidentiality orders”); *Alcon Mfg., Ltd. v. Apotex Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *4 (S.D. Ind. Nov. 26, 2008) (“protective order”); Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, 687–88, 735 (2009) (“nonwaiver agreement” and “502(d) order”); Paul & Baron, *supra* note 19, at 37 (“inadvertent disclosure agreement”).

105. FED. R. CIV. P. 26(b)(5)(B). Under the heading “Information Produced,” the rule provides the following: “If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it.” *Id.*

106. *Id.*

107. *Id.*

108. FED. R. EVID. 502.

the privilege . . . took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).¹⁰⁹ Like FRCP 26, the new FRE 502 contemplates that litigants may enter Privilege Disclosure Agreements.¹¹⁰ When federal courts enter Privilege Disclosure Orders consistent with these agreements, or enter a Privilege Disclosure Order in the absence of such an agreement, FRE 502(d) provides that the order is enforceable in subsequent federal and state court proceedings.¹¹¹ Subsection (c) of the rule discusses the effect in federal court of privilege disclosures that occur in state court.¹¹²

IV. APPLICATION OF THE VARIOUS SOURCES OF AUTHORITY REGARDING INADVERTENT DISCLOSURE: ISSUES ADDRESSED AND QUESTIONS THAT REMAIN

This Part synthesizes various sources of authority in order to consider the implications of inadvertent disclosure in litigation, and then in non-litigation matters. Finally, this Part discusses the legal and professional conduct issues surrounding disclosure and receipt of confidential information in metadata.

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

110. See FED. R. EVID. 502(e); FED. R. CIV. P. 26(f).

111. FED. R. EVID. 502(d) (“Controlling effect of a court order.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.”); FED. R. EVID. 502(e) (“Controlling effect of a party agreement.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, *unless it is incorporated into a court order.*” (emphasis added)); see also FED. R. EVID. 502(d) advisory committee’s note (“[T]he court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.”). The terminology used in 502(d) is so broad that it may encompass many orders other than what this Article terms Privilege Disclosure Orders. See, e.g., *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, No. 4:08-CV-684-Y, 2009 WL 464989, at *3–*5 (N.D. Tex. Feb. 23, 2009) (finding that although the defendant objected to producing privileged documents, citing concern that privilege would be considered waived in pending litigation in another court, the court ordered production and stated that privilege would not be waived pursuant to FRE 502(d)). Further, the language of 502(d) does not ensure that all Privilege Disclosure Orders will prevent waiver in future litigation; thus, the rule has a narrower application than many attorneys likely envision. See *infra* text accompanying notes 125–41 (discussing the rule’s application to “post-disclosure orders”).

112. FED. R. EVID. 502(c).

A. *Litigation Issues: The Continuing Possibility of Privilege Waiver and Gaps in Protection for a Document Pending a Waiver Determination*

In litigation, an attorney who learns that he or she inadvertently disclosed a document should have two questions. First, what is the likelihood that a court will find no waiver of the privilege, allowing the court to order the document's return and perhaps other relief?¹¹³ Second, prior to that waiver ruling, will my opponent protect the status quo, that is, not disseminate or otherwise use the contents of the document to my client's disadvantage?²

1. *Continuing Threat of Waiver*

While some have asserted that litigants have much greater protection against privilege waiver with the enactment of FRE 502,¹¹⁴ substantial risks of waiver remain.¹¹⁵ First, when there is no Privilege Disclosure Agreement or Order, the applicable law is FRE 502(b).¹¹⁶ That rule essentially adopts the "balancing" approach to determine waiver.¹¹⁷ Thus the new FRE 502(b) approach incorporates the same

113. See *supra* note 87 and accompanying text (explaining that the waiver ruling is sought to obtain additional relief beyond a decision on admissibility).

114. See, e.g., S. REP. NO. 110-264, at 3 (2008) (opining that because a Privilege Disclosure Order is enforceable in later proceedings, the rule will "limit discovery costs by ensuring that parties . . . will know they can rely on the new waiver rules in subsequent proceedings"); Ashish Prasad & Vazanthe Meyers, *The Practical Implications of Proposed Rule 502*, 8 SEDONA CONF. J. 133, 139 (2007) (opining that under then-proposed FRE 502, "[c]orporations will have a heightened ability to rely, even in state court, on agreements, such as 'clawback agreements,' which become a part of court orders, and the management of large-scale discovery should be less burdensome as a result").

115. This Article presumes that FRE 502 is constitutional and will be enforced. See generally Noyes, *supra* note 104, at 700-42 (discussing whether Congress had authority to enact FRE 502 and whether the rule's enforcement may violate the due process rights of persons and entities).

116. FED. R. EVID. 502(b); see, e.g., *Reckley v. City of Springfield*, No. 3:05-cv-249, 2008 WL 5234356, at *3 (S.D. Ohio Dec. 12, 2008) (holding that under FRE 502(b), privilege was not waived for inadvertently disclosed e-mail messages); *B-Y Water Dist. v. City of Yankton*, No. CIV. 07-4142, 2008 WL 5188837, at *1-*2 (D.S.D. Dec. 10, 2008) (applying FRE 502(b) and determining that counsel's disclosure of two privileged documents did not result in waiver).

117. FED. R. EVID. 502(b) advisory committee's note (explaining that "the rule opts for the middle ground: inadvertent disclosure of protected communications . . . does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error" and that "[t]he rule is flexible enough to accommodate any of [the five factors considered in balancing jurisdictions]"); see also *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 226-27 (E.D. Pa. 2008) (applying FRE 502(b) to determine privilege waiver and analyzing the facts of the case by considering the traditional five-factor balancing test).

uncertainty and possibility of waiver that exists in balancing jurisdictions.¹¹⁸

Second, contrary to popular misconception, orders entered under FRE 502(d) do not foreclose the possibility of waiver. The rule contemplates that courts will enter orders regarding the consequences of *future* disclosures of privileged information¹¹⁹—the Privilege Disclosure Orders previously discussed¹²⁰—that will be enforceable in subsequent state and federal courts.¹²¹ This future-looking Privilege Disclosure Order could provide, for example, that “any disclosure of privileged or work product protected information in this case does not result in privilege waiver.”¹²² But numerous authorities have encouraged other formulations for Privilege Disclosure Orders.¹²³ As a result, it is likely that courts will continue to enter orders that require the disclosing party to prove disclosure was “inadvertent,” to show that “prompt” action was taken to reclaim a disclosed document, or to satisfy other requirements to avoid waiver.¹²⁴

118. See *supra* note 93 and accompanying text.

119. FED. R. EVID. 502(d) advisory committee’s note (“Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention . . . [and] the rule contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.”).

120. See *supra* text accompanying notes 104, 108–12.

121. FED. R. EVID. 502(d); see also Paul & Baron, *supra* note 19, at 38 (stating that one purpose of FRE 502 was to make “court-endorsed ‘clawback’ type agreements *enforceable against third parties*” (emphasis added)). But see *supra* note 111 (explaining that the language of the rule is so broad that it could encompass orders other than Privilege Disclosure Orders).

122. See FED. R. EVID. 502(d) advisory committee’s note (“For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party . . .”).

123. See FED. R. CIV. P. 16 advisory committee’s note on 2006 amendment (while discussing party agreements that may be included in a court order, providing that “[parties] may agree that if privileged or protected information is *inadvertently produced*, the producing party may *by timely notice* assert the privilege or protection and obtain return of the materials without waiver” (emphasis added)); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 51 (Jonathan M. Redgrave et al. eds., 2d ed. 2007) (explaining that “the order should provide that the *inadvertent disclosure of a privileged or work product document does not constitute a waiver of privilege*, that the privileged document should be returned (or certification that it has been deleted),” and finally that “any notes or copies discussing the privileged or work product information will be destroyed or deleted” (emphasis added)); Moze Cowper & John Rosenthal, *Not Your Mother’s Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261, 267 (2007) (explaining that in a 26(f) conference, attorneys should discuss whether they will agree to seek a court order “that the *inadvertent production* of [electronically stored information] shall not constitute a waiver of privilege and, if so, under *what circumstances would constitute waiver*” (emphasis added)).

124. See, e.g., Alcon Mfg., Ltd. v. Apotex Inc., No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *4 (S.D. Ind. Nov. 26, 2008) (describing a court order providing that the “[inadvertent] production shall not . . . constitute a waiver . . . provided that the producing

The latter form of Privilege Disclosure Orders carries a risk of waiver in the very court that enters the order.¹²⁵ Even with a Privilege Disclosure Order in place, a receiving attorney can, and likely will, challenge a disclosure as waiving the privilege,¹²⁶ and a court may find the privilege waived.¹²⁷ For ease of reference, this ruling will be termed the “post-disclosure order.” Nothing in FRE 502(d) prevents

party promptly makes a good-faith representation that such production was inadvertent or mistaken and takes prompt remedial action to withdraw the disclosure upon its discovery”); *Amersham Biosciences Corp. v. PerkinElmer, Inc.*, No. 03-4901 (JLL), 2007 WL 329290, at *1 n.1 (D.N.J. Jan. 31, 2007) (describing a court protective order that provided that parties must make “best efforts” to identify privileged materials prior to disclosure and if a party discovers that it has inadvertently produced a privileged document, it “shall promptly give written notice to counsel for the receiving party”); *VLT, Inc. v. Lucent Techs., Inc.*, 54 Fed. R. Serv. 3d (West) 1319, 1320 (D. Mass. 2003) (identifying agreement providing that “[i]nadvertent production of documents subject to work product immunity or the attorney-client privilege shall not constitute a waiver”); *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 406 n.2 (D.N.J. 1995) (identifying protective order providing that if the parties are unable to agree upon a claim of inadvertent production, “the burden shall be on the producing party . . . to establish its claim of privilege”); *Steadfast Ins. Co. v. Purdue Frederick Co.*, 40 Conn. L. Rptr. 370, 370 (Conn. Super. Ct. 2005) (describing stipulated protective order providing for no waiver by inadvertent production “provided that the producing party shall promptly notify the receiving party in writing of such inadvertent production,” and further providing for documents to be returned if “reasonably prompt” notification was made).

125. This is ironic in that most commentary on the issue has focused on the risk of waiver if the order is *not enforced* in a subsequent case—not the risk that its *enforcement* in the court that entered the order may actually result in waiver. See, e.g., FED. R. EVID. 502(d) advisory committee’s note (“[T]he utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection *outside the particular litigation in which the order is entered.*” (emphasis added)); THE SEDONA CONFERENCE, *supra* note 123, at 54 (noting various risks of quick peek orders, including the risk that they may not be enforced in subsequent cases without the enactment of FRE 502, but not mentioning waiver risk in the case in which the order was originally entered).

126. See, e.g., *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417–18 (N.D. Ill. 2006) (describing facts where despite an agreement that the sending party could avoid waiver by providing notification “within 30 days of the discovery” of an inadvertent disclosure, the receiving attorney asserted waiver, arguing notice was more than thirty days after the sending attorney’s “constructive knowledge” of disclosure); *VLT, Inc.*, 54 Fed. R. Serv. 3d (West) at 1321–22 (holding that disclosure of a letter, which had even been produced in prior litigation involving VLT, “could be considered recklessness, never mind grossly negligent” and thus not “inadvertent” under the protective order); *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, No. 96Civ.7590(DAB)(JCF), 1997 WL 736726, at *1–*2 (S.D.N.Y. Nov. 26, 1997) (describing facts where despite a court order that inadvertent disclosures do not result in waiver, receiving counsel argued that a paralegal’s mistaken production of privileged documents that counsel had marked as privileged was not inadvertent); see also *Barner*, *supra* note 30, at 39 (suggesting that receiving counsel argue that disclosure resulted in waiver and stating that there is “no downside to seeking a [waiver] ruling”).

127. See, e.g., *Ciba-Geigy Corp.*, 916 F. Supp. at 411–12 (concluding that the disclosing party waived privilege by failing to undertake “reasonable precautions” to prevent disclosure despite a court order providing that an “inadvertent disclosure” does not result in waiver).

the entry of a post-disclosure order finding waiver.¹²⁸ As one of the first cases to specifically reference FRE 502(d), *Alcon Manufacturing, Ltd. v. Apotex Inc.* concerned a court's future-looking Privilege Disclosure Order.¹²⁹ To avoid waiver for an inadvertent disclosure, the order required a sending attorney to "promptly make[] a good-faith representation that such production was inadvertent or mistaken and take[] prompt remedial action to withdraw the disclosure upon its discovery."¹³⁰ The defendant refused to return the document and even provided the privileged document to its experts, arguing that the plaintiff waived the privilege by not taking "prompt" action as required by the order.¹³¹ Citing FRE 502(d) and setting out the terms of the order, the court determined that the plaintiff had complied with the order, justifying a conclusion that the privilege was not waived.¹³²

The opposite result was reached in another post-FRE 502 case, *Relion, Inc. v. Hydra Fuel Cell Corp.*¹³³ In this case, the court entered a Privilege Disclosure Order that provided in part the following: "Inadvertent production of documents or information subject to the attorney-client privilege . . . shall not constitute a waiver . . . provided that the producing party notifies the receiving party in writing promptly after discovery of such inadvertent production."¹³⁴ Relion asserted that it had inadvertently produced two privileged e-mail messages, defendant ASRC refused to return them despite Relion's written request, and ASRC had improperly attached the privileged documents to a motion filed with the court.¹³⁵ In response, ASRC argued that the documents had not been inadvertently produced, relying on the fact that Relion's counsel had reviewed the documents prior to their pro-

128. See FED. R. EVID. 502(d).

129. 2008 WL 5070465, at *4.

130. *Id.*

131. *Id.* at *1, *5.

132. *Id.* at *4-6.

133. No. CV06-607 HU, 2008 WL 5122828, at *3 (D. Or. Dec. 4, 2008).

134. See Memorandum in Support of Plaintiff Relion's Motion to Enforce Stipulated Protective Order Against Defendant ASRC at 3, *Relion, Inc. v. Hydra Fuel Cell Corp.*, No. 06-cv-00607 HU, 2008 WL 5585057 (D. Or. Sept. 12, 2008). The order further provided the following:

Such inadvertently produced documents and all copies thereof shall promptly be returned to the producing party upon request. *No use shall be made of such documents other than to challenge the propriety of the asserted privilege*, nor shall they be shown to anyone who has not already been given access to them subsequent to the request to return them.

Id.

135. *Relion*, 2008 WL 5122828, at *2.

duction.¹³⁶ In determining the appropriateness of waiver under the Privilege Disclosure Order, the court discussed FRE 502(b) and considered whether Relion took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the disclosure.¹³⁷ Determining that it had not, the court found that the privilege was waived and denied the motion to enforce the terms of the stipulated protective order.¹³⁸

Under FRE 502(d), the *Alcon* court's post-disclosure order finding no waiver is binding in subsequent federal and state court proceedings,¹³⁹ but what about the post-disclosure order finding waiver in *Relion*? Rule 502(d) only requires subsequent courts to enforce a federal court order that privilege is *not* waived by disclosure,¹⁴⁰ so a subsequent court could allow Relion to re-assert the privilege. But it is also possible, and consistent with FRE 502(d), for a subsequent court to find privilege was waived by the prior disclosure.¹⁴¹ In short, the *Relion* Privilege Disclosure Order did not prevent a waiver ruling in that case and it does not prevent a waiver ruling in a subsequent case.

Beyond these issues in federal courts, questions remain when a disclosure occurs in a state court proceeding. When parties enter Privilege Disclosure Agreements and courts enter Privilege Disclosure Orders, litigants face the same uncertainty as that faced in federal court: The instant court may find the privilege was waived for non-

136. See Memorandum in Opposition to Relion's Motion to Enforce Stipulated Protective Order Against Defendant ASRC at 2, *Relion, Inc. v. Hydra Fuel Cell Corp.*, No. 06-cv-00607 HU, 2008 WL 5585058 (D. Or. Sept. 24, 2008).

137. *Relion*, 2008 WL 5122828, at *2-*3. The court did not refer to FRE 502(d) in its discussion. See *id.*

138. *Id.* at *3-*4.

139. See FED. R. EVID. 502(d) (providing that a court "may order that the privilege or protection is not waived by disclosure," and that this order is binding in other federal and state courts).

140. See *id.*; see also Broun & Capra, *supra* note 100, at 264 (asserting that FRE 502 deprives third parties of the "opportunity to argue that a waiver occurred *if the disclosure was in accordance with the court's order*" (emphasis added)).

141. See, e.g., *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1418 (Fed. Cir. 1997). In *Genentech*, a pre-FRE 502(d) case, a court in a prior proceeding had found privilege waiver because Genentech, the disclosing party, failed to establish that it had complied with the terms of the protective order in the case. *Id.* at 1413. In the subsequent case, Genentech asserted that despite the finding of waiver in the prior case, the prior court's protective order protected against waiver in subsequent litigation. *Id.* at 1415-16. The Federal Circuit disagreed, explaining that the prior court's protective order only dealt with the issue of whether inadvertent disclosure results in waiver, that inadvertent disclosure did result in waiver in the prior case, and that it was not error to find waiver in the subsequent case. *Id.* at 1417-18.

compliance with the terms of the Privilege Disclosure Order.¹⁴² Further, because FRE 502(d) does not require subsequent federal and state courts to enforce Privilege Disclosure Orders entered by state courts,¹⁴³ attorneys practicing in state court must take care to craft an order that a subsequent court will be inclined to enforce.¹⁴⁴

2. *Use of Privileged Information Prior to a Waiver Ruling*

As the previous discussion illustrates, even after significant changes to federal law, the possibility of waiver remains in both federal and state court proceedings. And when receiving attorneys think waiver is possible, they will be inclined to use the opponent's document¹⁴⁵ unless they are specifically prohibited from doing so. Such

142. See *supra* notes 126–27 and accompanying text; see also *supra* text accompanying notes 133–38.

143. See FED. R. EVID. 502(d). The first draft of FRE 502 would have provided for uniform rules for subsequent state and federal courts to determine waiver regardless of whether the initial disclosure was in federal or state court; however, that proposal was abandoned. See FED. R. EVID. 502 advisory committee's note (discussing the committee's drafting choices); see also FED. R. EVID. 502(c) advisory committee's note (asserting that state confidentiality orders are not covered by the rule but that such an order "is enforceable" in federal courts under principles of "comity, courtesy, and . . . federalism" (alteration in original) (quoting *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D. Md. 2000))). Though the advisory committee cites *Tucker* for the proposition that federalism and comity constrain a federal court considering the enforceability of a state court order, the *Tucker* court explained there is "less need for deference and comity when the order involved is really an agreement by counsel approved, almost as a ministerial act, by the court." *Tucker*, 191 F.R.D. at 501; see also THE SEDONA CONFERENCE, *supra* note 123, at 52 ("There is no guarantee that a nonwaiver order in one jurisdiction will be fully honored in another if protected information is disclosed.").

144. See *Tucker*, 191 F.R.D. at 499–501 (noting factors that may influence a subsequent court to enforce a prior court's protective order). Even if the state court order is not enforced, it is still possible that waiver can be avoided under substantive law applied by the court. See *Hopson v. Mayor of Balt.*, 232 F.R.D. 228, 239–42 (D. Md. 2005) (explaining that subsequent courts applying federal common law will not allow admission of privileged information that was erroneously compelled or provided by a party that did not have an opportunity to claim the privilege, and discussing elements that should be included in an order to protect the privilege in future litigation); *supra* text accompanying notes 90–91 (discussing the law of lenient and balancing jurisdictions, which, if applied, could result in a finding of no waiver).

145. See, e.g., *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 698 (N.D. Ga. 1998) ("If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives . . ." (citation omitted)); Barrer, *supra* note 30, at 37 ("In reflecting upon the consequences of an inadvertent disclosure, a recipient should consider whether the disclosure: (a) is one that must be returned immediately without further consideration; [or] (b) may be considered a waiver of a privilege and therefore useable . . ." (emphasis added)); Michael J. DiLernia, *Federal Rule of Civil Procedure 26(b)(5)(B) and the Ethics of Inadvertent Disclosure*, 20 GEO. J. LEGAL ETHICS 533, 540 (2007) (asserting that "if the disclosure, despite its inadvertency, results or could result in the privilege being

prohibitions could be contained in a Privilege Disclosure Agreement or Order, professional conduct rules, or some other source of law.

As aforementioned, no such prohibition on use prior to a waiver ruling is contained in Model Rule of Professional Conduct 4.4(b).¹⁴⁶ No such prohibition is contained in FRE 502, either.¹⁴⁷ Some protection in this regard is provided by FRCP 26(b)(5)(B), however. For privileged or work product protected documents produced in discovery, the rule requires a receiving attorney to “return, sequester, or destroy” a privileged document if sending counsel provides notice that the privileged or work product protected document was produced and, presumably, that the sending attorney wants the document back.¹⁴⁸ The rule also provides that after receiving notice, the receiving attorney may not use or disclose the document pending a waiver determination and must retrieve information that has already been disseminated.¹⁴⁹ In these provisions, the rule protects the privilege to an extent pending the waiver determination. Notably, the receiving attorney cannot ignore the request based on a belief that the disclosure was not inadvertent.¹⁵⁰

Despite this seemingly broad protection of the status quo pending a waiver ruling, there are several gaps. First, FRCP 26(b)(5)(B) provides no protection for documents disclosed outside of discovery—such as a misdirected letter, facsimile, or e-mail sent in a non-discovery context. Such disclosures are often the subject of a waiver motion,¹⁵¹ but FRCP 26(b)(5)(B)’s protections do not apply because the documents were not produced in discovery.¹⁵² Thus, even if a sending attorney requests the return of a misdirected e-mail pending a waiver ruling, the receiving attorney would not be in violation of FRCP 26(b)(5)(B) if he or she ignored opposing counsel’s request. The sending attorney may ultimately receive the court’s ruling that

waived, then the recipient would be able to use the documents—at least until the privilege is affirmed—without facing any ethical conflicts”).

146. See MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2009).

147. See FED. R. EVID. 502; see also Noyes, *supra* note 104, at 749–50 (explaining that FRE 502 “does not contemplate what courts and clients will do once a party’s secret information is disclosed and used against them” and that the rule “does not contemplate what the Receiving Party’s attorney will do once it receives privileged or work product protected information”).

148. See FED. R. CIV. P. 26(b)(5)(B).

149. *Id.*

150. *Id.* But cf. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (requiring receiving attorney to determine if the disclosure was “inadvertently sent”).

151. See *supra* note 31 (discussing non-discovery disclosures of confidential information and motions seeking a ruling on privilege waiver).

152. See FED. R. CIV. P. 26(b)(5)(B); see also DiLernia, *supra* note 145, at 545–46 (noting that FRCP 26(b)(5)(B) does not appear to apply in a non-discovery context).

the privilege was not waived. Nonetheless, the receiving attorney may have reaped substantial rewards from disseminating the protected information in the meantime.

Second, the rule does not require the receiving attorney to take any action unless and until informed of the disclosure by *sending* counsel.¹⁵³ This means the sending attorney must discover the mistake before the receiving attorney has any affirmative obligation to protect the content of the document. With the large volume of electronically stored information provided to opposing counsel in litigation, it is more likely for the receiving lawyer to review information received and find a privileged document than for sending counsel to re-review what was sent and discover a mistake.¹⁵⁴ Nonetheless, in a jurisdiction without a professional conduct rule, ethics opinion, or other authority requiring the receiving attorney to provide notice to the sending attorney,¹⁵⁵ the receiving attorney would be free to use the document. Cases reflect that receiving attorneys often make substantial, strategic use of a document before sending counsel learns what happened.¹⁵⁶ Adding insult to injury, the sending attorney's delay in addressing the issue—even as receiving counsel used the fruits of the inadvertent disclosure—may be relied upon by receiving coun-

153. See FED. R. CIV. P. 26(b)(5)(B).

154. This expectation is embodied in comments to the new Federal Rule of Evidence. See FED. R. EVID. 502(b) advisory committee's note ("The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.").

155. See Fred C. Zacharias, *Evidence Laws and Ethics Rules*, 19 No. 2 PROF. LAW. 12, 15 (2009) (noting that Model Rule of Professional Conduct 4.4(b) "requires lawyers to bring inadvertent disclosures to light, which in turn will instigate judicial resolution of the question of whether the lawyers should return the documents").

156. See, e.g., *Koch Foods of Ala., LLC v. Gen. Elec. Capital Corp.*, 303 F. App'x 841, 846 (11th Cir. 2008) (explaining that counsel had listed the document on the privilege log but subsequently produced the document and learned of the production when opposing counsel revealed it in a deposition); *Am. Coal Sales Co. v. Nova Scotia Power Inc.*, No. 2:06-cv-94, 2009 WL 467576, at *18 (S.D. Ohio Feb. 23, 2009) (noting that the sending counsel discovered the disclosure of a privileged document when receiving counsel attempted to use it at a deposition); *B-Y Water Dist. v. City of Yankton*, No. CIV. 07-4142, 2008 WL 5188837, at *1 (D.S.D. Dec. 10, 2008) (describing where sending counsel became aware that he had disclosed privileged information when opposing counsel referenced documents in a deposition); *Figueras v. P.R. Elec. Power Auth.*, 250 F.R.D. 94, 97 (D.P.R. 2008) (explaining that sending counsel realized a privileged document was produced when receiving counsel used the privileged document as an exhibit in a deposition more than a month after it was produced); *Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1095-96 (Cal. 2007) (describing where receiving counsel admitted that even though he knew sending counsel did not intend to produce a document, he nonetheless copied it, studied it, made notes on it, gave copies to co-counsel and experts, discussed the document with each of his experts, and asked questions about the document in depositions of his opponents' experts).

sel in its argument for waiver.¹⁵⁷ Even if a court ultimately finds that the privilege was not waived, receiving counsel's dissemination and use of the information already may have caused irreparable harm.¹⁵⁸ While disqualification might prevent further harm, some courts are hesitant to disqualify when the receiving attorney did not violate a rule of professional conduct or other law.¹⁵⁹

Finally, while FRCP 26(b)(5)(B) requires counsel to file the document under seal if a waiver determination is sought, the rule does not specifically prohibit receiving attorneys from referencing the contents of the document while seeking a waiver ruling.¹⁶⁰ If attorneys discuss the contents of an opponent's document in court filings,¹⁶¹ the ultimate finding of "no waiver" loses some of its significance.

157. Under the terms of a Privilege Disclosure Agreement and related Order, such as under FRE 502(d), the receiving attorney may attempt to assert that the sending party's delay in addressing the issue justifies waiver. *See, e.g., Alcon Mfg., Ltd. v. Apotex Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *5-*6 (S.D. Ind. Nov. 26, 2008) (noting where receiving counsel argued—unsuccessfully—that "Plaintiffs cannot show that they promptly took remedial action to withdraw the disclosure" under the terms of a protective order). Alternatively, when no agreement or order is in place, the receiving attorney might successfully argue under FRE 502(b)(3) or comparable case law in balancing jurisdictions that the sending attorney did not "promptly" take steps to rectify the error; thus, waiver is justified. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263 (D. Md. 2008) (reasoning that, considering the time it took counsel to rectify error under the balancing test, "it is noteworthy that the [sending party] did not discover the disclosure, but rather the [receiving attorney] made the discovery").

158. *See, e.g., Alcon Mfg., Ltd.*, 2008 WL 5070465, at *5-*6 (finding that because sending counsel complied with the terms of the Privilege Disclosure Order, privilege was not waived even though receiving counsel had already asked questions about the disclosed privileged document in two depositions and provided the document to its experts).

159. *See, e.g., In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 697-98 (N.D. Ga. 1998) (finding that because ABA Formal Opinion 92-368 had not been adopted and because a receiving attorney's legal obligations are "not a matter of settled [waiver] law," receiving counsel would not be disqualified for using an inadvertently disclosed document); *Resolution Trust Co. v. First of Am. Bank*, 868 F. Supp. 217, 219-21 (W.D. Mich. 1994) (applying ABA Formal Opinion 92-368 to determine that receiving counsel acted unethically in reading a privileged letter, but concluding that disqualification was inappropriate in part because "precedent did not give clear directions to plaintiff's attorneys"). *But see Rico*, 171 P.3d at 1100 (disqualifying receiving counsel); *Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572, 574 (Fla. Dist. Ct. App. 1998) (disqualifying the recipient of privileged documents from continuing as counsel in the case based on counsel's "recalcitrance" in addressing the inadvertent disclosure and "the unfair tactical advantage gained from such disclosure").

160. *See* FED. R. CIV. P. 26(b)(5)(B).

161. *See, e.g., Memorandum in Support of Plaintiff Relion's Motion to Enforce Stipulated Protective Order Against Defendant ASRC at 1-2, Relion, Inc. v. Hydra Fuel Cell Corp.*, No. 06-cv-00607 HU, 2008 WL 5585057 (D. Or. Sept. 12, 2008) (stating that ASRC filed a motion that directly quoted from and attached privileged e-mails that Relion had inadvertently produced).

For matters pending in state court, if the state has no rule comparable to FRCP 26(b)(5)(B),¹⁶² the only legal authority that addresses use pending the waiver ruling is a professional conduct rule, ethics opinion, or case law. In a state that has adopted Model Rule 4.4(b), receiving counsel is required to notify sending counsel of the disclosure but is not required under the rule to take any action to protect the opponent's information pending the waiver ruling.¹⁶³

B. Little or No Protection for Confidences Disclosed Outside of Litigation

Recent changes in federal procedure and evidence rules do not appear to be applicable to transactional attorneys dealing with inadvertent disclosure.¹⁶⁴ Thus, when an inadvertent disclosure occurs outside of litigation, the receiving attorney is left to determine the applicable professional conduct rule or ethics opinion. The first hurdle is choice of law, which is often a difficult issue for transactional attorneys with multi-jurisdictional practices.¹⁶⁵ In most jurisdictions that have a professional conduct rule or ethics opinion addressing the issue, the receiving attorney must determine if the disclosure was "inadvertent," a question that the attorney may answer in the interest of his or her own client.¹⁶⁶

162. Some states have adopted rules of civil procedure with protections identical or similar to those provided by FRCP 26(b)(5)(B). *See, e.g.*, ARK. R. CIV. P. 26(b)(5)(B) ("Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way."); MICH. R. CIV. P. 2.302(B)(7) (using language similar to the federal rule, listed under the heading "Information Inadvertently Produced"); TEX. R. CIV. P. 193.3(d) (allowing a sending attorney to identify privileged or work product protected information within ten days of discovering its production and requiring the receiving attorney to "promptly return the specified material or information and any copies pending any ruling by the court denying the privilege").

163. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) cmt. 2 (2009).

164. *See* FED. R. CIV. P. 26(b)(5)(B) (applying only when documents are produced in discovery); FED. R. EVID. 502 (applying to privilege waiver in federal courts). Transactional attorneys can enter Privilege Disclosure Agreements, of course, but without a pending case, they cannot seek a court order implementing the agreement. *See* FED. R. EVID. 502(d).

165. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2009) (stipulating that an attorney may be subject to discipline in more than one jurisdiction); MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) (2009) (explaining that outside of litigation, the applicable rule is that of the jurisdiction where the lawyer's conduct occurred or in the jurisdiction where the predominant effect of the conduct occurred); *see also* Mark J. Fucile, *Important Choices: Choice of Law under Model Rule 8.5(b)*, 19 No. 2 PROF. LAW. 20, 20 (2009) (explaining that Model Rule 8.5(b) "addresses litigation and non-litigation matters separately").

166. *See supra* text accompanying note 58 (noting that thirty-nine of forty-one jurisdictions with a professional conduct rule require receiving counsel to determine "inadver-

Even if a transactional attorney determines an opponent's disclosure was inadvertent, the ethics rules and opinions impose few requirements on the receiving attorney. In states that follow Model Rule 4.4(b), the receiving attorney must only give notice to the sending attorney.¹⁶⁷ As previously discussed, comments to the rule provide that whether additional steps are required, such as returning the document, turns on legal issues beyond the scope of the rule.¹⁶⁸ The "legal issue" is privilege waiver, an issue that may appear to be inapplicable outside of litigation.¹⁶⁹ Thus, the receiving transactional attorney is left to balance the interests of his or her client in taking full advantage of the disclosure against professional courtesy and furthering the profession's interest in confidentiality.¹⁷⁰

While the receiving attorney sorts through these issues, the sending attorney, if he or she realizes the error, struggles with how to mitigate the damage. The transactional attorney is not concerned about admissibility at trial, but knows that losing control of the information may have repercussions in the present transaction as well as in future litigation against the client. Unlike the receiving lawyer, the sending attorney likely thinks the law of privilege waiver is applicable, particularly when there is precedent that would support an order that the document must be returned and other relief be granted.¹⁷¹ But if receiving counsel does not agree to return the document, the sending attorney has a significant problem—lack of a forum. Many who favor Model Rule 4.4(b) assume that even though the rule does not require the document's return, the sending attorney can seek a court's assis-

tence"); *see also supra* notes 13–18, 126, 136 and accompanying text (discussing examples of how attorneys answer the "inadvertence" question in a way that allows them to avoid obligations to protect an opponent's information).

167. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2009).

168. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) cmt. 2 (2009).

169. Perlman, *supra* note 33, at 777–78 (asserting that "[w]aiver law does not offer any guidance" to a transactional attorney who receives an inadvertent disclosure).

170. Comment 3 to Model Rule 4.4 provides the following:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 3 (2009). Elsewhere, comments provide that attorneys are not required to "press for every advantage" for the client and that the lawyer is not required to use "offensive tactics." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009). Another comment states that normally the client defers to the lawyer regarding the means of accomplishing client objectives, "particularly with respect to technical, legal and tactical matters." MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2 (2009).

171. *See supra* note 87 and accompanying text (discussing the substantive law of privilege waiver and how it is used to seek return of a document and other relief).

tance in determining the ultimate disposition of the document.¹⁷² But without pending litigation, that is not the case.¹⁷³

C. Metadata

In most jurisdictions, “inadvertence” is a central issue in determining a receiving attorney’s duties upon discovery of an opponent’s confidential metadata. Some state ethics opinions specifically require attorneys to determine if confidential metadata was produced inadvertently;¹⁷⁴ Maine states this obligation in comments to its professional conduct rule 4.4(b).¹⁷⁵ In the absence of an ethics opinion on metadata, thirty-nine jurisdictions’ professional conduct rules require a receiving attorney to determine if an opponent produced confidential information “inadvertently.”¹⁷⁶ Even when the confidential information is contained in metadata, these rules apply.¹⁷⁷

If inadvertence turns on the amount of care taken by the sending attorney,¹⁷⁸ determining inadvertence is no easy task given the various

172. See, e.g., Barrer, *supra* note 30, at 37 (“The sender of inadvertently disclosed information should take all steps necessary to rectify the problem including an application to the appropriate court or tribunal.”); Zachary Wang, *Ethics and Electronic Discovery: New Medium, Same Problems*, 75 DEF. COUNS. J. 328, 342 (2008) (noting that a receiving lawyer is not legally or ethically required to return an inadvertently disclosed document and concluding that leaving the decision to the judge “makes sense” because it allows the sending attorney an opportunity to seek the document’s return and allows the receiving attorney to act zealously in the interest of her own client); Dike, *supra* note 30, at 294–95 (explaining that “the best course of action for a receiving attorney is to notify opposing counsel of the mistaken communication and then seek assistance from the court in determining the proper disposition of the inadvertently disclosed materials”; thus, “[states] whose rules of professional conduct are silent on this issue . . . should choose the ‘notify only’ approach as the proper response to inadvertent disclosure” (emphasis added)); American Bar Association Center for Professional Responsibility, *supra* note 46 (“The Commission decided that this Rule should require only that the lawyer notify the sender . . . thus permitting the sending lawyer to take whatever steps might be necessary or available to protect the interests of the sending lawyer’s client.”).

173. Arguably the transactional attorney could file a separate action seeking the document’s return, such as a declaratory judgment action. Nonetheless, this author’s research reveals no reported case in which a disclosing party sought return of a document disclosed outside of litigation. *But cf.* Perlman, *supra* note 33, 778 n.48 (“In the non-litigation context, parties seek court orders when a conflict of interest has arisen, so perhaps a party could seek a court order requiring the recipient to return the document.”).

174. See *supra* note 85 and accompanying text.

175. See ME. RULES OF PROF’L CONDUCT R. 4.4 cmt. 4 (2009); see also *supra* text accompanying note 84.

176. See *supra* text accompanying note 58.

177. See MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 2 (2009) (noting that the rule applies to any electronically transmitted material “subject to being read or put into readable form”).

178. See *supra* text accompanying notes 9–11 (discussing various definitions of inadvertence).

ways metadata disclosure might occur. On one end of the spectrum, a sending attorney may be aware that confidential information could be contained in metadata of a document, such as a draft contract e-mailed to opposing counsel, but he or she nonetheless disregards the obligation to remove the metadata, hoping that the receiving attorney will not find it. On the other end of the spectrum, an attorney may mistakenly believe the format of a document sent does not contain metadata¹⁷⁹ or may try but fail to remove confidential information in the metadata of a document.¹⁸⁰ Even if receiving counsel determines that the metadata was provided “inadvertently,” states that follow Model Rule 4.4(b) require only notice to the sending attorney.¹⁸¹ Meanwhile, the receiving attorney is legally and ethically permitted to disseminate the information unless prohibited by a Privilege Disclosure Agreement, Privilege Disclosure Order, or some other source of law.¹⁸² Unless the metadata disclosure occurred in discovery in a federal court, FRCP 26(b)(5)(B) will not protect the content of the information pending a waiver ruling.¹⁸³

The situation is different, but not necessarily better, in the jurisdictions that prohibit attorneys from viewing an opponent’s metadata.¹⁸⁴ These jurisdictions assume the receiving attorney has a sinister motive in searching metadata and overlook the legitimate reasons for doing so.¹⁸⁵ The jurisdictions acknowledge (or at least do not prohibit) searching metadata produced in discovery.¹⁸⁶ But even

179. See *supra* note 78 and accompanying text (explaining that the PDF file format that attorneys have been encouraged to use often contains metadata).

180. See *supra* note 77 and accompanying text (explaining user errors in attempts to remove or not create metadata).

181. See MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2009).

182. See MODEL RULES OF PROF’L CONDUCT R. 4.4 (2009) (containing no prohibition on a receiving attorney disseminating inadvertently sent information either in the rule itself or in any of its accompanying footnotes).

183. See FED. R. CIV. P. 26(b)(5)(B).

184. See *supra* note 86 and accompanying text.

185. See, e.g., Hricik, *supra* note 25, at 100 (“A lawyer who deliberately takes steps to view embedded data is engaging in a deliberate review of information that she ostensibly *knows* should have been removed, and which she *knows* is confidential, at a minimum.”); Peter Mierzwa, *Metadata: Now You Don’t See It—Now You Do*, CHL. B. ASS’N REC., Oct. 2006, at 52, 56 (quoting a member of the Florida Bar Board of Governors as stating, “I have no doubt that anyone who receives a document and mines it . . . is unethical, unprofessional, and uneverything else”); Bradley H. Leiber, Note, *Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar’s Approach to Metadata*, 21 GEO. J. LEGAL ETHICS 893, 909 (2008) (noting that some jurisdictions view the use of metadata as “bad”).

186. Indeed, this use of metadata is one of the reasons recent amendments to the federal civil procedure rules encourage production of electronically stored information in its native format. See FED. R. CIV. P. 34(b)(2)(E) (requiring that electronically stored information be produced as “kept in the usual course of business” or “in a reasonably usable

outside of discovery, an attorney may have a reason other than uncovering an opposing party's confidences to review metadata. For example, counsel may be trying to remember if she, or her opponent, was the attorney who last revised language in a particular provision of a draft contract or proposed settlement agreement.¹⁸⁷ The simple act of turning on "track changes" in a word processing program may reveal this information, but it may also reveal an opponent's confidential information. The absolute ban on metadata review prohibits legitimate uses of technology and may give sending attorneys a false sense that they do not have to protect against the disclosure of confidential metadata.¹⁸⁸

V. INTERESTS FURTHERED BY A PROFESSIONAL CONDUCT SOLUTION TO INADVERTENT DISCLOSURE

Since adopting Model Rule 4.4(b) and withdrawing ABA Formal Opinion 92-368, the ABA has been steadfast in its assertion that inadvertent disclosure raises a legal, rather than a professional conduct, issue.¹⁸⁹ Cognizant of the continuing problems associated with inadvertent disclosure—and apparently believing the ABA could not contribute to the solution through professional conduct rules—the ABA

form"); Ralph C. Losey, *Hash: The New Bates Stamp*, 12 J. TECH. L. & POL'Y 1, 21 n.78, 21–22 (2007) (noting that the "usual course of business is to keep [electronically stored information] in its native format" and arguing that native files are "likely to become the preferred format" for the production of electronically stored information under the amended rules).

187. See Colo. Bar Ass'n Ethics Comm., Formal Op. 119 (2008) (asserting that in some circumstances, metadata, such as redlines or comments in a draft contract or formulas in a spreadsheet, is intended to be "searched for, reviewed, and used" by receiving counsel).

188. Even in a jurisdiction with a ban on receiving counsel's review, the sending attorney must be diligent to avoid disclosure of confidential metadata. Sending attorneys are required to do so under state versions of Model Rule 1.6(a), which states that a lawyer shall not reveal confidential information unless the client gives informed consent or certain exceptions are met. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009). As a practical matter, even if the receiving attorney's conduct is governed by an ethics opinion in one of the prohibition-on-review jurisdictions, there is still a risk that he or she does not know of the opinion and will review the information or that a non-lawyer, such as a client or third party, will review the information. See Israel, *supra* note 77, at 470, 482 (explaining that media sources, rather than opposing counsel, intentionally reviewed metadata in court filings to find confidential information revealing that attorneys and their client had originally planned to sue a different defendant).

189. See MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2009) ("Whether the lawyer is required to take additional steps [beyond notification], such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived." (emphasis added)); Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 469 (2002) (explaining that the commission that drafted Model Rule 4.4(b) "decided against trying to sort out a lawyer's possible legal obligations in connection with examining and using" inadvertently disclosed documents (emphasis added)).

lobbied for federal evidence and procedure rules to address the issue.¹⁹⁰

The resulting federal rules are undoubtedly a necessary step toward addressing inadvertent disclosure in the age of electronically stored information. Despite the problems with Privilege Disclosure Agreements and Orders, the new rules address the realities of modern practice: The ease of electronic communication and the volume of information make it neither possible nor practical to prevent every disclosure.¹⁹¹ Other protections are therefore necessary. Further, the federal rules recognize that litigation is not an isolated event¹⁹² and that attorneys should have the ability to protect their clients from an inadvertently disclosed document being used in future litigation.¹⁹³ And even though there is reason to doubt that FRE 502 has succeeded on this front, the rule recognizes that attorneys need more certainty about when a privilege disclosure will result in waiver.¹⁹⁴

190. See Section of Litigation, American Bar Association, Report to the House of Delegates 120D (2006) (recommending amendments to the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure to address inadvertent disclosure and privilege waiver). Multiple letters from the ABA advocated the passage of FRE 502. See, e.g., Letter from Kim J. Askew, Chair, ABA Section of Litig., to The Honorable Peter G. McCabe, Sec'y of the Comm. on Rules of Practice & Procedure (Feb. 15, 2007), available at <http://www.abanet.org/buslaw/attorneyclient/materials/079/079.pdf> (suggesting revision to Advisory Committee's proposed 502(b)); Letter from Denise A. Cardman, Acting Dir., ABA Governmental Affairs Office, to The Honorable John Conyers, Jr., Chairman, Comm. on the Judiciary, The Honorable Lamar S. Smith, Ranking Member, Comm. on the Judiciary, The Honorable Howard L. Berman, Chairman, Subcomm. on Courts, the Internet & Intellectual Prop., Comm. on the Judiciary, The Honorable Howard Coble, Ranking Member, Subcomm. on Courts, the Internet & Intellectual Prop., Comm. on the Judiciary (Mar. 21, 2008), available at http://www.abanet.org/poladv/letters/attyclient/2008mar21_fre502govtaffh_1.pdf (supporting the adoption of FRE 502); Letter from Denise A. Cardman, Acting Dir., ABA Governmental Affairs Office, to Honorable Patrick J. Leahy, Chairman, Comm. on the Judiciary, Honorable Arlen Specter, Ranking Member, Comm. on the Judiciary (Dec. 7, 2007), available at http://www.abanet.org/poladv/letters/attyclient/2007dec07_fre502s_1.pdf (supporting the adoption of FRE 502); Letter from R. William Ide, III, Chair, ABA Task Force on Attorney-Client Privilege, to The Honorable Peter G. McCabe, Sec'y of the Comm. on Rules of Practice & Procedure (Feb. 15, 2007), available at http://www.abanet.org/poladv/letters/attyclient/2007feb15_rule502tf_1.pdf (proposing an implied waiver amendment); Letter from Judith A. Miller, Chair, ABA Section of Litig., to The Honorable John Conyers, Jr., Chairman, Comm. on the Judiciary, The Honorable Lamar S. Smith, Ranking Member, Comm. on the Judiciary (Mar. 21, 2008), available at http://www.abanet.org/poladv/letters/attyclient/2008mar21_fre502litsech_1.pdf (supporting the adoption of FRE 502).

191. See *supra* text accompanying notes 19–34 (discussing the risks and likelihood of privilege disclosure).

192. See *supra* notes 111, 126, 141, 143 and accompanying text (discussing risk of waiver in subsequent litigation and noting cases where a party was involved in multiple cases in which privilege waiver was at issue).

193. See FED. R. EVID. 502(d).

194. See *supra* notes 100, 114 and accompanying text.

Despite these advances, the federal rules have not—and indeed cannot—adequately protect the profession’s interests in the inadvertent disclosure arena. State bars and the ABA should recognize that their stake in this matter extends beyond federal courts, beyond disclosures in the context of discovery, and beyond litigation. These areas can be addressed by professional conduct rules.¹⁹⁵ The following Sections consider the bar’s interests in confidentiality, compliance, efficiency, and setting the standards for professional behavior, and explain why each of these interests can be advanced by revising professional conduct rules that touch upon inadvertent disclosure.

A. *Protecting Confidentiality*

Confidentiality is essential to the uncensored communications that are necessary for the attorney-client relationship.¹⁹⁶ Protecting confidential and privileged information was a central consideration by the ABA when it issued Formal Opinion 92-368.¹⁹⁷ The ABA explained that it could not identify a more important principle to protect than the “strong policy in favor of confidentiality.”¹⁹⁸ The committee concluded that it could not countenance or encourage attorney conduct in response to inadvertent disclosure that would be in derogation of confidentiality.¹⁹⁹ Even after withdrawing that opin-

195. Because a federal court can adopt its own attorney conduct rules, it can adopt the rules of the state in which it sits. See, e.g., E.D. TENN. R. 83.6 (adopting the Supreme Court of Tennessee’s professional conduct rules); see also Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137, 150–52 (1994). Thus, a federal court interested in adopting attorney conduct rules such as those proposed in this Article could do so, even if state bars and the ABA decline to do so.

196. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2009). The comment provides the following:

[Confidentiality] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. . . . Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Id.

197. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-368 (1992), *withdrawn by* Formal Op. 05-437 (2005). Discussing the bar’s interest in confidentiality, the Standing Committee noted the importance of “full, free and frank exchange[s] between lawyer and client.” *Id.* (internal quotation marks omitted). The committee observed that absent a guarantee of confidentiality, critical discussion will be proscribed or intruded upon in a way that will impact the ability of lawyers to serve clients, and that there will be a chilling effect on the attorney-client relationship if counsel fears that confidential information will be shared with those with adverse interests to the client. *Id.*

198. *Id.*

199. *Id.*

ion,²⁰⁰ the ABA has devoted substantial resources to advocating protection for the attorney-client privilege against various threats,²⁰¹ including the threat posed by inadvertent disclosure.²⁰² The ABA heralded FRE 502 as essential to protecting the attorney-client privilege and work product protection.²⁰³

A missing element in the legal solution provided by the federal rules is comprehensive protection of the *content* of confidential information—both before and after its inadvertent disclosure—until a court determines that the privilege was waived. The federal procedure and evidence rules have the effect of encouraging attorneys to agree to little or no pre-production review and to seek court orders implementing these agreements.²⁰⁴ As demonstrated by the cases discussed in Part IV, the result can be production of privileged information to an opponent who uses the information to his or her client's advantage and then argues that the privilege was waived by the disclo-

200. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).

201. For example, the ABA Task Force on Attorney-Client Privilege has lobbied against government policies that encourage businesses to waive the attorney-client privilege. See American Bar Association Task Force on Attorney-Client Privilege, <http://www.abanet.org/buslaw/attorneyclient/home.shtml> (last visited Feb. 13, 2010). Others assert that the ABA has taken a somewhat schizophrenic approach to privilege and confidentiality—arguing for the protection of privilege in some contexts, but taking steps to erode confidentiality in others, such as by amending in 2003 Model Rule 1.13 regarding organizational clients. See Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1092 (2006) (explaining that in 2003, the ABA “diminish[ed] the . . . interests of corporate clients in maintaining confidentiality”); Lawrence J. Fox, *Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?*, 34 STETSON L. REV. 147, 157 (2004) (noting that Model Rule 1.13 gave an attorney “permission to disclose confidential information beyond the [corporate] client”). The amendment to Model Rule 1.13 does not demonstrate an abandonment of confidentiality, but rather a recognition that in narrow circumstances there may be countervailing interests, including the client's own interest. See Paula Schaefer, *Protecting a Business Entity Client from Itself Through Loyal Disclosure*, 118 YALE L.J. POCKET PART 152, 153 (2009). In the context of inadvertent disclosure, the bar has not identified any interest that is more important than protecting confidentiality pending a waiver determination, and should provide such protection in professional conduct rules.

202. See *supra* note 190 (noting ABA efforts to influence the content of federal rules addressing inadvertent disclosure).

203. See H. Thomas Wells Jr., President, Am. Bar Ass'n, Statement Regarding Congressional Approval of Federal Rule of Evidence 502 (Sept. 9, 2008), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=443> (“By clarifying the law . . . [FRE 502] will help preserve fundamental attorney-client privilege and work product protections of all parties, while substantially reducing unnecessary discovery costs that would be passed on to consumers.”).

204. See *supra* text accompanying notes 101–04, 110–11; see also Noyes, *supra* note 104, at 760 (asserting that it may become the norm for federal courts to enter orders under FRE 502(d) and for attorneys to voluntarily produce privileged documents without reviewing them, which “may ultimately dilute and weaken the importance of . . . state laws that protect the relationship between attorney and client”).

sure.²⁰⁵ While FRCP 26(b)(5)(B) provides some protection against use of the content of a privileged document prior to a waiver ruling, that protection is incomplete.²⁰⁶

Inadvertent disclosure is so common today that most practitioners will soon have firsthand knowledge of the current state of the law and the lack of protection for the content of their communications. If attorneys and clients doubt that the content of privileged information will be protected, they may change the way they discuss matters with one another.²⁰⁷ While many would argue that too many confidential thoughts are put in writing today (particularly in e-mail), something is lost when attorneys and clients purposely avoid the written word. There may be a misunderstanding about the advice being sought and the advice being given. The deliberative process that occurs when an attorney puts thoughts in writing to a client will be compromised. Clients will have less opportunity to digest and reflect upon counsel's advice. To the detriment of their clients, attorneys may forget key information that they feared putting in writing. And to their own detriment, attorneys with no written records may have less ability to defend themselves if a client asserts attorney misconduct or malpractice.

The bar must consider how professional conduct rules could bolster confidence in confidentiality. Waiver is a legal issue, but protecting the profession's faith in confidentiality is a professional conduct issue. Solutions to both problems are compatible and can be achieved through rules that require attorneys to protect the content of confidential information both before and after disclosure.

1. *Pre-Disclosure Protection of Confidentiality*

If disclosure is truly "inadvertent," it may seem that a professional conduct rule cannot avert the disclosure. This Article, however, has identified two areas in which professional conduct rules could educate attorneys and thus prevent unnecessary compromise of confidential

205. See *supra* text accompanying notes 129–38.

206. See FED. R. CIV. P. 26(b)(5)(B); see also *supra* text accompanying notes 151–63.

207. In 1981, the Supreme Court asserted the following:

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). But see Dennis J. Tuchler, *Teaching Legal Profession: Ethics Under the Model Rules*, 51 ST. LOUIS U. L.J. 1161, 1171 n.35 (2007) ("It is unlikely that the possibility of inadvertent disclosure seriously reduces the value to the client of the duty of confidentiality.").

information. One area is metadata. Comments to the Confidentiality of Information rule—Model Rule 1.6—could advise attorneys of specific methods that can be used to protect confidential information in metadata.²⁰⁸

The second area is Privilege Disclosure Agreements and Orders.²⁰⁹ As described throughout this Article, Privilege Disclosure Agreements and Orders anticipate that counsel may disclose the client's confidential information, but that those confidences will be protected against adverse use and waiver.²¹⁰ Because the current Confidentiality of Information rule requires counsel to protect client confidences unless informed consent is given by the client to do otherwise,²¹¹ an attorney should not enter a Privilege Disclosure Agreement or seek a related Order without that consent.²¹²

208. See *supra* text accompanying notes 68–79 (discussing sparse guidance in current authorities regarding how attorneys should protect against disclosure of confidential metadata).

209. Some have asserted that it should not be necessary to use a Privilege Disclosure Agreement to avoid privilege waiver following inadvertent disclosure. See Paul & Baron, *supra* note 19, at 38 (“[O]ne can question whether immunity from privilege waiver, through an inadvertent disclosure of information, should be dependent on an agreement at all, since in many instances there will be no agreement, yet the same cost-saving policies regarding lack of punitive privilege waiver rules should apply.”). Greater protection against waiver could be provided in the evidence rules, which could prohibit waiver as a consequence of any disclosure of confidential information. But then parties would have no incentive to protect client confidences. Privilege Disclosure Agreements and Orders provide a better solution. Through these devices, parties can make a rational, thoughtful decision about the specific efforts they will make to avoid disclosure of client confidences, protections to be provided if disclosure occurs, and the standard to be applied if the recipient argues disclosure waived privilege. See *infra* Part VI.B (discussing issues that should be discussed with a client in entering Privilege Disclosure Agreements).

210. See *supra* text accompanying notes 101–04, 110–11 (defining Privilege Disclosure Agreements and Orders).

211. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .”). Attorneys should not assume that Privilege Disclosure Agreements or Orders are simply a “means” of achieving the client's goals that do not require client consent. See MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2009). Because Privilege Disclosure Agreements and Orders impact confidentiality, counsel is required to follow the provisions of Model Rules 1.6(a) and 1.4(a) that require informed consent. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a), 1.4(a) (2009).

212. A different issue is presented when the court enters a Privilege Disclosure Order that is opposed by counsel and client. Professor Noyes asks, “Does [a Privilege Disclosure Order entered despite client objection] require the attorney to violate [professional conduct obligations]?” Noyes, *supra* note 104, at 746. While the attorney should object to an order that is unacceptable to the client, it would not be professional misconduct for the attorney to abide by the order if it was entered despite objection. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2009) (permitting disclosure of confidential information if the lawyer reasonably believes it necessary “to comply with . . . a court order”); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) cmts. 13, 15 (2009) (requiring counsel to consult

While some may read the Confidentiality of Information rule to require consent only when counsel plans to disclose the client's confidential information *intentionally*, such as under a quick peek-style agreement,²¹³ that reading is too narrow. Model Rule 1.6 requires a client's *own attorney* to preserve client confidences, and if counsel thinks it is appropriate to shift that obligation to opposing counsel or to the courts through a Privilege Disclosure Agreement or Order, that document impacts confidentiality and the client's consent should be obtained.²¹⁴ It is of note that these agreements often include privilege review protocols that contemplate less than a document-by-document pre-production privilege review, but more than the intentional disclosure of confidences as under a quick peek agreement.²¹⁵ These protocols can result in a heightened risk of disclosure, which may or may not be acceptable to the client in light of the client's facts, the protections and risks inherent in the proposed Privilege Disclosure

with the client regarding the possibility of an appeal, but explaining that absent appeal, subsection (b)(6) permits compliance with the court order).

213. *See, e.g.*, THE SEDONA CONFERENCE, *supra* note 123, at 54 (noting that “[i]t is possible” that entering a quick peek agreement could result in a violation of an attorney's ethical duty to protect client confidences).

214. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009). Informed consent to the terms of a Privilege Disclosure Order, developed by a competent, diligent attorney, is distinct from an agreement that purports to insulate counsel from professional negligence for “sloppy” efforts to protect client confidences. The latter is prohibited by Model Rule 1.8(h). *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (2009) (prohibiting a lawyer from making an agreement prospectively limiting the lawyer's liability to a client for malpractice, unless the client is independently represented).

215. *See, e.g.*, Spieker v. Quest Cherokee, LLC, No. 07-1225-EFM, 2008 WL 4758604, at *4 (D. Kan. Oct. 30, 2008) (encouraging counsel to utilize FRE 502 so that they can agree to a less exhaustive pre-production privilege review); Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 559–62 (W.D. Tenn. 2003) (ordering party to use a privilege review protocol that involved keyword searches and subsequent attorney review and providing that the producing party does not waive privilege for any privileged documents produced in the case). Examples abound of methods and protocols used to detect privileged information. *See, e.g.*, FED. R. EVID. 502(b) advisory committee's note (asserting that in light of the number of documents to be reviewed and time constraints of a case, it may be reasonable for litigants to use “advanced analytical software applications and linguistic tools in screening for privilege and work product”); The Honorable Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 374–76 (2008) (highlighting trends in the appointment of special masters to facilitate the electronic discovery process); Sasha K. Danna, Comment, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 LOY. L.A. L. REV. 1683, 1718–19 (2005) (emphasizing the usefulness of keyword searches in identifying and reducing the number of privileged documents that must be reviewed); Jonathan M. Redgrave & Kristin M. Nimsgger, *Electronic Discovery and Inadvertent Productions of Privileged Documents*, FED. LAW., July 2002, at 37, 39 (discussing the use of computer searches, software that analyzes word matches to locate privileged information, human review, and coordination between attorneys and discovery consultants).

Agreement or Order and applicable law, and available alternatives. A client can only provide “informed” consent if attorneys explain the factual and legal issues relevant to the decision; comments to the Confidentiality of Information rule could guide counsel through these topics.²¹⁶

2. *Post-Disclosure Protection of Confidentiality*

Before the bar can embrace a professional conduct rule that protects confidential information *after* disclosure, the profession must move beyond the narrow lens underlying Model Rule 4.4(b): You cannot “unring the bell” of inadvertent disclosure.²¹⁷ Undoubtedly, when a confidential document is read by an opponent, *some* harm is done.²¹⁸ But that harm need not be compounded by the bar’s acquiescence to receiving attorneys refusing to return the document, making notes as they dissect and analyze its contents, and forwarding it to others, perhaps even third parties who may use the document in subsequent litigation or non-litigation matters, *before any court determines that privilege was waived*.

Ironically, ABA Formal Opinion 92-368 recognized the truth that the harm need not be compounded in an age when the fax machine

216. Alternatively, if state bars and the ABA do not believe that the current Confidentiality of Information rule requires client consent to Privilege Disclosure Agreements and Orders, the rule could be revised to explicitly require informed consent to clawback, quick peek, and other agreements concerning confidential client information. Such a revision could work in harmony with the proposed comments to Model Rule 1.6 outlined in this Article. *See infra* app. A.

217. This is the approach implicit in the Model Rules’ advice that whether the document should be returned is a matter of law beyond the scope of the rules. *See* MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 2 (2009); *see also* Ill. State Bar Ass’n, Op. 98-04 (1999) (“ABA Formal Opinion 92-368 is unrealistic, expecting the receiving lawyer to ‘unring the bell’ and ignore material information that has been received and reviewed in good faith.”); Barrer, *supra* note 30, at 39 (“[Y]ou cannot ‘un-ring’ a bell. . . . Once it has been reviewed, it is difficult if not impossible to ‘unlearn’ the information disclosed.”); Perlman, *supra* note 33, at 806 (“Because returning the document would not erase what the receiving lawyer already learned, a rule requiring the document’s return would accomplish very little.”); Hon. Lee H. Rosenthal & Hon. James C. Francis IV, *Managing Electronic Discovery: Views from the Judges*, 76 *FORDHAM L. REV.* 1, 31 (2007) (noting the problem that you cannot “un-ring the bell”).

218. *See* Michael D. Fielding, *You Need to Know This: Bankruptcy and Attorney-Client Privilege in the Electronic Age*, *AM. BANKR. INST. J.*, Dec.–Jan. 2007, at 61, 64 (asserting that even if a court orders the return or destruction of privileged material, disclosed documents may nonetheless have an impact on settlement negotiations); Perlman, *supra* note 33, at 806 (explaining that a rule that mandates the return of a document has little utility since the receiving attorney cannot eliminate from their mind what they learned from the document simply by virtue of returning it).

was the greatest inadvertent disclosure culprit.²¹⁹ Today, the risks of inadvertent disclosure have expanded exponentially. Compounding the risk, courts are urging parties to use Privilege Disclosure Orders instead of exhaustive pre-production privilege review.²²⁰ These circumstances have resulted in opponents receiving confidential information they were not intended, or entitled, to see. Prohibiting receiving attorneys from using the information before a waiver ruling does not unfairly “punish” them.²²¹ Further, allowing receiving attorneys to use the information does not discourage future inadvertent disclosures—these disclosures are happening despite current punishment under the law.²²² Attorneys, clients, and the bar have an interest in preventing further exploitation and use of an opponent’s confidential information.²²³ It causes no harm to litigators to delay use unless and until they receive a waiver ruling.²²⁴ Moreover, without such a

219. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992), *withdrawn by* Formal Op. 05-437 (2005) (lamenting the possibility that a “facsimile machine will still be ‘mis-speed-dialed’” and later concluding that “even where the receiving lawyer examines the materials before discovering that they were mis-sent, *there is still value in maintaining what confidentiality remains*” (emphasis added)).

220. *See, e.g., Spieker*, 2008 WL 4758604, at *4 (urging counsel to discuss FRE 502 in future production and cost discussions because the rule was enacted “to reduce the costs of exhaustive privilege reviews of [electronically stored information]”).

221. *See, e.g., Ill. State Bar Ass’n*, Op. 98-04 (1999) (arguing that ABA Formal Opinion 92-368 put the burden on the “wrong party,” asking the receiving lawyer to protect the “careless” lawyer); DiLernia, *supra* note 145, at 540 (arguing that putting the burden on receiving counsel to alert sending counsel of an inadvertent disclosure may increase the number of “false alarms” and “condones and perhaps even encourages insouciance or malice from the producer, who would then have a way to drain the opposing party’s resources with little, if any, additional cost or effort”); Hundley, *supra* note 87, at 283 (“When the adversary learns privileged information, not through any wrongdoing on her part, but through the negligence of the party responsible for guarding the confidence, curative measures not only are of dubious efficacy; they seem downright unjust and counter-productive.”); Kurt L. Schmalz, *On the Receiving End*, L.A. LAW., June 2006, at 33, 38 (“[T]he courts should not be in the business of compelling attorneys to clean up their opposing counsel’s mistakes. . . . [C]ourts should be careful not to advance amorphous interpretations of fair play at the expense of the lawyer’s fundamental duty to zealously represent his or her client.”).

222. *See, e.g., ABA Comm. on Ethics and Prof'l Responsibility*, Formal Op. 92-368 (1992), *withdrawn by* Formal Op. 05-437 (2005) (discussing the argument that “letting the receiving lawyer keep the confidential materials in this situation [of inadvertent disclosure] will encourage more careful conduct on the part of other counsel in the future”).

223. *See State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999) (“We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the *waiver* of privileged information or the *retention of the privileged information by an adversary who might abuse and disseminate the information with impunity.*” (emphasis added)).

224. This point responds to the ABA’s assertion that whether the document should be returned is a matter of law beyond the scope of professional conduct rules. *See MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 2* (2009). Professional conduct rules that require

rule, transactional attorneys will continue to have no remedy. In both cases, requiring attorneys to protect an opponent's confidences can help slow the erosion of the profession's faith in confidentiality.

B. Promoting Compliance with Professional Conduct Expectations

Incorporating specific guidance into the professional conduct rules and comments would lead to greater compliance with the bar's expectations for senders and recipients of inadvertent disclosures. Currently, these expectations are difficult to discern in many states. In ten jurisdictions, there is still no professional conduct rule that addresses the issue of inadvertent disclosure; any authority that exists is scattered throughout ethics opinions and case law.²²⁵ In some jurisdictions, the authorities appear to be in conflict.²²⁶ Guidance in dealing with confidential information in metadata is even slimmer: Only one state references metadata in its professional conduct rule.²²⁷ Further, just a small number of states' ethics opinions address metadata—and the authorities are split regarding what an ethical attorney should do.²²⁸

When it is difficult for attorneys to find professional conduct guidance, it is likely they will not fulfill the bar's expectations. For exam-

the document to be returned, and otherwise protected, prior to the waiver determination do not interfere with the legal issue and are preferable to current ethics rules in light of the fact that the court may ultimately find that privilege was not waived.

225. See *supra* notes 46–51, 56–61 and accompanying text (discussing various professional conduct rules, opinions, and case law addressing receiving counsel's obligations).

226. For example, in California, no professional conduct rule addresses the issue, but opinions of California appellate courts have provided seemingly inconsistent messages to receiving counsel. See *Aerojet-Gen. Corp. v. Transp. Indem. Ins.*, 22 Cal. Rptr. 2d 862, 867–68 (Cal. Ct. App. 1993) (explaining that an attorney has a professional obligation to his client to utilize information learned through an opponent's inadvertent disclosure). *But see Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1098–99 (Cal. 2007) (distinguishing *Aerojet* and holding that receiving counsel has an obligation to read a confidential document no further than necessary to determine its status, to notify sending counsel, and work with counsel or seek court intervention to resolve the issue). Florida has now adopted Model Rule 4.4(b), which only requires receiving counsel to provide notice of an inadvertent disclosure. FLA. RULES OF PROF'L CONDUCT R. 4–4.4(b) (2009). It is not clear, however, whether the rule was meant to overrule a Florida appellate court decision that counsel can be disqualified for taking “unfair tactical advantage” by using an opponent's inadvertently disclosed document. See *Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572, 573–74 (Fla. Dist. Ct. App. 1998) (holding that the “unfair tactical advantage” gained by an inadvertent disclosure was grounds for attorney disqualification).

227. See *supra* note 84 and accompanying text (observing Maine's reference to metadata in the comments to its professional conduct rule).

228. See *supra* notes 71–74, 85–86 and accompanying text; see also Mierzwa, *supra* note 185, at 55 (“Though one might argue that reviewing metadata is permitted in Illinois, attorneys should exercise caution. Other states have found reviewing metadata is an ethical violation and their rules are not substantially different from the Illinois Rules.”).

ple, in *Holland v. Gordy Co.*,²²⁹ discussed at the beginning of this Article,²³⁰ Michigan's professional conduct rules were silent on the issue of inadvertent disclosure.²³¹ There was precedent in the jurisdiction, however, that relied upon ABA Formal Opinion 92-368 to define a receiving attorney's duties.²³² Relying on that precedent, the *Holland* court concluded that "plaintiffs' counsel should have refrained from examining the materials, notified defendants' counsel . . . and abided defendants' instructions until the issue was raised and addressed by the trial court."²³³ Professional conduct rules should say what they mean and mean what they say,²³⁴ particularly in addressing an increasingly common dilemma. The bar's expectation should not be a moving target.²³⁵ Articulating specific requirements in the text of professional conduct rules would aid attorneys immeasurably as they attempt to determine their obligations.

Another compliance issue stems from use of the word "inadvertent" in professional conduct rules.²³⁶ This Article contains multiple examples of attorneys who reasoned or rationalized that an opponent's disclosure was not "inadvertent," so that the receiving attorney could avoid any obligation under the professional conduct rule or under a Privilege Disclosure Agreement or Order.²³⁷

Because the bar has an interest in attorneys complying with professional conduct rules, it would be prudent to remove the factually and legally complex question of inadvertence from the receiving attorney's analysis. The challenge, however, is how to create an inadvertent disclosure rule that does not contain the term "inadvertent."

229. Nos. 231183–85, 2003 WL 1985800 (Mich. Ct. App. Apr. 29, 2003).

230. See *supra* text accompanying notes 13–18.

231. See *Holland*, 2003 WL 1985800, at *7 (stating that Michigan draws its professional conduct rules from the American Bar Association Model Rules).

232. *Id.* at *7–*8 (citing *Resolution Trust Corp. v. First of Am. Bank*, 868 F. Supp. 217, 220 (W.D. Mich. 1994)).

233. *Id.* at *8.

234. See Hellman, *supra* note 61, at 334 (asserting that ABA Formal Ethics Opinions often set forth the ABA Ethics Committee's "view of what the rules *should* say or were *meant* to say" rather than reflect "a straightforward exercise of [statutory] interpretation").

235. See, e.g., Schmalz, *supra* note 221 (describing the ethics rules as a "moving target"). Another aspect of fairness to receiving counsel is the substance of the requirements. The number of requirements for receiving counsel in the Proposed Model Rule 4.5 may seem onerous, but the requirements have a purpose and are fairly articulated in the rule. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5. If attorneys do not follow these provisions, it will be a choice; indeed, they will not be able to claim a lack of explanation of the requirements.

236. See *supra* text accompanying note 58 (noting that thirty-nine of forty-one jurisdictions with a professional conduct rule addressing the issue require the receiving attorney to determine if the opponent's disclosure was "inadvertent").

237. See *supra* notes 13–18, 126, 136 and accompanying text.

FRCP 26(b)(5)(B) imposes an obligation to sequester when an opponent gives notice that he or she produced a privileged or work product protected document; the receiving attorney has no discretion to avoid that obligation by determining the disclosure was not inadvertent.²³⁸ A professional conduct rule could contain similar terminology to trigger the receiving attorney's obligations, thus eliminating the inadvertence question. Such a rule, however, would take away a positive component of the current Model Rule 4.4(b)—the receiving attorney's obligation to provide notice.²³⁹

Given the bar's interest in confidentiality, a professional conduct rule could require a receiving attorney to presume that any confidential document received from an opponent was not intentionally provided and is entitled to certain protections. The breadth of the term "confidential" is problematic, however. Outside of discovery, every document provided by opposing counsel is conceivably "confidential," in that all information learned in the representation of a client must be kept in confidence unless the client consents to its disclosure or an exception applies.²⁴⁰ For this reason, a rule requiring a presumption that every confidential document was produced unintentionally is not workable. But a rule that requires a presumption of protection for attorney-client privileged or work product protected information would be effective. This is usually the most sensitive confidential information and these categories encompass the confidential information that can be withheld from discovery.²⁴¹ A rule that incorporates these terms is discussed in Part VII.

238. See FED. R. CIV. P. 26(b)(5)(B). The rule does not require the sending attorney to prove or even argue that the production was inadvertent. See *id.*

239. See *supra* text accompanying notes 154–58 (explaining that the receiving attorney is more likely to recognize an inadvertent disclosure, and that rules which require nothing of the receiving attorney lead to attorney use of the privileged document without the sending attorney's knowledge). It is of note that Maine, which adopted its "inadvertent disclosure" professional conduct rule in 2009, considered the text of FRCP 26(b)(5)(B), but nonetheless crafted a rule that obligated receiving counsel to provide notice to sending counsel and to take steps to protect the content of the disclosed document pending a waiver ruling or informal resolution of the issue between the parties. See ME. RULES OF PROF'L CONDUCT R. 4.4 Reporter's Notes (2009).

240. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009). Within discovery, a responsive, confidential document cannot be withheld unless it is also privileged or work product protected. Accordingly, its disclosure is either authorized or impliedly authorized under Model Rule 1.6(a). See *id.*

241. See *supra* note 7 (discussing attorney-client privilege and work product protection).

C. Efficiency

As they consider the current web of authority addressing inadvertent disclosure, state bars and the ABA should also be concerned about improving efficiency through rulemaking.²⁴² Today, various court decisions, ethics opinions, rules of procedure, and attorney conduct rules may or may not address a receiving attorney's professional conduct obligations.²⁴³ If a single, comprehensive attorney conduct rule clearly articulated a receiving attorney's obligations, attorneys would not have to conduct exhaustive research each time they receive or send confidential information.²⁴⁴ Further, when these various sources of law provide little or no direction, the receiving attorney must expend additional time deciding how to address the issue. These questions could all be answered by a single professional conduct rule. To gain such efficiency, the professional conduct rule should be consistent with the requirements of FRCP 26(b)(5)(B), but could also fill gaps that are unaddressed by the procedure rule.²⁴⁵

Further, an attorney concerned about how to fulfill his or her confidentiality obligation with regard to metadata will have difficulty finding guidance.²⁴⁶ At best, most of the ethics opinions that address

242. See Perlman, *supra* note 33, at 789 (explaining that promoting efficiency should be a concern in professional conduct rulemaking).

243. See, e.g., J. Charles Mokriski, *Ethics in Advocacy: Instinct, Insight, and Competing Obligations*, 14 No. 2 PROF. LAW. 2, 12 (2003) (asserting that a Massachusetts attorney who receives a misdirected confidential e-mail will research but find no clear ethical guidance coming from a "cacophony of voices" that includes a state ethics opinion, the decision in *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287 (D. Mass. 2000), ABA Formal Opinion 92-368, and Model Rule 4.4(b)).

244. In *Resolution Trust Corp. v. First of America Bank*, 868 F. Supp. 217 (W.D. Mich. 1994), the court explained research efforts and other steps taken by receiving counsel, whom the court ultimately decided had reached the wrong conclusion about his ethical obligations:

The privileged letter was received by plaintiff's local counsel. After returning from vacation, plaintiff's lead counsel asked that the letter be forwarded to him so that he could obtain instructions from his client regarding a response. At that time plaintiff's lead counsel was unaware of American Bar Association (ABA) Formal Opinion 92-368 but was experienced in a similar situation. Plaintiff's lead counsel attempted to contact his client to inform the client of the disclosure and obtain instructions. . . . Lead counsel then researched the issue of what he should do with the letter and concluded that "even the inadvertent disclosure of attorney client privileged material terminated the privilege." After further consultation with the client, lead counsel "out of a sense of fairness" but with no sense of a duty, notified defendant's counsel that plaintiff had the letter.

. . . Plaintiff has not returned the letter.

Id. at 218, 220.

245. See Perlman, *supra* note 33, at 795 (noting that rulemakers typically try to craft rules that are consistent with other legal obligations, with other legal principles, and with other ethical rules).

246. See *supra* notes 70-79 and accompanying text.

the issue provide a starting point for more research that the attorney may or may not complete. It would be more efficient for comments to the Confidentiality of Information rule to provide specific examples of how counsel can avoid transmitting confidential metadata.

Finally, professional conduct rules could also create greater efficiencies for parties negotiating Privilege Disclosure Agreements and seeking Privilege Disclosure Orders. Given the current state of the law, both transactional attorneys and litigators would be prudent to negotiate such agreements in every matter. The problem with negotiating the agreements on a case-by-case basis is that it takes time and, in the end, the agreements are often poorly drafted. This problem is apparent in case law: Attorneys draft Privilege Disclosure Agreements and seek related Orders that contemplate handing over confidential information, but that do not provide a definitive answer to the question of privilege waiver and do not clearly delineate the obligations of the receiving attorney upon receipt of a privileged document.²⁴⁷ Two rules could achieve greater efficiency in this regard. First, comments to the current Confidentiality of Information rule could be amended to specifically address the issues an attorney should discuss with a client to receive informed consent to enter Privilege Disclosure Agreements and Orders.²⁴⁸ Second, a new professional conduct rule that provides comprehensive protection for confidential information after disclosure and before a waiver ruling would make it unnecessary for counsel to negotiate such protection in Privilege Disclosure Agreements and Orders: They would simply rely on the protection contained in the jurisdiction's professional conduct rules.

D. Policymaker for the Profession

Finally, the bar has an interest in making policy decisions for the profession. To some, requiring an attorney to protect her opponent's confidential information is antithetical to an attorney's obligation to zealously represent the interests of her own client.²⁴⁹ The bar's role

247. See, e.g., *Alcon Mfg., Ltd. v. Apotex Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *2–*3 (S.D. Ind. Nov. 26, 2008) (noting that receiving counsel used the privileged information, forwarded it to experts, and challenged the disclosure as waiving the privilege even though the court had entered a Privilege Disclosure Order).

248. See *supra* text accompanying notes 210–16 (discussing the need to seek informed consent).

249. See, e.g., SHIRA A. SCHEINDLIN ET AL., *ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE* 516 (2009) (asking, and not answering, in the concluding lines of a chapter dedicated to privilege issues the following questions: "In light of the obligations imposed on the receiving party by Rule 26 and Model Rule 4.4(b), one might wonder: What happened to the adversary system? Why can't the receiving party take full advantage of the mistakes of her

in developing professional conduct rules is to decide which interest should prevail when competing interests conflict. Several other Model Rules of Professional Conduct require or permit an attorney to put the interests of an opponent,²⁵⁰ a court,²⁵¹ or a third party²⁵² ahead of the lawyer's own client. The bar's interest in confidentiality should prevail in the area of inadvertent disclosure.²⁵³

The bar cannot rely on individual recipients of inadvertent disclosures to protect the profession's interest in confidentiality. While comments to Model Rule 4.4(b) tell receiving attorneys that they can choose to protect an opponent's inadvertently disclosed information,²⁵⁴ it is not realistic to believe a sufficient number will make this choice to adequately safeguard the profession's commitment to confidentiality. Receiving attorneys as fiduciaries are necessarily—and rightly—influenced by the interests of their own clients.²⁵⁵ As a result, the organized bar is the body that must make this policy choice.²⁵⁶

adversary?"); Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179, 180 (2006) (arguing that "[t]he traditional ethic of zeal is another casualty" of a professional obligation to not utilize an opponent's inadvertent disclosure); David D. Dodge, *Eye on Ethics: Inadvertent Disclosure Revisited*, ARIZ. ATT'Y, Sept. 2006, at 8, 8 (2006) (explaining that such requirements are "often criticized as exulting the rights of a careless lawyer over the receiving lawyer's own obligations of zealous representation to his client").

250. See MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009) ("Fairness to Opposing Party and Counsel").

251. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009) (stating that if a lawyer's client offers false evidence to a tribunal, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal").

252. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2009) (permitting disclosure of confidential information to protect a third party from substantial financial injury resulting from a client's crime or fraud).

253. See *supra* Part V.A (discussing the bar's interest in confidentiality).

254. See MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 3 (2009).

255. See Freedman, *supra* note 249, at 180 ("The lawyer's fiduciary obligation to her own client is one of several ethical duties that are often ignored or minimized in discussions of erroneous disclosure of damaging information."); Tuchler, *supra* note 207, at 1171 (explaining that "the duty of loyalty seems to be peremptory, except as it is clearly made inapplicable by the [Model Rules] themselves" and concluding that "to the extent the rules allow it," a receiving attorney must use an opponent's inadvertent disclosure).

256. See Perlman, *supra* note 33, at 787–88 (explaining that rulemakers are in a better position because of time and resources to answer ethics questions and that they will come to different conclusions than practicing attorneys).

VI. PROPOSED COMMENTS TO MODEL RULE 1.6 ADDRESS PRIVILEGE DISCLOSURE AGREEMENTS AND ORDERS AS WELL AS METADATA

A. *Proposed Comments Regarding Protecting Confidences in Metadata*

Proposed Comments 19 and 20 to Model Rule 1.6, the Confidentiality of Information rule, are found in Appendix A under the heading “Metadata.” These comments address the steps counsel should take to prevent revealing client confidences in metadata.²⁵⁷ Proposed Comment 19 provides specific examples of how counsel can fulfill the obligation to protect confidential information contained in metadata. The comment provides more guidance than contained in current comments and ethics opinions and focuses on the methods that have been associated with the fewest problems in practice.²⁵⁸ Because technology changes frequently, the comment contains a reference to a state bar website that could contain links to scrubbing software resources.²⁵⁹ The comment concludes by guiding attorneys that if they wish to transmit documents electronically but do not have the technical ability to remove confidential metadata, they should seek expert assistance.²⁶⁰ Proposed Comment 20 helpfully notes that metadata may be the subject of discovery, so attorneys must avoid producing privileged information and must also avoid spoliation.²⁶¹ Taken together, the proposed comments would further the profession’s interest in confidentiality. Additionally, by providing this guidance in comments to the rule rather than in a harder-to-find ethics opinion, the change should further the bar’s interest in compliance and efficiency.

B. *The Proposed Comments Provide Guidance to Attorneys Regarding Seeking Informed Consent to Privilege Disclosure Agreements and Orders*

Additional proposed comments to the Confidentiality of Information rule, Model Rule 1.6, also found in Appendix A, would provide guidance to attorneys entering Privilege Disclosure Agreements and seeking Privilege Disclosure Orders. Though this Article has used the

257. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmts. 19–20.

258. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 19; see also *supra* notes 68–79 and accompanying text (discussing the meager guidance that exists in current authorities regarding how attorneys should prevent disclosure of confidences in metadata).

259. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 19.

260. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 19.

261. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 20.

phrase “Privilege Disclosure Agreements and Orders,” the comments would be indexed under a heading using the popular terminology: “Clawbacks, Quick Peeks, and Other Agreements and Orders Regarding the Disclosure of Confidential Information.”²⁶² Proposed Comments 21 and 22 explain that these Agreements and Orders implicate the Confidentiality of Information rule because they contemplate the disclosure of client confidences; accordingly, counsel must obtain the client’s informed consent.²⁶³ Informed consent requires the lawyer to communicate the “material risks of and reasonably available alternatives to the proposed course of conduct”;²⁶⁴ Proposed Comments 23 through 28 are aimed at guiding an attorney through the pertinent topics.²⁶⁵ Counsel might not otherwise understand the issues that are relevant to the risks of and alternatives to a Privilege Disclosure Agreement or Order. Thus, the proposed comments further compliance and efficiency, and may ultimately protect confidentiality.

Proposed Comment 23 provides a basic overview of the subjects of counsel’s conversation with a client about a proposed Privilege Disclosure Agreement or Order—the privilege review protocol to be utilized to protect against disclosure, receiving counsel’s obligations when a document is received, and the risk of waiver in the present case and in future litigation.²⁶⁶ These topics are further expanded upon in Proposed Comments 24 through 27. Proposed Comment 24 notes that a privilege review protocol may take various forms, and lists factual and legal issues that may have a bearing on the type of privilege review protocol adopted.²⁶⁷ Next, Proposed Comment 25 describes obligations that the agreement or order could impose upon receiving counsel to protect the client’s confidences, highlighting provisions that may be implemented to provide protection for the content of a disclosed document.²⁶⁸ Then, Proposed Comments 26 and 27 require counsel to discuss the continuing risks of waiver in both the present case and in future cases.²⁶⁹ Proposed Comment 27 provides a

262. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmts. 21–28.

263. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmts. 21–22; see also *supra* text accompanying notes 210–16 (discussing the need for informed consent under current Model Rule 1.6).

264. MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2009) (defining informed consent).

265. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmts. 23–28.

266. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 23.

267. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 24.

268. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 25; see also *supra* Part IV.A.2 (discussing the current gaps in protection for the content of a disclosed document prior to a waiver ruling).

269. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmts. 26–27; see also *supra* Part IV.A.1 (discussing the risks of waiver).

citation to authority that may help attorneys in state court craft an agreement or order that is more likely to be enforced in subsequent courts,²⁷⁰ particularly in light of the fact that subsequent courts are not bound to do so under FRE 502.²⁷¹ Finally, Proposed Comment 28 notes that such agreements may be appropriate in non-litigation matters and outlines the issues that counsel should discuss with the client to receive informed consent.²⁷²

VII. A PROPOSED PROFESSIONAL CONDUCT RULE GOVERNING DISCLOSURE AND RECEIPT OF PRIVILEGED AND WORK PRODUCT PROTECTED INFORMATION

Appendix B contains “Proposed Model Rule of Professional Conduct 4.5: Duties of Sending and Receiving Lawyers When Privileged or Work Product Protected Information Is Disclosed,” along with proposed comments.²⁷³ The rule is intended to replace the current Model Rule 4.4(b), as well as ethics opinions, case law, and any other authority governing an attorney’s response to inadvertent disclosure by an opponent. Placing all of the requirements in a single rule is consistent with the interests of efficiency and compliance discussed in Part V.

Under Proposed Rule 4.5, receiving counsel’s duties are triggered when counsel knows or reasonably should know that he or she received an opponent’s privileged or work product protected information.²⁷⁴ Receiving attorneys cannot escape their obligations under the rule by determining that the disclosure was not “inadvertent.”²⁷⁵ An alternative trigger under the proposed rule is notice from the sending

270. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 27; *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499–501 (D. Md. 2000); see also *supra* note 144 and accompanying text.

271. FED. R. EVID. 502(c)–(d).

272. See *infra* app. A, Proposed Model Rules of Prof’l Conduct R. 1.6 cmt. 28; see also *supra* Part IV.B (discussing problems faced by transactional attorneys under current rules).

273. See *infra* app. B, Proposed Model Rules of Prof’l Conduct R. 4.5. Although the topic of “unauthorized disclosure” is beyond the scope of this Article, this proposed rule could be expanded slightly to address that issue as well. This approach has been taken in Tennessee’s proposed rule. See Petition of the Tennessee Bar Association for the Adoption of Amended Tennessee Rules of Professional Conduct (May 13, 2009), available at http://www.tba.org/ethics/amends_051309/2009_rules_petition_withallexhibits.pdf.

274. See *infra* app. B, Proposed Model Rules of Prof’l Conduct R. 4.5(a).

275. See *infra* app. B, Proposed Model Rules of Prof’l Conduct R. 4.5 cmt. 2. This addresses the problem inherent in requiring attorneys to make a determination of “inadvertence” to determine if their duties under a professional conduct rule have been triggered. See *supra* notes 13–18, 126, 136 and accompanying text (providing examples of this problem); see also *supra* text accompanying notes 236–41 (discussing how removing the term “inadvertent” from the rule could improve compliance).

lawyer.²⁷⁶ After either triggering event, the proposal requires receiving attorneys to protect the content of the privileged or work product information pending a waiver determination. The receiving attorney is prohibited from reading further than necessary to determine the document's privileged or work product status, prohibited from disseminating the document or information about its contents to others, and is required to follow the sending attorney's instructions regarding returning, deleting, or destroying the document and information about its contents.²⁷⁷ The receiving attorney is only allowed to maintain a copy to be submitted to the court under seal for a waiver determination.²⁷⁸

The following Sections explain the specific application of these provisions in litigation, outside of litigation, and with regard to confidences in metadata.

A. The Proposed Rule Would Complement and Supplement Current Litigation Rules

Proposed Rule 4.5 is intended to complement and supplement the key provisions of FRCP 26(b)(5)(B). The proposal borrows from the components of this federal civil procedure rule in that a receiving lawyer must return, sequester, or destroy a privileged document when directed to do so by the sender.²⁷⁹ Like FRCP 26(b)(5)(B), the proposed rule allows the receiving attorney to submit the document to a court for a determination of waiver or a determination that the document is not otherwise privileged or work product protected.²⁸⁰

Supplementing FRCP 26(b)(5)(B) to address problems discussed in this Article, Proposed Rule 4.5 applies to any disclosure of confi-

276. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(b). If counsel intentionally discloses privileged or work product protected information, disclosing counsel can notify receiving counsel that he or she need not abide by the requirements of the rule. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5 cmt. 7.

277. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(a)–(b). The proposed provisions allowing a supervisory attorney to be consulted (as envisioned by Model Rules 5.1(b) and 5.2(b)) or a disinterested attorney to be consulted for purposes of seeking advice regarding compliance with the rule (as envisioned in Model Rule 1.6(b)(4)) are the only provisions that allow communication with another attorney about the contents of the document. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(a)(1) & cmt. 4; see also MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4), 5.1(b), 5.2(b) (2009).

278. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(c).

279. See FED. R. CIV. P. 26(b)(5)(B); *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(a)(3)–(4).

280. See FED. R. CIV. P. 26(b)(5)(B); *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(c).

dential information, not just information produced in discovery.²⁸¹ Second, the proposed rule requires *receiving counsel* to provide notice that he or she has received a privileged or work product document, similar to the only requirement of the current Model Rule of Professional Conduct 4.4(b).²⁸² Finally, the proposal makes clear that the receiving attorney seeking a waiver ruling should not make reference to the contents of the privileged document in court filings or argument.²⁸³

The result should be a workable rule that protects confidentiality pending a waiver ruling in both federal and state courts. By clearly stating the requirements in the rule, compliance and efficiency should be enhanced as well. The proposal could create problems if sending attorneys use the rule as a sword to seek disqualification of receiving counsel who did not recognize that a document was privileged or work product protected.²⁸⁴ This may also lead to additional ethics complaints to state bars. Fear of such accusations and ethics complaints may cause receiving attorneys to over-identify documents as privileged and work product protected, creating additional and unnecessary work for receiving attorneys. These risks seem preferable to instances in which receiving attorneys under-identify privileged and work product protected documents (claiming they were not inadvertently produced) and use those documents strategically until the opponent discovers the error.

B. The Proposed Rule Provides a Framework for Addressing Inadvertent Disclosure for Transactional Lawyers

Proposed Model Rule 4.5 is crafted to require receiving attorneys to protect the content of privileged and work product protected documents disclosed in non-litigation matters, returning any such document to the sender.²⁸⁵ Unlike their litigation counterparts, transactional attorneys have no easy means to seek a waiver ruling.²⁸⁶

281. See FED. R. CIV. P. 26(b)(5)(B); *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5 (lacking any confinement to discovery); see also *supra* text accompanying notes 151–52.

282. See MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2009); *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(a)(2); see also *supra* text accompanying notes 153–59.

283. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(c); see also *supra* text accompanying notes 160–61.

284. See *supra* note 159 and accompanying text (explaining that disqualification appears to be more likely if a rule prohibits counsel's conduct).

285. See *infra* app. B, Proposed Model Rules of Prof'l Conduct R. 4.5(a)–(b); see also *supra* Part IV.B.

286. See *supra* text accompanying notes 171–73.

Under Model Rule 4.4(b), this means that the sending attorney had no means to seek the return of the document; under the proposal, it would mean that the receiving lawyer would have no means to keep the document. The new “status quo” of document protection in transactions is preferable in light of the increasing amount of inadvertent disclosure and the reality that all clients have an interest in mitigating the damage of an inadvertent disclosure. While this proposed rule will not cause a transactional attorney to unlearn the contents of a document that was disclosed, it can lessen some of the harm of a disclosure.

A potential problem under the proposal is non-compliance by receiving attorneys. When transactional attorneys dispute the proper disposition of a document under the rule, they have no simple means to seek resolution by a court (as would their litigator counterparts). But the strong language—requiring receiving attorneys to “follow the sending lawyer’s instructions regarding returning, deleting, or destroying” the document and information about its contents²⁸⁷—should avert most disputes.

C. The Proposed Rule Directly Addresses the Metadata Issue for Litigators and Non-litigators

Finally, Proposed Rule 4.5 addresses privileged and work product protected information found in an opponent’s metadata. Under the proposal, the receiving attorney’s duty is simple: If privileged or work product information is in the metadata, the lawyer’s obligations are the same as if the information were found in any other document.²⁸⁸ Acknowledging the legitimate uses of metadata,²⁸⁹ the rule does not prohibit metadata review for receiving attorneys.²⁹⁰ The sending attorney has a duty to prevent disclosure of confidential metadata under Model Rule 1.6(a); the proposed rule reinforces the importance of this obligation.²⁹¹

287. See *infra* app. B, Proposed Model Rules of Prof’l Conduct R. 4.5(a)(4).

288. See *infra* app. B, Proposed Model Rules of Prof’l Conduct R. 4.5 cmts. 1, 5 (defining a “document” as a writing, electronically stored information, metadata, and other embedded electronic information, and stating that the rule applies when privileged or work product protected information is found in metadata).

289. See *supra* text accompanying notes 186–87 (discussing uses of metadata).

290. See *infra* app. B, Proposed Model Rules of Prof’l Conduct R. 4.5 cmt. 5.

291. See MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2009). The proposed rule is preferable to a rule that prohibits deliberately searching for metadata, which might give sending attorneys the false impression that they do not have to prevent metadata disclosure. See *supra* note 188 and accompanying text.

Opponents of this proposed approach might argue that even if a blanket prohibition is inappropriate, a blanket rule could prohibit attorneys from reviewing the metadata if their purpose is finding privileged or work product protected information. As a practical matter, the result under such a rule is likely no different from that provided by the proposal. Attorneys searching metadata for some legitimate purpose may still find privileged information, and attorneys who deliberately hunt for metadata to find privileged information could point to a legitimate reason for the search. The proposed rule is preferable because it does not create the increased likelihood of ethics complaints with no discernible benefit.

VIII. CONCLUSION

Professional conduct rules are a necessary component of a more comprehensive “inadvertent disclosure” solution. Continuing deference to the law of waiver provides no relief for transactional attorneys, allows misuse of confidential information pending a waiver ruling in litigation, and does not adequately address the issues posed by metadata. The revisions to professional conduct rules proposed in this Article would accomplish more than a peaceful co-existence with recent changes to the federal civil procedure and evidence rules. The proposed amendments would protect the profession’s interest in confidentiality, create a more efficient framework for addressing inadvertent disclosure, and lead to greater compliance by attorneys. All of these improvements are essential for attorneys and their clients to persevere in an age of increasing inadvertent disclosures.

APPENDIX A

PROPOSED COMMENT TO MODEL RULE OF PROFESSIONAL CONDUCT
1.6: CONFIDENTIALITY OF INFORMATION*Metadata*

[19] Lawyers must exercise reasonable care to avoid revealing confidential information in metadata (the hidden “data about data” or embedded electronic information contained in electronic documents). Lawyers may fulfill their confidentiality obligation by providing documents to non-parties in non-electronic formats (such as by printing, copying, or faxing documents). If counsel desires to provide electronic documents to non-clients, the safest way to remove confidential metadata is through the use of “scrubbing” software. Links to information about scrubbing software programs are available at [jurisdictions that adopt this rule will insert a website address where links to such programs are maintained]. Lawyers who do not have the technological ability to implement these resources should hire experts to set up systems to remove metadata when documents are transmitted electronically.

[20] In litigation, metadata may be the proper subject of discovery. With the client’s informed consent, lawyers should adopt privilege review protocols to detect and avoid producing privileged or work product protected metadata. *See* cmts. 23–24. Any methods utilized to avoid production of privileged or protected metadata must not result in spoliation of evidence or the violation of Rule 3.4’s prohibition against altering, destroying, or concealing material with potential evidentiary value.

Clawbacks, Quick Peeks, and Other Agreements and Orders Regarding the Disclosure of Confidential Information

[21] On behalf of their clients, attorneys sometimes enter “clawback,” “quick peek,” or other agreements in which they agree with opposing counsel about the consequences of disclosing confidential client information. *See, e.g.*, FED. R. CIV. P. 26(f) advisory committee’s note on 2006 amendment (describing clawback and quick peek agreements); FED. R. EVID. 502(d) advisory committee’s note (same). In litigation, attorneys may also seek entry of a court order implementing these agreements. *See, e.g.*, FED. R. EVID. 502(d).

[22] These agreements and orders implicate Rule 1.6(a) because they foresee the possible disclosure of client confidences and dictate the protections to be afforded the client’s confidential information after disclosure. Accordingly, counsel must seek the client’s informed

consent prior to entering such an agreement or seeking such an order. *See* Rule 1.0(e) (defining “informed consent” as an agreement by the client after the lawyer has “communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct”).

[23] To provide adequate information about the risks and alternatives available to the client regarding clawbacks, quick peeks, and other such agreements and orders, lawyers should discuss the following subjects that bear on the issue: (1) Privilege Review Protocol for Documents to Be Produced in Discovery: What method or methods will be utilized to detect privileged or work product protected information prior to production in discovery, and what factual and legal issues have a bearing on the decision regarding methodology?; (2) Receiving Counsel’s Obligations to Protect Client’s Confidential Information: What event will trigger opposing counsel’s obligations to protect the client’s disclosed information and what are the obligations?; and (3) Waiver Standard and Risk of Waiver: What standard will the court apply to determine waiver? What is the risk of waiver in the present case? What is the risk of waiver in a future case?

[24] Privilege Review Protocol for Documents to Be Produced in Discovery. The client must give informed consent to the privilege review protocol (methods that will be used to detect privileged or work product protected information) that will be utilized in association with any clawback, quick peek, or similar proposed agreement or order. The protocol appropriate for the client may be influenced by both factual and legal issues that should be discussed with the client, including the volume of documents or electronically stored information to be reviewed, the time constraints of discovery, the financial stakes of the present case and possible future litigation, the cost of various review protocol options and their effectiveness, the sensitivity of information that may be revealed, protections afforded the disclosed information prior to a waiver ruling under the proposed agreement or order, *see* cmt. 25, and the risks of waiver in the present case and possible future litigation, *see* cmts. 26–27.

[25] Receiving Counsel’s Obligations to Protect Client’s Confidential Information. A lawyer must seek the client’s informed consent regarding the receiving attorney’s obligations under the proposed agreement or order to protect the client’s confidential documents if disclosed. Receiving counsel’s obligations could be triggered in the following instances: (1) by notice from the sending lawyer that a confidential, privileged, or work product protected document was produced; (2) by receiving counsel’s knowledge that he or she has

received an opponent's confidential, privileged, or work product protected document; or (3) by some other event or events. Receiving counsel's obligations to protect the client's confidential information could include not reading or disseminating the document or information about its contents, retrieving information about the document and information about its contents (if already disseminated), and returning, destroying, deleting, or sequestering the document and information about its contents pending a waiver ruling. *See, e.g.*, FED. R. Civ. P. 26(b)(5)(B); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992), *withdrawn by* Formal Op. 05-437 (2005). The lawyer should impress upon the client that the receiving attorney cannot "unlearn" any information contained in a disclosed document, despite any other protections provided.

[26] Waiver Standard and Risk of Waiver in the Present Case. The lawyer must also seek informed consent to the standard that the court will apply to determine if a disclosure waives privilege or work product protection. Clients should also be informed that even with that standard in place, the court could rule that a disclosure waived privilege or work product protection if counsel is unable to satisfy the standard. Counsel should explain this risk to the client and explain alternatives that would mitigate this risk (such as a strongly worded presumption against waiver in the agreement or order).

[27] Risk of Waiver in Subsequent Litigation. Lawyers must seek informed client consent to the risk of waiver in subsequent litigation under the terms of the agreement or order. When a matter is originally pending in federal court, parties are ensured that subsequent courts must enforce a "no waiver" order. FED. R. EVID. 502(d). Thus, the strongest protection against waiver in a subsequent case is a federal court order that makes waiver unlikely in the first case. In contrast, when a matter is originally pending in state court, subsequent courts are not mandated to enforce an order concerning waiver. *See id.* Accordingly, state court litigants must consider the risk that the proposed order would not be enforced in a future court, and if the order is not enforced, the risk that any disclosure may be viewed as a waiver under the substantive law of a subsequent court. *See Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499-501 (D. Md. 2000) (explaining factors that may influence a court's decision regarding enforcement of a prior court's order and noting that there is "less need for deference and comity when the order involved is really an agreement by counsel approved, almost as a ministerial act, by the court").

[28] Non-litigation Matters. In non-litigation matters, lawyers may wish to enter clawback-type agreements to protect against the ad-

verse consequences of disclosing confidential documents to an opponent. If the non-litigation matter requires counsel to provide opposing counsel with a volume of documents (similar to a document production in litigation), counsel should seek client consent to a protocol to detect confidential information, discussing the matters listed in Comment 24. In all other matters, counsel should seek the client's informed consent to all other aspects of the proposed agreement in light of the client's facts, including the following: (1) the risk of disclosing confidential information under the circumstances of the matter; (2) the benefits of the proposed agreement (focusing on the receiving attorney's obligations to protect and return the client's confidential information if revealed, as discussed in Comment 25); (3) the risks inherent in the agreement, including no easy access to a court to enforce the agreement and the risk of waiver in subsequent litigation in a court that is not obligated to enforce the agreement; and (4) available alternatives.

APPENDIX B

PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT 4.5: DUTIES OF
SENDING AND RECEIVING LAWYERS WHEN PRIVILEGED OR WORK
PRODUCT PROTECTED INFORMATION IS DISCLOSED

(a) When a lawyer receives from another lawyer a document that the receiving lawyer knows or reasonably should know is attorney-client privileged or work product protected, the receiving lawyer:

(1) shall not read the document further than reasonably necessary to determine it is privileged or work product protected and shall not disseminate the document (or information about its contents) to anyone other than a supervisory lawyer and/or a disinterested lawyer consulted to secure legal advice about the receiving lawyer's compliance with this rule; and

(2) shall promptly notify the sending lawyer; and

(3) shall retrieve and sequester the document (including duplicates and information about the document's contents); and

(4) other than as permitted in subsection (c), shall follow the sending lawyer's instructions regarding returning, deleting, or destroying the document (including duplicates) and deleting or destroying any information about the document's contents.

(b) A receiving lawyer is also required to follow the requirements of subsections (a)(3)–(4) if a sending attorney notifies the receiving lawyer that an identified document is privileged or work product protected. The receiving lawyer shall not read the document or disseminate the document or information about its contents after receiving notice from sending counsel.

(c) The receiving lawyer may maintain under seal a copy of the document that may be submitted to the court in which the matter is pending for a waiver ruling no later than thirty days after receiving the sending lawyer's (a)(4) instructions. In any such proceeding, the receiving lawyer shall not refer to the contents of the document in any brief or in argument before the court. The receiving lawyer shall not retain any copy of the sealed document in his or her files and shall destroy the sealed document if it is not submitted to the court within thirty days.

Proposed Comment

[1] Under this rule, a "document" includes all writings and electronically stored information, including a document's metadata and other embedded electronic information. In litigation, the receiving attorney should apply the law of the jurisdiction where the matter is

pending to determine attorney-client privilege or work product protection. In non-litigation matters, the receiving attorney should apply the law of this jurisdiction to determine if the document would be protected by the attorney-client privilege or as work product if the document had been requested in discovery in litigation in this jurisdiction. Any uncertainty regarding a document's status should be resolved in favor of counsel complying with the requirements of this rule. Whether a receiving attorney reasonably should have known that a document is privileged or work product protected turns on whether an attorney who had actual knowledge of the contents of the document should have made the determination that the document was privileged or work product protected.

[2] The rule does not require (or allow) the receiving attorney to determine if the disclosure was "inadvertent" or if attorney-client privilege or work product protection was waived by the disclosure. Attorney-client privilege or work product protection is determined without regard to whether such protection may have been waived by disclosure.

[3] When two or more lawyers are associated with one another to represent a client, if any one of them knows that a document is covered by this rule, the associated lawyers shall not read the document because doing so is not reasonably necessary to determine if it is privileged or work product protected.

[4] If a lawyer consults another lawyer to ensure compliance with this rule, the consulted lawyer should be one who has not and will not represent the client in the continuing matter, unless he or she is a supervisory lawyer of the receiving lawyer as described in Rules 5.1(b) and 5.2(b).

[5] Unless the parties have agreed or a court has ordered, receiving attorneys are not prohibited from reviewing a document's metadata or other embedded electronic information. However, once a receiving attorney finds privileged or work product protected information in the metadata or embedded electronic information, the review must cease under subsection (a)(1) of this rule and the other requirements of this rule are fully applicable.

[6] This rule does not prohibit the receiving lawyer from seeking a ruling that (1) the document is not privileged or work product protected; or (2) that the document's disclosure waived privilege or work product protection. If a receiving lawyer seeks such a determination, the receiving lawyer shall not refer to or rely upon the contents of the document in making this argument. This requirement puts counsel in no different position than if the document had appeared on the

sending party's privilege log and the receiving lawyer had argued that the document based on its description was not privileged or work product protected.

[7] In a case or other matter in which an attorney intends to provide opposing counsel with privileged or work product protected documents, sending counsel can notify the receiving attorney in writing that he or she is not obligated to abide by the terms of this rule for identified documents.