ARTICLE

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Ethically Handling the Receipt of Possibly Privileged Information

Abstract. Inadvertently sent e-mails that contain privileged information, material negligently included in a discovery response, or employer's documents taken by a whistle-blower all share a common theme—the materials were not intended to be disclosed to the opposing party.

This Article makes two contentions. First, all unintended disclosures should be treated under a single standard that asks whether the privilege holder exercised reasonable care in maintaining the confidentiality of the materials. Second, with respect to the receiving lawyer's professional obligations, a lawyer who receives materials that may be privileged should be allowed to read the materials: (1) to determine whether the materials are privileged, and (2) to better argue to the court that the materials are not privileged. Reading the material should not result in a finding of improper behavior so long as the receiving lawyer: (1) notifies opposing counsel of receipt of the material, and (2) does not use the material until its status is clarified by the court.

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I. INTRODUCTION

E-mail and e-discovery, along with complex litigation involving large, dispersed support staff, contribute to an environment in which the unintended disclosure of privileged[1] information is always a lurking possibility.[2] The best defense against the unintended disclosure of privileged information is the establishment of protocols, training, and practices that help ensure that a client's privileged information is preserved and protected against unintended disclosure. Few systems, however, are fool proof, and no system is "damn fool proof." Moreover, even the best information management systems may fail to catch the disaffected employee or principled whistleblower who believes that disclosure is necessary to redress personal injustices or advance the public good.

The consequences of disclosure must also be considered. The recipient of the information disclosed may be sanctioned if the disclosure is deemed improper.[3] The person responsible for protecting the information from disclosure may be liable for failing to prevent disclosure.[4] Aside from the

1. The attorney-client privilege and the work-product doctrine allow for information to be privileged or confidential. Information may also be proprietary, as in the case of trade secrets. I will generally refer to all such protections as "privileged" information. I use the term "materials" inclusively to encompass the myriad of ways information may be unwittingly communicated, such as by voice mail, fax, e-mail, regular mail, etc.

2. *See generally* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 199–200 (2010) (describing the exponential growth of electronically-stored information).

3. *See* Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1094–96 (Cal. 2007) (disqualifying a lawyer who received inadvertently disclosed privileged information, used the information, and failed to disclose its receipt until after the information was used); *cf.* Unarco Material Handling, Inc. v. Liberato, 317 S.W.3d 227, 239–40 (Tenn. Ct. App. 2010) (stating that even if a lawyer's conduct in obtaining privileged information from a witness is shielded from civil liability by the litigation privilege, the lawyer is still subject to the collateral consequences of the conduct, such as sanctions or discipline).

4. *See* Elkind v. Bennett, 958 So. 2d 1088, 1092 (Fla. Dist. Ct. App. 2007) (reiterating that "a breach by an attorney of a duty of confidentiality" that causes harm to a client or former client may be redressed by a legal malpractice action); Thiery v. Bye, 597 N.W.2d 449, 456 (Wis. Ct. App. 1999) (holding that the duty of confidentiality survives the termination of the attorney-client relationship, and remanding the case for determination of whether the failure to redact the client's identity constituted a breach of the lawyer's duty of confidentiality even though the client consented to the lawyer's use of the client's file for public disclosure in connection with educational purposes); *cf.* Poway Land, Inc. v. Hillyer & Irwin, No. D038642, 2002 WL 31623603, at *4 (Cal. Ct. App. Nov. 21, 2002) (noting that expert testimony was unnecessary on the issue of whether an attorney's role in the transmission of a misdirected fax containing confidential legal strategy was improper when the matter "would be clear even in the absence of expert testimony"). However, in *Poway Land*, the

possibility of sanction or liability, the release of privileged information may also affect the dynamics of the representation. Inadvertent disclosure may: (1) cause the lawyer to lose the client's respect and confidence; (2) affect the lawyer's ability to achieve the goals of the representation; and (3) affect the reputation of the lawyer.

With the stakes involved, it is not surprising that the issue of unintended disclosure of privileged information has generated significant interest among commentators,[5] bar associations,[6] and the courts.[7] Recently, Federal Rule of Evidence 502 was enacted,[8] which provides that, in general, an inadvertent disclosure "made in a Federal proceeding or to a Federal office or agency . . . does not operate as a waiver" of the attorney-client or work product privilege if the holder of the privilege took

court ultimately affirmed summary judgment for the law firm because the client could not establish that the disclosure caused any actual harm. *See id.* at *8 (upholding the trial court's grant of summary judgment because the appellant failed to show damages).

5. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 195–96 (2010) (noting that privilege waiver "has been the primary focus of commentators and lawmakers" discussing inadvertent disclosures); *see also* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 768–69 (2005) (noting that commentators often give conflicting advice about inadvertent disclosures). *See generally* Douglas R. Richmond, *Key Issues in the Inadvertent Release and Receipt of Confidential Information*, 72 DEF. COUNS. J. 110, 110 (Apr. 2005) (reviewing authorities and rules regarding inadvertent disclosures); Kathleen Maher, *Don't Fax, Don't Tell: Differing Opinions About ABA Opinions 92-368 and 94-382*, PROF. LAW., Summer 2001, at 2 (examining "how courts and state and local ethics committees have interpreted" the rules on inadvertent disclosures).

6. *See, e.g.*, Md. State Bar Ass'n Comm. on Ethics, Op. 04 (2000) (stating: (a) when a lawyer who receives privileged documents from opposing counsel in discovery and learns, before examining them, that they were inadvertently produced, the lawyer must immediately return documents unopened and unreviewed; and (b) a lawyer who learns of inadvertent production only after reviewing documents must inform the client and opposing counsel, and consider whether to return the documents or seek a court ruling); Thomas G. Wilkinson, *Formal Opinion 2007-200 Inadvertent Disclosures*, PENN. LAW., July-Aug. 2007, at 50, 50 (describing ABA and other bar associations' opinions on inadvertent disclosures of privileged material).

7. *See generally* John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—Federal Law*, 159 A.L.R. FED. 153 (2000) (discussing federal cases that address waiving privileges by inadvertent disclosure); John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—State Law*, 51 A.L.R. 5th 603 (1997) (analyzing state court responses to inadvertent disclosure of privileged documents).

8. On September 19, 2008, President Bush signed Senate Bill 2450, which added Rule 502 to the Federal Rules of Evidence. *See* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (adding a new privilege waiver rule to the Federal Rules of Evidence). Because Rule 502 addresses the issue of privilege, congressional approval was required. *See* 28 U.S.C. § 2074(b) (2006) (providing that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress").

reasonable precautions to prevent disclosure and takes "reasonable steps [after disclosure] to rectify the error."[9] While Rule 502 provides some clarification as to the evidentiary consequences of an inadvertent disclosure, it does not directly address the lawyer's professional obligations when confronted with the issue of disclosure of possibly privileged materials.[10] Moreover, Rule 502 simply prescribes a reasonableness standard when analyzing whether disclosure results in a waiver of privilege and, thus, does not resolve the current uncertainty over the lawyer's actions when presented with materials that may be privileged.[11] Should the lawyer notify the holder that the lawyer has possibly privileged materials? Should the lawyer review the materials to ascertain whether they are privileged? Which should come first—notice or review?

This Article seeks to compile and summarize the discussion that has arisen around this topic. In Part Two, the current state of the law regarding inadvertent disclosure and unauthorized disclosure as separate topics is examined. Part Three of this Article takes the position that the distinction between inadvertent and unauthorized disclosure is artificial and should be rejected in favor of a unified term—unintended disclosure.

9. Rule 502(b) of the Federal Rules of Evidence states in full:

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

FED. R. EVID. 502(b).

10. Federal Rule of Evidence 502(a) reaffirms that waivers of privilege must be intentional but does not resolve the debate as to whether intent may be inferred from a failure to exercise reasonable care. *See* FED. R. EVID. 502(a) (declaring that waivers of privilege must be intentional in federal proceedings); *see also* Michael J. Burg & Richard Hunter, *A Review of How Courts Are Analyzing New Federal Rule of Evidence 502*, 78 U.S.L.W. 2499 (Mar. 2, 2010) ("A party . . . who mistakenly discloses privilege material . . . may avoid waiving the privilege as to the disclosed material depending on the reasonableness of the precaution and its steps to rectify the error."); Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney-Client Privilege, and Federal Rule of Evidence 502*, 32 CAMPBELL L. REV. 467, 527 (2010) (discussing the "low standard of reasonableness" that Congress intended Rule 502 to impose on the holder of a privilege to prevent inadvertent disclosures). *See generally infra* notes 102–03 and accompanying text (discussing Rule 502(b)'s emphasis that whether the holder took "reasonable steps to prevent disclosure" determines whether disclosure results in a loss of privilege).

11. *See* FED R. EVID. 502(b)(2)–(3) (indicating that "reasonable steps" must be taken to prevent disclosure and rectify error with regard to inadvertent disclosures, but failing to provide insight into steps an attorney should take after *receiving* potentially privileged material).

When we disaggregate the disclosure cases along the lines I suggest above, we see a much richer and thicker problem than one might initially discern. Because the inadvertent disclosure cases dominate the cases and commentary, this distinction may be overlooked. Looking at the larger landscape of disclosure cases allows the reviewer to see similarities that are missed and dissimilarities that are confused. This Article aims to take stock of the opportunity to view the disclosure cases broadly to identify similarities that call for analogous treatment and material dissimilarities that warrant distinctions in the approach to the issue of disclosure of privileged information and its consequences.

Part Four concludes by offering four suggestions for resolving claims of unintended disclosure that better reconcile the competing considerations than current efforts provide. In advancing these suggestions, I concede that my primary concern is to provide a clear, clean set of rules that lawyers may apply in lieu of the incomplete and uncertain guidelines and balancing tests that currently exist. The suggestions are as follows: first, a lawyer should be able to review, without limit or constraint, materials that are received by the lawyer without the lawyer's active connivance in aiding or abetting a breach of a duty of confidentiality. The right to review the materials would not attach, however, to materials the lawyer knows were stolen or misappropriated from the privilege holder. Second, a lawyer should promptly notify the privilege holder whenever apparently privileged materials are received that reasonably appear to have been sent unintentionally from the standpoint of the privilege holder. Third, a lawyer should not use materials for evidentiary purposes that are apparently privileged or claimed to be privileged until the claim of privilege has been resolved by the parties or by a tribunal. Fourth, a lawyer who receives privileged materials should not be disqualified unless the lawyer fails to comply with one of the above requirements, absent exceptional circumstances.

II. FORMS OF UNINTENDED DISCLOSURE

A. *Inadvertent Disclosure*

The errant fax or e-mail, or the discovery document that should not

have been included in the response, are classic examples of what is generally described as the "inadvertent" disclosure problem. The basic assumption is that the sender of the information did not intend the disclosure.[12] Here the operative word is "Oops!" The modern approach to the inadvertent disclosure is exemplified by Model Rule of Professional Conduct 4.4(b), which instructs the receiving lawyer to notify the sender of the errant disclosure.[13] Comment 2 to Model Rule 4.4 suggests that it is the responsibility of the *sender* to affect a resolution of any problem(s) raised by the disclosure.[14]

Model Rule 4.4(b) works if the facts are clear, such as when the information is privileged and the disclosure was inadvertent. In that case, the Rule imposes a professional obligation of notification.[15] The problem is that Model Rule 4.4(b) is largely silent as to how a lawyer knows that the duty of notification has been triggered: the Rule says that the lawyer must know (actually or constructively)[16] that the information was inadvertently sent, but it provides no guidance as to how the lawyer gains the requisite knowledge to trigger the professional duty of notification.[17] Prior to the adoption of Model Rule 4.4(b), the American Bar Association focused on the presence of privileged information in the document and held that

12. *See generally* Ashby Jones, *Email Gremlins Strike Skadden's Sheila Birnbaum*, WALL ST. J. L. BLOG (Feb. 20, 2008, 3:15 PM), http://blogs.wsj.com/law/2008/02/20/email-gremlins-strike-skaddens-shelia-birnbaum (discussing a lawyer's dissemination of confidential responses to journalists that she intended to go only to specific recipients); Dan Slater, *Report: Lawyer's Email Slip-Up Leads to Zyprexa Leak*, WALL ST. J. L. BLOG (Feb. 5, 2008, 5:42 PM), http://blogs.wsj.com/law/2008/02/05/report-lawyers-email-slip-up-leads-to-zyprexa-leak (discussing the transmission of confidential documents to a journalist who had a similar name to that of the intended lawyer recipient—the e-mail system matched the incorrect name to prompt).

13. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002) ("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.").

14. Comment 2 to Model Rule of Professional Conduct 4.4 provides in pertinent part: "If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit *that person* to take protective measures." *Id.* R. 4.4 cmt. 2 (emphasis added).

15. *See id.* R. 4.4(b) (demanding prompt notification of known inadvertent disclosures).

16. *See generally id.* R. 1.0(f) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."); *id.* R. 1.0(j) ("'Reasonably should know' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.").

17. *See id.* R. 4.4(b) (stating only that a lawyer has a duty to notify the sender of material that he "knows" was inadvertently sent).

"materials that on their face appear to be subject to the attorney-client privilege or [that are] otherwise confidential, [and are received] under circumstances where it is clear they were not intended for the receiving lawyer," require the receiving lawyer to notify the sending lawyer of the situation.[18] The operative assumption is that a lawyer will at least suspect that the document was inadvertently sent when it contains the adversary's privileged information that the lawyer was not expecting to receive because privileged information is not usually given on a silver platter, without strings or reasons, to one's adversaries.

Model Rule 4.4(b)'s silence, and the implicit rejection of the prior ABA position on this point, is deliberate.[19] It adopts a neutral stance that is not tied to collateral issues, such as whether the recipient of the document must return the document. Model Rule 4.4(b) treats the issue of document return as a legal, rather than a professional, question;[20] however, it is silent as to why "notification" is a professional duty, but "returning the original document" is a legal question. The drafters may have been influenced by the issues of privilege and waiver, but these issues are related to use of the information, not the functional issue of return.

18. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 368 (1992) (discussing obligations of a receiving lawyer when he or she knows, or should know, that confidential materials were inadvertently sent), *withdrawn by* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 437 (2005).

19. Comment 1 to Model Rule 4.4 suggests that the absence of a consensus as to how to organize and order the issues raised by inadvertent disclosure led to the truncated Rule. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 1 (2002) ("It is impractical to catalogue all . . . rights [owed to third parties], but they include legal restrictions on . . . unwarranted intrusions into privileged relationships."); *see also* 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) (discussing Model Rule 4.4).

> A new provision in Rule 4.4 ("Respect for Rights of Third Persons") deals with the currently controversial issue of the "errant fax." It provides that a lawyer who receives a document relating to the representation of the lawyer's client, and knows or reasonably should know that it was inadvertently sent, must promptly notify the sender. Beyond this, however, the Commission decided against trying to sort out a lawyer's possible legal obligations in connection with examining and using confidential documents that come into her possession through the inadvertence or wrongful act of another.

Id.

20. Comment 2 to Model Rule 4.4 provides in pertinent part: "Whether the lawyer is required to take additional steps, such as returning the original document, *is a matter of law* beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived." MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2002) (emphasis added).

Model Rule 4.4(b) simply classifies, without explanation, the issue of retention or return as one of privilege and waiver, and hence an issue of law, whereas receipt is deemed by the Rule to not involve issues of privilege or waiver.[21]

Model Rule 4.4(b) does not address the connection between review of the information to ascertain whether the duty to notify was triggered and review of the information as tainting the lawyer and subjecting the lawyer to sanction or disqualification.[22] It eludes these issues by disaggregating the method by which the document was obtained (inadvertent vs. deliberate) from the nature of the document (privileged vs. non-privileged).[23] In effect, Model Rule 4.4(b) instructs that the lawyer's duty to notify turns solely on the fact of apparent inadvertent disclosure. This is surprising. One would think that whether a disclosure requires notice to the sender should be connected to whether the content of the disclosure is arguably privileged. Disclosure alone is innocuous; disclosure of possibly privileged materials is dangerous. Model Rule 4.4(b), however, is not tied to that view; any inadvertent disclosure, privileged or not, triggers a duty of notification.[24] The difficulty, however, is whether the two concepts (inadvertency and privilege) can, or should be, separated in the manner envisioned by Model Rule 4.4(b).

In *Rico v. Mitsubishi Motors Corp.*,[25] the California Supreme Court addressed this question. In *Rico*, a lawyer came into possession of his adversary's litigation notes.[26] The court had no difficulty characterizing the notes as absolutely protected from disclosure under California's work

21. *See generally id.* (failing to provide reasons why notification is a professional issue, while returning the document is a legal question).

22. *See id.* R. 4.4(b) (discussing the duty of notification when the receiving lawyer knows, or should know, that privileged material was sent, but failing to address whether review of the material is allowed in order to determine if it is privileged and if review will result in sanction or disqualification of the receiving lawyer).

23. *See id.* (ordering that inadvertently disclosed information be reported to the sending party, but not indicating whether the material has to be privileged in order to require notification). In fact, Model Rule 4.4(b) never mentions the nature of the material sent. *See id.* ("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.").

24. *See id.* R. 4.4(b) (failing to provide whether or not inadvertently disclosed information must be privileged before requiring notification).

25. Rico v. Mitsubishi Motors Corp., 171 P.3d 1092 (Cal. 2007).

26. *See id.* at 1094 (considering the proper course of action required when an attorney "receives privileged documents through inadvertence").

product rules.[27] As a side note, California does not presently have a professional rule of conduct that corresponds to Model Rule 4.4(b),[28] although prior California cases have addressed the issue of inadvertent disclosure.[29]

A two-prong test was adopted by the California Supreme Court in *Rico* that addressed both the information content and the method of information disclosure.[30] As to content, the court held that the receiving lawyer does not have a notification obligation unless the information received "obviously" or "clearly" appears to be privileged.[31] As to the method by which the materials came into the possession or attention of the receiving lawyer, it must be "reasonably apparent" the information was produced inadvertently to require notification.[32]

The California Supreme Court in *Rico* implicitly accepted that "inadvertency" cannot usually be discerned from the method of transmission of the information alone.[33] Lawyers deal with mounds of paper and oral communications. Should a lawyer know from a cursory review of a cover sheet, heading, or salutation that the information that

27. *See id.* at 1100–01 (holding that the writings were protected by work-product privilege).

28. California is in the process of revising its rules of professional conduct so that they more closely follow the ABA Model Rules. *See generally Rules of Professional Conduct,* STATE BAR OF CAL., http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx (last visited May 9, 2011). The status of the California revision is reported (and regularly updated) on the California State Bar website. *Id.*

29. *See* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 805–06 (Ct. App. 1999) (considering materials inadvertently produced in response to a discovery request and holding that waiver does not include inadvertently produced documents); O'Mary v. Mitsubishi Elecs. Am., Inc., 69 Cal. Rptr. 2d 389, 398–99 (Ct. App. 1997) (refusing to find a waiver when documents are accidently produced during discovery because "[t]he substance of an inadvertent disclosure under such circumstances demonstrates that there was no *voluntary* release"); *cf.* Masonite Corp. v. Cnty. of Mendocino Air Quality Mgmt. Dist., 49 Cal. Rptr. 2d 639, 648–49 (Ct. App. 1996) (holding that the Government's disclosure of a plaintiff's trade secret material to third parties did not operate to waive the plaintiff's privilege in the confidentiality of the material because the third parties were not "entitled to distribute it further"); Aerojet-Gen. Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862, 866 (Ct. App. 1993) (stating that attorney-client privilege protects against deliberate intrusion, not inadvertent disclosure).

30. *See Rico*, 171 P.3d at 1099 (citing *State Farm Comp. Ins. Fund*, 82 Cal. Rptr. 2d at 807–08) (applying a test that requires lawyers to notify the sender and refrain from examining material that appears to be: (1) privileged, and (2) inadvertently disclosed).

31. *Id.*

32. *Id.*

33. *See id.* (stating that when materials received "clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence," the lawyer should avoid examining them and notify the sender).

follows was inadvertently transmitted? Take the case where the communication clearly states that it is addressed to someone other than the receiving lawyer. The fact that the communication is addressed to another does not, without more, make it reasonably apparent that the communication is erroneously in the possession of the recipient. Lawyers often receive documents addressed to the attention of other lawyers because of notice requirements in litigation or information distribution protocols in transaction matters. Appreciating the content of the material is a necessary and inherent aspect to determining if the transmission is inadvertent even in the most apparent of cases, such as when a correctly labeled and addressed package is delivered to the wrong recipient. In addition, it is not unusual for lawyers to take a liberal approach to claiming that information is attorney-client privileged: letters, e-mails, and faxes from lawyers are customarily adorned with pretextual, boilerplate claims of privilege, which are attached both to confidential communications with clients and to lunch orders to the corner delicatessen. Even when the document is labeled as privileged, some content review is warranted to test the pro forma claim. In effect, review of the material is almost always necessary to confirm that a mistake in distributing the document to the recipient was made.[34]

Both the California Supreme Court in *Rico* and the ABA in Model Rule of Professional Conduct 4.4(b) address what a lawyer should do when he receives materials inadvertently transmitted to him; however, neither *Rico* nor Rule 4.4(b) provide guidance beyond requiring that the receiving lawyer notify the sender of the receipt of the materials.[35] The additional

34. This Article addresses the issue of review by the recipient of the materials that were allegedly inadvertently sent in Parts III and IV(B). The California Supreme Court did not address this issue in *Rico*, although other courts have done so. *See, e.g.*, Am. Express v. Accu-Weather, Inc., No. 91 CIV. 6485 (RWS), 1996 WL 346388, at *1 (S.D.N.Y. June 25, 1996) (addressing the issue of reviewing documents labeled privileged).

> In light of [ABA Ethics Opinion 92-368], and the important policy concerns it embodies, Milakovic's conduct constituted an ethical violation. Potter explicitly stated that the package should not be opened and that document XX-173 was privileged. Milakovic and Beckley did not abide by Potter's instructions, and instead "g[a]ve[] in to temptation." According to the Opinion, they should have adhered to the instructions and not decided for themselves if the document warranted the attorney-client privilege.

Id. at *2 (second and third alteration in original).

35. *See Rico*, 171 P.3d at 1099 (requiring notification upon receipt of inadvertently produced

guidance the California Supreme Court provided in *Rico* was loose and injected incoherence into the analytical framework the court sought to establish to resolve the problem. *Rico* effectually stated that the lawyer should refrain from reading or examining any more of the materials received than necessary to ascertain whether the materials are privileged or confidential.[36] The implicit admonition is that the lawyer should not review or examine the documents further after reaching the "apparently privileged" threshold. Although Model Rule 4.4(b) is silent on this point,[37] the concept that a lawyer should not examine materials the lawyer knows to be privileged is fairly well accepted in the United States, although there are contrary views. The review and examination of material that is known to be privileged will be addressed in Part II(B). For now, I will focus on the view adopted in *Rico*, that further exploration of the materials by the lawyer is improper after the attorney has determined that the materials are apparently privileged.

Neither *Rico* nor Model Rule 4.4(b) *require* a lawyer to return materials to the inadvertent sender.[38] They both operate under the assumption that

documents); MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002) (mandating notification when materials are inadvertently produced).

36. *See Rico*, 171 P.3d at 1099 (summarizing the duty of a lawyer who receives inadvertently produced documents). In particular, the court in *Rico* stated:

> "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."

Id. (quoting State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999)).

37. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002) (failing to discuss the duty to review inadvertently produced documents).

38. In *Rico*, the court only required the receiving lawyer to notify the sender of the material once it was clear the material was inadvertently sent. Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1099 (Cal. 2007) (quoting *State Comp. Ins. Fund*, 82 Cal. Rptr. 2d at 807). Comment 3 to Model Rule 4.4 treats the decision of whether to return the inadvertently disclosed materials as committed to the professional discretion of the lawyer. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 3 (2002) ("*Some* lawyers *may* choose to return a document unread." (emphasis added)). ABA Formal Opinion 92-368 *did* contain a turnover obligation, and courts relied on that duty to sanction lawyers who read on after the privileged status of the information was claimed or became apparent. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 368 (1992) (requiring a lawyer who received inadvertently-disclosed material to abide by the sending lawyer's instructions

the lawyers will either resolve the issue or seek judicial assistance to resolve the matter.[39] As an abstract proposition, that's good advice. As a practical matter, lawyers have been left between the proverbial rock and a hard place because both *Rico* and Model Rule 4.4(b) are silent as to how the lawyer can resolve the status of information in her possession if she can only read part of what she has in her possession. *Rico* instructs lawyers that they can only read to an imprecisely-defined point, with potentially draconian consequences (disqualification, sanction) if they read past that point.[40] However, unless the lawyer reads the entire information package, she will be unable to formulate an accurate opinion as to whether the claim of privilege is valid. Model Rule 4.4(b), on the other hand, requires the receiving lawyer to notify the sender when inadvertently sent material is received, yet how one is to know it is inadvertently sent is never explained.[41]

This uncertainty will hamper both private and judicial resolution of a dispute over the status of the information. Consider a disclosure that suggests that a material witness testified inaccurately or that certain documents were not produced in response to discovery because opposing counsel interpreted the request to produce very narrowly. The receiving lawyer notifies the sending lawyer (opposing counsel) of the receipt of the inadvertently disclosed information, and the sending lawyer demands its return. What does the receiving lawyer do? Without reviewing the information to ascertain whether the privilege has been waived or an exception applies (e.g., in the instance of crime-fraud), how does the receiving lawyer discuss the matter responsibly with the sending lawyer?

regarding the material); *see also Am. Express*, 1996 WL 346388, at *2 (refusing to consider whether disclosure had waived privilege status of information inadvertently disclosed because receiving lawyer read further after sending lawyer asserted claim of privilege); *cf.* Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290 n.2 (D. Mass. 2000) (commending party for not reading inadvertently sent materials until court resolved the claim of waiver). Opinion 92-368 was, however, disavowed after adoption of Model Rule 4.4. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 437 (2005).

39. *See Rico*, 171 P.3d at 1099 (noting that lawyers may seek judicial assistance when there is a question about the need to return inadvertently produced documents); *see also* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 3 (2002) (construing Rule 4.4 to leave it to the discretion of lawyers to determine whether to return inadvertently produced material).

40. *See Rico*, 171 P.3d at 1100 (affirming the appellate court's decision to disqualify the lawyer who read and used privileged documents).

41. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

Unless the receiving lawyer reviews the contents of the material, how does the lawyer ascertain whether the confidentiality of the material was adequately protected to preserve the privilege from loss? Without reviewing the contents of the material, how does the receiving lawyer ascertain whether the privilege was lost because the material was also transmitted to non-privileged persons?

This problem is augmented if the lawyer seeks judicial assistance to resolve an impasse—an approach recommended by the California Supreme Court in *Rico*.[42] Unless the receiving lawyer reviews the material, the lawyer is not well positioned to argue that the claim of privilege has been lost due to the inadvertent transmission and partial reading of the privileged materials. Unless the facts supporting waiver become known before the communication's apparent inadvertent transmission became known, the receiving lawyer has no basis, other than the fact of transmission itself, to claim waiver or that the information is not privileged as the sending lawyer claims.

The situation is different from the usual claim when a document is registered in a privilege log and the parties contest the status of the document. When the document has never been disclosed, the holder's right to keep the contents from others until the status of the document has been determined is at its highest. While courts have the power to compel limited disclosure for *in camera* inspection,[43] that power is not usually

42. *See Rico*, 171 P.3d at 1099 ("'The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.'" (quoting *State Comp. Ins. Fund*, 82 Cal. Rptr. 2d at 807)). Model Rule 4.4(b) is silent on this point, but comment 2 states that the notice obligation permits the sender "to take protective measures." MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2002). This would appear to include private resolution or, if that fails, judicial assistance to resolve the issues raised by the inadvertent transmission of the materials. However, this option is not open-ended. In *Bak v. MCL Financial Group, Inc.*, a lawyer received 112 pages of documents during an arbitration proceeding. Bak v. MCL Fin. Grp., Inc., 88 Cal. Rptr. 3d 800, 803 (Ct. App. 2009). The sending party demanded their return, claiming both privilege and inadvertent disclosure. *Id.* The receiving lawyer complied with the demand, but before doing so he reviewed the materials, made a copy, and sent the copy to the arbitration panel. *Id.* The court found that sending the materials to the panel before being instructed to do so by the panel was sanctionable conduct: "[W]here, as here, defendants objected to plaintiffs' demand for immediate return of the privileged documents, objector should have sought guidance from the arbitration panel rather than unilaterally copying the material and sending it to FINRA." *Id.* at 807.

43. *See* United States v. Zolin, 491 U.S. 554, 568–69 (1989) ("[T]his Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents

exercised when a proper privilege log is prepared.[44] Once, however, the privilege holder discloses the communication, but seeks its return, the situation changes because the privilege holder has affected the status quo. Contrary to the usual case, the inadvertent disclosure case represents a situation where the information, whose status is yet to be determined, has been disseminated outside the ranks of privileged persons.[45]

In determining whether the crime-fraud exception to the attorney-client privilege applies, some courts have permitted communication contents review of disclosed communications.[46] When the underlying communication has remained confidential, courts generally require the party seeking disclosure to establish a prima facie case that the exception applies without recourse to the contents of the communication: a court should first determine that the prima facie case exists independent of the contents of the communication before reviewing the communication *in camera* to adjudicate the claim.[47] However, when the communication has

available for *in camera* inspection."); Kerr v. U.S. District Court, 426 U.S. 394, 405–06 (1976) ("[T]his Court has long held the view that in camera review is a highly appropriate and useful means of dealing with [certain] claims of . . . privilege."). This is a departure from the common law. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE § 5507 (2008) (noting that "[a]t common law, the judge could not require a disclosure of a communication . . . in order to make a determination" of its privileged status); *see also* CAL. EVID. CODE § 915 (West 2005) (noting the same, and extending the limit on production to attorney work product).

44. *See* FED. R. CIV. P. 26(b)(5)(A) (describing the procedure a party must follow when withholding otherwise discoverable information based on a claim of privilege); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE § 5507, n.68 (2008) (collecting decisions about court inspections). California courts are specifically barred from requiring disclosure in order to rule on a claim of privilege. CAL. EVID. CODE § 915(a) (West 2005); *see* Costco Wholesale Corp. v. Super. Ct., 219 P.3d 736, 745 (Cal. 2009) ("[A] court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege.").

45. "Privileged persons" encompass those individuals among whom privileged information may be shared without causing the privilege to be lost. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000); *cf.* Truckstop.net, LLC v. Sprint Corp., 547 F.3d 1065, 1067–68 (9th Cir. 2008) (holding that appeal pursuant to "collateral order doctrine" would not lie as to district court's disclosure order involving allegedly privileged material because "information ha[d] already been disclosed").

46. *Compare* Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 12 Cal. Rptr. 3d 123, 129–30 (Ct. App. 2004) (allowing the court to review disclosed material to determine if the crime-fraud exception applied), *rev. granted*, 94 P.3d 475 (Cal. 2004), and *rev. dismissed*, 182 P.3d 513 (Cal. 2008), *with* Cunningham v. Conn. Mut. Life Ins., 845 F. Supp. 1403, 1412–13 (S.D. Cal. 1994) (stating that a prima facie case for the application of the crime-fraud exception must be established by non-privileged evidence).

47. In *United States v. Zolin*, the Court stated:

been disclosed the requirement to establish the prima facie case independently of the contents of the communication may not be imposed.[48]

A lawyer who receives an inadvertent disclosure is often advised not to use the disclosed information until its status is resolved, after notification, by the parties or by the court, which complicates the receiving lawyer's ability to demonstrate that the privilege has been waived or never properly attached in the first place. However, simply submitting the allegedly privileged materials for *in camera* review denies the recipient the opportunity to effectively advocate that the materials are not privileged or that they have lost their privileged status. Moreover, the recipient is disadvantaged in the argument vis à vis the party claiming that the materials are privileged because the claimant fully knows the contents of the materials and, thus, is better positioned to make its arguments. The recipient, who is only partially informed of the content of the materials because he ceased reading at the point the materials' status as arguably

> In fashioning a standard for determining when *in camera* review is appropriate, we begin with the observation that "*in camera* inspection . . . is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure." We therefore conclude that a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege. The threshold we set, in other words, need not be a stringent one.
>
> We think that the following standard strikes the correct balance. Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

United States v. Zolin, 491 U.S. 554, 572 (1989) (citations omitted). State practices on this point may vary from the federal approach. *See* 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8:9 (2d ed. 2007) (stating that most courts have rejected the "independent evidence" requirement and permit courts to examine the contested communication when considering the application of the crime-fraud exception to a prima facie case).

48. *See, e.g.*, *Jasmine Networks*, 12 Cal. Rptr. 3d at 129–30 (holding that disclosure of privileged information operated as a legally significant fact that permitted the court to consider the information in determining whether the party established a prima facie case that the crime-fraud exception applied). *See generally* Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583 (2003) (analyzing the effect *in camera* reviews have on the crime-fraud exception to privileged materials). If inadvertent disclosure is part of the discovery process, federal practice requires that the allegedly inadvertently produced privileged materials be filed with the court if there is a question as to the potential use of the discovery. *See* FED. R. CIV. P. 26(b)(5)(B) (determining that a lawyer who receives inadvertently disclosed material should give it to the court for determination of a privilege claim).

privileged became apparent, fights, in effect, with one hand tied behind his back. Fairness suggests that both sides should be able to argue the privilege issue with equal knowledge of the materials' contents.[49]

The concern that lawyers will use the inadvertent disclosure to exploit the sending party without their knowledge is not relevant to the discussion of whether the receiving party should be able to use it to argue that it is no longer privileged, because the very fact that its privileged status is being debated means that both parties are aware that it has been sent. This is different from those situations in which the receiving party uses the material without disclosing that it has been received. For example, in *Rico*, the receiving lawyer used the information to cross-examine an expert witness retained by the sender of the disclosure.[50] In *State Compensation Insurance Fund v. WPS, Inc.*,[51] the receiving lawyer provided the disclosed information, which was clearly marked as privileged, to an expert witness who, in turn, provided it to a third-party that used it for discovery purposes against the original sender.[52] Few courts expressly adopt this "use first, ask permission later" approach;[53] however, "read and use to obtain permission" incentivizes parties to resolve disputes openly and quickly.

The transmission of possibly privileged materials implicates the professional obligations of counsel. Did the sending lawyer exercise

49. *See* Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 924–25 (Ct. App. 2001) (holding that when privileged material is at the heart of the issue before the court, "'fundamental fairness requires that it be disclosed for the litigation to proceed'"; therefore, the privilege holder cannot restrict disclosure to the opposing party by submitting the claimed privileged materials under seal for the *in camera*, ex parte review by the court (quoting Steiny & Co. v. Cal. Elec. Supply Co., 93 Cal. Rptr. 2d 920, 925 (Ct. App. 2000))); *cf.* Myers v. Porter (*In re* Estate of Myers), 130 P.3d 1023, 1026–27 (Colo. 2006) (en banc) (reversing an order that disqualified counsel based on the fact that counsel's paralegal unlawfully obtained a trustee's credit report because the lower court failed to "identify the contents of the credit report or assess its discoverability or the impact of its release").

50. *See* Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1095–96 (Cal. 2007) (criticizing an instance where a lawyer used privileged notes to depose defense counsel's expert witness).

51. State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799 (Ct. App. 1999).

52. *See id.* at 802 (noting that the material received was clearly marked as "CONFIDENTIAL" and "ATTORNEY-CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT").

53. *But cf.* Granada Corp. v. Honorable First Court of Appeals, 844 S.W.2d 223, 226–27 (Tex. 1992) (concluding that dispensing with the notice and return requirement was consistent with the approach of many courts treating inadvertent disclosure in general as a waiver, and with the principle that failure to interpose a timely objection to discovery amounted to waiver of the claim of privilege absent a showing of good cause).

appropriate care in maintaining the allegedly confidential information? Did the receiving lawyer act professionally on receipt of the allegedly confidential information? Even if these questions can, to some extent, be answered independently of the contents of the information, the question remains whether they should be. Emphasizing counsel's professional obligations, however, tilts the resolution in favor of the return of the materials and their non-use. If the focus stays on the method and means by which the materials were transmitted rather than the content of the materials transmitted, it will reduce the likelihood that a court will find that the materials could be used, such as when the privilege was lost or never attached in the first place.[54] If the receiving lawyer returns the materials after ascertaining that it is apparently privileged, the matter is concluded: the material is back where it belongs and its privileged status is arguably maintained. If the receiving lawyer uses the materials without securing the right to do so, however, the lawyer risks sanction.[55] Interestingly, when confronted by error on the part of both the sending lawyer and the receiving lawyer, it is the receiving lawyer who is sanctioned—usually by disqualification.[56] Courts and the bar apparently perceive the receiving lawyer's conduct (failure to notify and surreptitious use) as a more serious professional error than the sending lawyer's conduct (failure to adequately protect the materials).

If the court determines that a privilege (i.e., attorney-client or work product) did not exist or was waived, the lawyer's use of the material is not improper.[57] The California Supreme Court effectively conceded this point in *Rico* by its treatment of *Aerojet-General Corp. v. Transport*

54. *See id.* at 226 (suggesting that many federal courts "now determine waiver by evaluating the circumstances of the disclosure" (citing Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 329 (N.D. Cal. 1985); Niagra Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 587–88 (N.D.N.Y. 1989))).

55. *See, e.g.*, *Rico*, 171 P.3d at 1100 (holding that disqualification of a lawyer who used inadvertently received material was proper). *But see, e.g.*, Aerojet-Gen. Corp. v. Transport Indem. Ins., 22 Cal Rptr. 2d 862, 867–68 (Ct. App. 1993) (vacating sanctions against a firm for not timely disclosing the inadvertent receipt of privileged communications).

56. *E.g.*, Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc., 724 So. 2d 572, 573–74 (Fla. Dist. Ct. App. 1998) (disqualifying an attorney who inadvertently received documents based upon the fact that the attorney gained an unfair tactical advantage (citing Gen. Accident Ins. Co. v. Borg-Water Acceptance Corp., 483 So. 2d 505, 506 (Fla. Dist. Ct. App. 1986))).

57. *See Rico*, 171 P.3d at 1098 (reaffirming that acquiring non-privileged information without fault will not result in disciplinary action (citing *Aerojet-Gen.*, 22 Cal Rptr. 2d at 862)).

Indemnity Insurance.[58] In *Aerojet-General*, the court refused to sanction a lawyer who received an inadvertent disclosure and used it without notifying the sender.[59] The *Rico* court noted that the receiving lawyer in *Aerojet-General* was blameless in his acquisition of the material and the information was not privileged.[60] How is this concept of blamelessness to be understood? One construction of *Rico* suggests that "blameless" includes a notify protocol and a "do not use until clarified" protocol.[61] This assumes, however, that we emphasize the *conduct* of the sender and the recipient. If we emphasize the *content* of the information sent, the status of the information becomes central, and the issue of blame morphs into asking whether the lawyer was complicit in obtaining the materials (i.e., asking whether the disclosure was "unauthorized" as opposed to "inadvertent"). This alternative construction is supported by *Rico's* construction of *Aerojet-General*, with the latter's emphasis on the recipient lawyer's innocence in obtaining the information, coupled with the conclusion that the information was not privileged.[62] Thus, *Rico* introduces some incoherence because the court tells lawyers they should not read inadvertently disclosed materials past the trigger point and should not use possibly privileged materials without an *ex ante* judicial determination that the privilege has been lost,[63] but if the court determines *ex post* that the materials used were not privileged, the lawyer should not be sanctioned even if the lawyer read and used the materials without notifying the adversary.[64]

58. Aerojet-Gen. Corp. v. Transport Indem. Ins., 22 Cal Rptr. 2d 862 (Ct. App. 1993); *see also Rico*, 171 P.3d at 1098 (reviewing the *Aerojet-General* decision).

59. *Aerojet-Gen.,* 22 Cal Rptr. 2d at 868.

60. *Rico*, 171 P.3d at 1098 (citing *Aerojet-Gen*., 22 Cal Rptr. 2d at 866).

61. *See generally id.* at 1098–99 (discussing *Aerojet-General* and *State Compensation Insurance Fund* and each opinion's derived protocols).

62. In *Aerojet-General*, the court concluded that the information was not privileged because it merely identified the existence of a witness. *See Aerojet-Gen*., 22 Cal. Rptr. 2d at 866 ("'[T]he identity and location of persons having knowledge of relevant facts' [cannot] be concealed under the attorney work product rule . . . ." (quoting City of Long Beach v. Super. Ct., 134 Cal. Rptr. 468, 473–74 (Ct. App. 1976))); *see also Rico*, 171 P.3d at 1098 (reviewing and approving *Aerojet-General*).

63. *See Rico*, 171 P.3d at 1099 (suggesting that the guidance of the court may be relied upon to resolve a dispute pertaining to inadvertent disclosure of privileged materials).

64. *See id.* at 1098 (summarizing the *Aerojet-General* opinion and explicitly stating that because the information at issue was determined not to be privileged, no fault would come from using it (citing *Aerojet-Gen.*, 22 Cal Rptr. 2d at 866)).

The *Rico* court may or may not have perceived this dilemma. While the court had the opportunity to confront this question directly in *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*,[65] it ultimately chose not to address it.[66] *Jasmine Networks* involved the sale of Jasmine Networks, Inc. to Marvell Semiconductor, Inc. As part of the sale, the parties agreed to share information and data.[67] While the transaction was still executory and incomplete, the defendant (Marvell) inadvertently left a voicemail that indicated it had acted fraudulently towards Jasmine.[68] Jasmine sought to use the information in subsequent litigation against Marvell, while Marvell sought an injunction barring "Jasmine from disclosing, disseminating or referring to the contents of the recorded voicemail conversation."[69]

The court of appeals focused on whether the voicemail message was a privileged communication and, if so, whether the privilege was lost due to its dissemination to Jasmine.[70] However, the trial court in *Jasmine Networks* addressed the privilege issue without considering the content of the voice message left on the Jasmine Networks, Inc. telephone.[71] Without the content evidence, Jasmine was unable to present a prima facie case for application of the crime-fraud exception or the claim of waiver of attorney-client privilege at trial.[72] The court of appeals reversed the trial

65. Jasmine Networks v. Marvell Semiconductor, Inc., 12 Cal. Rptr. 3d 123 (Cal. 2004), *rev. granted*, 94 P.3d 475 (Cal. 2004), and *rev. dismissed*, 182 P.3d 513 (Cal. 2008).

66. The California Supreme Court granted review of *Jasmine Networks* along with *Rico*; however, after *Rico* was decided, the California Supreme Court dismissed the *Jasmine Networks* appeal and remanded the matter for reconsideration in light of *Rico*. *See* Jasmine Networks v. Marvell Semiconductor, 94 P.3d 475 (Cal. 2004) (granting review). *But see* Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 182 P.3d 513 (Cal. 2008) (dismissing review following the decision in *Rico*). The dismissal of review was disappointing because the *Jasmine Networks* appeal presented the issue in a transaction, rather than litigation, context. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 228–30 (2010) (noting a lack of attention to the issue in the context of transactional work).

67. *Jasmine Networks*, 12 Cal. Rptr. 3d at 124.

68. *Id.* at 125–26. The voicemail left inadvertently on the Jasmine telephone involved a discussion between Marvell constituents, one of whom was a lawyer, as to how to proceed with the acquisition of Jasmine by Marvell. *See id.* at 125–26 (identifying the parties who participated in the call and the circumstances of the message, and providing a transcript of the message that was left).

69. *Id.* at 126. The "use" of the material in refusing to conclude the executory transaction with Marvell was not addressed by the court. *Id.*

70. *Id.* at 127–29.

71. *See id.* at 124 (noting that the trial "court refused to review the contents of the transcript on the grounds that such conversation was privileged").

72. *See id.* at 129 ("In its ruling granting the preliminary injunction, the trial court not only concluded the privilege had not been waived, but it also held that Jasmine failed to make a prima

court's ruling that the voicemail message was privileged.[73] It used the content of the voicemail to establish that at least one speaker on the recorded message was a constituent of Marvell whose status and responsibilities could allow him to make an "uncoerced disclosure" that could (and did) waive the privilege.[74] Alternatively, the court of appeals held that the contents of the recorded message could be examined to determine if the crime-fraud exception applied, which the court concluded it did.[75]

In this light, the California Supreme Court's remand order becomes enormously interesting. Did the court intend that the lower court should focus on the receiving lawyer's conduct exclusively, or in addition to examining the content of the inadvertent recording? The facts in *Jasmine Networks* evidence that the receiving lawyer did not immediately notify Marvell of the recording; on the other hand, the lawyer did not attempt to surreptitiously exploit the information in litigation.[76] Rather, Jasmine sought a judicial declaration of the right to use the information.[77] Does that amount to a *Rico* violation because the lawyer did not immediately notify the other party? Should there be a misuse or harm requirement, or is the failure to promptly notify sufficient?[78] For the purpose of imposing

facie showing that the crime-fraud exception existed in this case. In reaching the conclusion that a prima facie case was not established, the court refused to consider the contents of the voicemail.").

73. *Id.* at 132.

74. Jasmine Networks, Inc. v. Marvell Semiconductors, Inc., 12 Cal. Rptr. 3d 123, 128–29 (Ct. App. 2004), *rev. granted*, 94 P.3d 475 (Cal. 2004), *rev. dismissed*, 182 P.3d 513 (Cal. 2008). The court of appeals in *Jasmine Networks* construed California authorities as precluding a waiver of the attorney-client privilege by the attorney; holding, instead, that waiver had to be based on words or conduct by the privilege holder. *Id.* at 128; *see also* Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 803 (Wis. 2004) (holding that a lawyer cannot waive attorney-client privilege by voluntarily producing information in response to a discovery request); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 386–90 (2007) (collecting decisions and authorities regarding lawyers' power to waive clients' privilege through inadvertent disclosure).

75. *Jasmine Networks*, 12 Cal. Rptr. 3d at 131–32.

76. *See id.* at 126 (noting that Jasmine merely filed suit against Marvell upon learning of the alleged trade secret misappropriation).

77. *See id.* at 124 (establishing that the appeal stemmed from the grant of a preliminary injunction prohibiting the use or disclosure of the contents of a voicemail message).

78. *See In re* Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002) (per curiam) (stating that harm to the privilege holder is a critical factor in assessing whether a lawyer who has innocently reviewed inadvertently disclosed privileged documents should be disqualified); *cf.* Bak v. MCL Fin. Grp., Inc., 88 Cal. Rptr. 3d 800, 802 (Ct. App. 2009) (holding that a lawyer who unilaterally forwarded copies of documents claimed to be both privileged and inadvertently produced could be

litigation sanctions such as disqualification, significant misconduct or harm is often required because the cost of the sanction may be severe.[79]

B. *Unauthorized Disclosure*

A lawyer may also receive materials from a source who deliberately sends them to the lawyer. This situation is not uncommon in wrongful termination and *qui tam* proceedings when the client or third party (an employee or a whistleblower) brings information the provider believes shows wrongful conduct by another.[80] Here the operative word is *unauthorized* rather than *inadvertent*; the disclosure is deliberate on the part of the provider of the information, not mistaken or inadvertent. Unlike the inadvertent disclosure case when, for example, the information

sanctioned for his conduct).

79. Courts often note that granting a disqualification motion will operate to deprive a party of the lawyer of its choice and that this right of selection is highly valued and prized. *See, e.g.*, Comden v. Superior Court, 576 P.2d 971, 974–75 (Cal. 1978) (noting that disqualification of counsel motions affect the client's right to counsel of choice, interfere with the attorney's interest in the representation, impose a financial burden on the client who must select replacement counsel, and raise the prospect of tactical abuse); *cf.* Myers v. Porter (*In re* Estate of Myers), 130 P.3d 1023, 1025 (Colo. 2006) (en banc) ("[D]isqualification is a severe remedy that should be avoided whenever possible. . . . [D]isqualification of an attorney may not be based on mere speculation or conjecture, but only upon the showing of a clear danger that prejudice to a client or adversary would result from continued representation." (citations omitted)). The problem is that this value is counterbalanced with the interest of protecting a party's right to have privileged materials remain confidential, and it is not always clear which value will be seen by a court as dominant. The ability to predict the outcome of a disqualification motion is complicated by the often abstract principles courts apply. *See* Roush v. Seagate Tech., LLC, 58 Cal. Rptr. 3d 275, 281 (Ct. App. 2007) ("The 'paramount' concern in determining whether counsel should be disqualified is 'the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.'" (citations omitted)); *see also* Geoffrey C. Hazard, Jr., *Imputed Conflicts of Interest in International Law Practice*, 30 OKLA. CITY U. L. REV. 489, 505–06 (2005) (discussing the role of the trial court's discretion in the "disposition of a motion to disqualify").

> Disposition of a motion to disqualify is conventionally and properly laid to rest in the trial court's judicial discretion. The motion can be considered as an injunction, and accordingly is subject to the traditional equitable requirement of timeliness and the defense of laches, particularly the effect on the client of the lawyer whose disqualification is sought. Alternatively, the motion can be considered an incident of a court's authority to control its docket and the conduct of advocates appearing before it. Under either approach, the court has substantial discretion to refuse a remedy in the absence of demonstrable injury or risk to the complaining party.

Id.

80. *E.g.*, Adams v. Shell Oil Co. (*In re* Shell Oil Refinery), 143 F.R.D. 105, 107 (E.D. La. 1992) (recounting that plaintiff's legal committee acquired information and documentation from one of defendant's current employees), *amended by* 144 F.R.D. 73 (E.D. La. 1992).

provider hits the "reply" icon when intending to hit "forward,"[81] the provider here intends that the recipient of the information receive it.

There is no professional rule directly on point. The closest rules to address this situation are Model Rules of Professional Conduct 4.2, 4.4, and 8.4(c). Model Rule 4.2 bars certain *ex parte* contacts with represented persons regarding the subject matter of the representation;[82] however, the Rule has numerous exceptions and limited application, particularly when the represented person is an entity.[83] It is when the lawyer meets with a present or former constituent of a represented entity that the general duty to avoid prying into or eliciting confidential or privileged information is raised.[84] Model Rule 4.4 addresses a lawyer's duty to respect the rights of third parties:[85] it prohibits a lawyer from using means of "obtaining evidence that violate the legal rights of . . . a person."[86] Consequently, Model Rule 4.4 suggests some undefined limit on a lawyer's right to obtain privileged material; however, the Rule does not address the issue of unauthorized disclosure and comment 2 of the Rule expressly disclaims coverage of the situation.[87] Model Rule 8.4(c), which generally instructs the lawyer to abjure from acts of dishonesty, deception, and the like, may also apply to the extent the materials were acquired by such means.[88] In effect, the general understanding is that a lawyer should not attempt to pry or elicit confidential or privileged information from others: "A lawyer

81. *See generally* E. Scott Reckard, *Mozilo Gets Flak over an E-Mail Misfire*, L.A. TIMES, May 21, 2008, at C2, http://articles.latimes.com/print/2008/may/21/business/fi-mozilo21 (providing an example of inadvertent disclosure). According to the article in the *Los Angeles Times*, "Apparently clicking 'reply' when he meant to hit 'forward,' Countrywide Financial Corp. Chairman Angelo Mozilo ignited an online furor Tuesday by describing a mortgage customer's plea for help as a 'disgusting' example of form letters inundating the Calabasas home lender." *Id.*

82. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

83. *See id.* R. 4.2 cmt. 4, 7 (allowing communication outside the scope of the representation, communication with an otherwise uninvolved attorney, and, in cases of entity representation, communication with a former constituent).

84. *Id.* R. 4.2 cmt. 7.

85. *Id.* R. 4.4.

86. *Id.* R. 4.4(a).

87. Specifically, comment 2 states: "[T]his Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person." *Id.* R. 4.4 cmt. 2.

88. *See id.* R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ."). *See generally id.* at 8.4(a) (expressing that a lawyer may not use another to do indirectly what that lawyer cannot do directly).

communicating with a nonclient in a situation permitted under [the general anti-contact rule] . . . may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law."[89] The same principle has been extended to a lawyer's conduct with another lawyer[90] and with the lawyer's own client.[91]

What should a lawyer do, however, when the materials are thrust upon the lawyer by the client or a third party? The traditional view was that the failure to protect privileged information from unauthorized disclosure caused the protected status to be lost.[92] This approach has largely abated

89. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 (2000); *see also* Adams v. Shell Oil Co. (*In re* Shell Oil Refinery), 143 F.R.D. 105, 108 (E.D. La. 1992) (stating that it is "inappropriate and contrary to fair play" for a lawyer to accept confidential information from an employee of the adversary), *amended by* 144 F.R.D. 73 (E.D. La. 1992) (amending the original court order prohibiting ex parte conduct by extending the prohibition to ex parte conduct through third parties); Valassis v. Samelson, 143 F.R.D. 118, 124–25 (E.D. Mich. 1992) (relying on the text of Model Rule 4.4 in holding the actions of an attorney to be unethical); *cf.* Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 347 (D. Conn. 1991) (discussing Model Rule 4.2 (no-contact rule) and Rule 4.4 (rights of third persons) and stating: "[I]t goes without saying that . . . plaintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy"). The approach was bolstered by the ABA in 2002 when it added to comment 1 of Model Rule 4.4, which states that "privileged relationships" are among those protected against lawyer intrusion. MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 1 (2002).

90. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 cmt. e (2000) ("A lawyer may not induce another lawyer to violate that lawyer's duty of confidentiality to a client or accept confidential information known to have been imparted in a breach of trust by the communicating lawyer.").

91. *See* Lipin v. Bender, 644 N.E.2d 1300, 1304 (N.Y. 1994) (upholding a dismissal for misconduct of plaintiff's counsel in deliberately reading and copying defense counsel's notes and files); *In re* Wisehart, 721 N.Y.S.2d 356, 361 (App. Div. 2001) (per curiam) (holding that a lawyer who: (1) condoned the use of privileged documents obtained by the lawyer's client's theft of those documents, (2) failed to advise the adversary or the court of the theft, and (3) sought to use the documents to extract a settlement, engaged in conduct that involved "dishonesty, fraud, deceit or misrepresentation"); *cf.* Stephen Slesinger, Inc. v. Walt Disney Co., 66 Cal. Rptr. 3d 268, 271–72 (Ct. App. 2007) (upholding a trial court's imposition of a termination sanction based on plaintiff's actions and noting "that when a plaintiff's deliberate and egregious misconduct makes any sanction other than dismissal inadequate to ensure a fair trial, the trial court has inherent power to impose a terminating sanction").

92. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2325 (John T. McNaughton ed., 1961) (discussing involuntary and indirect disclosures by an attorney). Specifically, Wigmore contends:

> All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle . . . that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take the measures of caution sufficient to prevent being overheard by third persons. The risk of

in favor of the modern view that unauthorized (i.e., through theft or misappropriation) disclosure of privileged information does not cause the protected status of the information to be lost automatically.[93] Three views have developed as to whether the disclosure of privileged information causes the information to lose its protected status. One view retains the traditional focus that any breach of confidentiality through disclosure to an unprivileged person causes the protection to be lost.[94] The opposite of this easy-waiver approach is the deliberate-waiver approach that requires the waiver be knowing and intentional (i.e., that the holder of the confidence or privilege actually intended to waive the information's protected status).[95] Under this test, waivers will be infrequent.[96] Most

insufficient precautions is upon the client. This principle applies equally to documents.

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

93. *See* David B. Smallman, *The Purloined Communications Exception to Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 TORT & INS. L.J. 715, 724–28 (1997) (providing a historical analysis of the treatment of purloined communications and other unauthorized disclosures with respect to the waiver of privilege).

94. *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (stating that no legal distinction exists between deliberate and inadvertent disclosure of privileged information). This is sometimes euphemistically referred to as the "Crown Jewels Test." *See id.* (finding that privileged documents must be protected as if they were "crown jewels"). Why the allusion to crown jewels warrants the loss of protected status rather than its retention—after all they are crown jewels—is unexplained. *See id.* (providing only that the court would "not distinguish between various degrees of 'voluntariness' in waivers"). A cleaner analogy is to strict liability. *See* Fed. Election Comm'n v. Christian Coal., 178 F.R.D. 61, 71–72 (E.D. Va. 1998) ("Under the common law of attorney-client privilege, the parties privy to the communication must zealously and carefully guard against disclosure to third parties. Courts in this area take almost a strict liability approach to third party disclosure. If the information ends up in the hands of a third party, courts don't want to hear how it got there. Once in the hands of a third party, the privilege, if it ever existed, is lost."), *aff'd in part, modified in part*, 178 F.R.D. 456 (E.D. Va. 1998).

95. Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991) (citing Medenhall v. Baber-Green Co., 531 F. Supp. 951, 954 (N.D. Ill. 1982)); *cf.* Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 798–99 (Wis. 2004) (noting that pursuant to Wisconsin statutory law, only the client can waive privilege, and conduct by a lawyer is ineffectual as to that issue unless the client authorizes disclosure by the lawyer).

96. *See* Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) ("The majority of courts, though, while recognizing that inadvertent disclosure *may* result in a waiver of the privilege, have declined to apply this 'strict responsibility' rule of waiver and have opted instead for an approach which takes into account the facts surrounding a particular disclosure.").

courts today, however, have adopted an intermediate, Goldilocks's stance that rejects each extreme position in favor of a middle ground, "not too hot, not too cold" approach.[97] When applied to instances of inadvertent disclosure, this approach relies on a series of factors or guidelines to determine whether the disclosure has caused the information's protected status to be lost,[98] and, if so, the extent of the loss—partial (the information disclosed)[99] or entire (all related information even though it was not disclosed).[100] When applied to unauthorized disclosure cases, the inquiry focuses on the reasonableness of the efforts undertaken by the holder of the privilege to protect the information from unauthorized use.[101] Both approaches adopt a balancing test executed on a case-by-case basis. These considerations remain after the recent enactment of Rule 502 of the Federal Rules of Evidence.[102] Rule 502's explicit reference to

97. *See* Harp v. King, 835 A.2d 953, 966–67 (Conn. 2003) (discussing the middle-ground test and concluding that this moderate approach creates the fairest balance); *see also* David B. Smallman, *The Purloined Communications Exception to Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 TORT & INS. L.J. 715, 723 (1997) (indicating that a majority of courts use the "middle test" when considering circumstances of disclosure in determining if waiver is fair and reasonable).

98. *See* Elkton Care Ctr. Assocs., Ltd. P'ship v. Quality Care Mgmt., Inc., 805 A.2d 1177, 1184 (Md. Ct. Spec. App. 2002) (listing the factors to consider as: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving a party of its error" (internal quotation marks omitted)); *see also* Gray v. Bicknell, 86 F.3d 1472, 1483–84 (8th Cir. 1996) (applying the same factors as *Elkton Care Center*); Scott v. Glickman, 199 F.R.D. 174, 178 (E.D.N.C. 2001) (discussing factors that give rise to waiver that mirror *Elkton Care Center*). The test is derived from the opinion in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

99. *See* Status Time Corp. v. Sharp Elecs. Corp., 95 F.R.D. 27, 34 (S.D.N.Y. 1982) (limiting waiver to disclosed information only).

100. *See* Drimmer v. Appelton, 628 F. Supp. 1249, 1252 (S.D.N.Y. 1986) (holding that disclosure of a significant part of privileged information waives the privilege relating to the entire matter); *cf. In re* Sealed Case, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982) (stating that it is a matter of judicial discretion whether "to impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it"). *See generally* 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:80 (2d ed. 2007) (detailing how, when a client voluntarily discloses privileged communication thereby waiving privilege, a court will determine the scope of the waiver).

101. *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 870 (D. Minn. 1979); *cf.* Sitterson v. Evergreen Sch. Dist. No. 114, 196 P.3d 735, 742 (Wash. Ct. App. 2008) (holding that a three year delay in asserting a claim of privilege after inadvertent disclosure, failure to show that any precautions were taken to prevent inadvertent disclosure, and absence of large scale discovery demand (only 439 documents produced) supported a finding of waiver).

102. *See* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (amending the Federal

"reasonable steps to prevent disclosure" and "reasonable steps to rectify" as factors relevant to whether disclosure resulted in privilege waiver[103] essentially adopts a balancing approach using "reasonableness" as the fulcrum.

It is unclear whether the specific factors identified in the inadvertent disclosure cases are supposed to be applied in the unauthorized disclosures cases. Although Rule 502 applies only by its terms to instances of inadvertent disclosure, it would not be surprising if courts look to the Rule for guidance in cases of unauthorized disclosure.[104] In both cases, the disclosure is unintended from the standpoint of the privilege holder.

Unauthorized disclosure, because of its "intended" transmission element, also bears some similarity to "selective" disclosure cases where the disclosure is intended but the audience for the disclosure is intended to be limited.[105] Courts have also formulated another middle ground test, albeit one that is worded somewhat differently from the inadvertent disclosure test.[106] The critical considerations in the "selective disclosure as waiver" cases appear to be fairness (should selective disclosure be allowed),[107] burden (has disclosure enhanced the ability of third parties to

Rules of Evidence to address waiver of attorney-client privilege and work-product doctrine).

103. *See* FED. R. EVID. 502(b)(2) (requiring "the holder of the privilege or protection [to take] reasonable steps to prevent disclosure," or the disclosure will operate as a waiver). The Advisory Committee Notes to Rule 502 identify several factors as assisting the determination whether a disclosure is "inadvertent" such that it should not be deemed a waiver of any privilege: (1) "the reasonableness of [the] precautions taken"; (2) "the [amount of] time taken to rectify the [disclosure]"; (3) "the scope of discovery" undertaken; (4) "the extent of [the] disclosure"; and, (5) fairness. These factors substantially duplicate the judicially-developed factors. FED. R. EVID. 502 advisory committee's note.

104. *See infra* Part III (arguing that inadvertent and unauthorized disclosure should be treated similarly).

105. This type of waiver has also proven to be contentious. *Compare* Saito v. McKesson HBOC, Inc., No. Civ. A. 18553, 2002 WL 31657622, at *11 (Del. Ch. Nov. 13, 2002) (concluding that, because the privilege holder's transmission of information to a third party, the Securities and Exchange Commission (SEC), was made pursuant to a confidentiality agreement during an investigation, and the privilege holder maintained an expectation of privacy, plaintiff could not successfully assert that the privilege holder had waived work-product privilege), *with* McKesson HBOC, Inc. v. Super. Ct., 9 Cal. Rptr. 3d 812, 821 (Ct. App. 2004) (holding that transmission of privileged information to the SEC waived privilege status of information as to third parties notwithstanding confidentiality agreement entered into between privilege holder and SEC).

106. *See supra* notes 98–100 and accompanying text (discussing consequences of inadvertent disclosure in terms of scope of waiver).

107. John Doe Co. v. United States, 350 F.3d 299, 302 (2d Cir. 2003); *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993). Initially, Rule 502 would have significantly opened

access the material),[108] and need (was disclosure necessary to enable the lawyer to competently advise the client).[109] The selective disclosure cases involve, however, deliberate relinquishment of the privileged information by the privilege holder.[110] The issue in these cases is not intent, but the legal consequences of the intended disclosure by the privilege holder.[111] This is structurally different from unauthorized disclosure cases.[112] For that reason, the selective disclosure cases do not assist in the resolution of this issue.

Cases and commentary attempt to distinguish between inadvertent and unauthorized disclosure, but the distinction is difficult to maintain. Comment 2 to Model Rule 4.4(b) states that the Rule "does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."[113] Comment 2 is, however, silent as to the reason for the distinction. Smallman, a legal commentator, also notes the distinction

up the use of selective waiver when information was provided to government officials. This provision, however, was dropped from the final version of the bill. *See* Alvin F. Lindsay, *New Rule 502 to Protect Against Privilege Waiver*, NAT'L L.J., Aug. 25, 2008, at S2 (stating that this provision was dropped at the urging of corporate privilege holders who were concerned that inclusion of a provision authorizing selective waiver would legitimize the Government's approach that cooperation requires privilege waiver).

108. *In re* Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982) (stating, in the context of work product, that disclosure "does not waive its protection unless it substantially increases the opportunity for potential adversaries to obtain the information").

109. Gramm v. Horsehead Indus., Inc., No. 87 CIV. 5122 (MJL), 1990 WL 142404, at *4 (S.D.N.Y. Jan. 25, 1990) (noting that attorney-client privilege is waived by disclosure of a privileged document to a client's accountants, "unless the transmission was for the purpose of enabling the accountants to assist the attorney in rendering legal services").

110. *See* Michael E. Gertzman, *Uncertainty Continues Concerning Selective Waiver*, N.Y. L.J., July 21, 2008, at 10, 10 (defining the selective waiver doctrine as one which applies where a privilege holder produces privileged information to government investigators with the intent to retain the privilege as to third parties).

111. *See* Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 145–46 (2007) (indicating that before Rule 502's enactment, one of the chief criticisms of the judiciary's general aversion to selective waiver was "the punitive consequences visited upon [those who elect to] cooperat[e] . . . when their protected information is turned over to their adversaries in later civil litigation").

112. *See* Carol Poindexter, *Recent Developments in Corporate "Cooperation" Credit: Opening Pandora's Box or Slamming the Privilege Waiver Lid Shut?*, 22 HEALTH LAW., No. 3, at 48, 50 (2010) (arguing that with unauthorized disclosure, while there is no waiver of the privilege, the "information is already out there and the question is how to remedy the disclosure").

113. MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2002).

in his *Purloined Communications* article:

> Although the implied waiver approach is understandable in the context of negligent disclosures by the holders of the privilege or their agents, its application to cases in which disclosure arises from tortious, criminal, unethical, or otherwise wrongful acts of others is far less compelling. Accordingly, courts have distinguished inadvertent disclosures from involuntary disclosures, recognizing that cases involving privileged information obtained due to the actions of a third party are inapposite to cases in which disclosure of privileged information arises from unilateral error by the party asserting the privilege.[114]

The decisions relied on by Smallman for the distinction involved coerced disclosures, which are distinct from the type of "unauthorized" disclosure discussed here (misappropriated or stolen materials).[115] Courts have treated coerced compliance as not constituting a waiver;[116] however, coerced compliance is meaningfully different from unauthorized disclosure based on misappropriation or theft by an insider. This leads us to question whether the distinction between unauthorized and inadvertent disclosure should be maintained.

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114. David B. Smallman, *The Purloined Communications Exception to Inadvertent Waiver: Internet Publication and Preservation of Attorney-Client Privilege*, 32 TORT & INS. L.J. 715, 722–23 (1997) (citing James M. Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511, 512 n.6 (1985)).

115. *Id.* at 724–28.

116. Compliance with judicially compelled disclosure of privileged documents or information is not a waiver. Hopson v. Mayor of Balt., 232 F.R.D. 228, 232 (D. Md. 2005); *cf.* Regents of the Univ. of Cal. v. Super. Ct., 81 Cal. Rptr. 3d 186, 194–95 (Ct. App. 2008) (holding that disclosure to the Department of Justice, pursuant to the Department's policy of requiring waiver of attorney-client privilege in considering whether criminal indictment would be sought, was sufficiently coercive to preclude extending waiver to civil proceeding brought by third parties even though civil proceedings involved the same matter as that before the Department of Justice); Coral Reef of Key Biscayne Developers, Inc. v. Lloyd's Underwriters at London, 911 So. 2d 155, 157–58 (Fla. Dist. Ct. App. 2005) ("We hold that a higher standard must apply for disqualifying counsel when the privileged documents are received pursuant to a court order that is subsequently vacated. Contrary to the 'inadvertent disclosure' cases, the mere possibility of an unfair tactical advantage cannot give rise to the drastic *remedy of disqualification in cases where the disclosure results from a court order*.") (emphasis added); John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2 FED. CTS. L. REV. 57, 62–63 (2007) (indicating that a "compelled disclosure does not waive privilege"). The failure, however, to seek prompt judicial relief from the coercion may itself be deemed a waiver. *See* United States v. Ary, 518 F.3d 775, 785 (10th Cir. 2008) (holding that a defendant's failure to timely assert privilege involving information obtained pursuant to a search warrant constituted waiver).

III. INADVERTENT AND UNAUTHORIZED DISCLOSURE COMPARED

Initially, the ABA Standing Committee on Ethics and Professional Responsibility identified inadvertent disclosure as categorically different from unauthorized disclosure. In Formal Opinion 92-368, the committee addressed the issue of inadvertent disclosure.[117] The opinion was clear that it was addressing the problem of errant disclosure, not unauthorized disclosure.[118] Two years later, in Formal Opinion 94-382, the committee separately addressed the issue of unauthorized disclosure.[119] Notwithstanding the classification distinction, the committee expressly acknowledged that the issues would be resolved similarly: "The present issue is similar to that considered by the Standing Committee in Formal

117. Formal Opinion 92-368 provides in pertinent part:

> The Committee has been asked to opine on the obligations under the Model Rules of Professional Conduct of a lawyer who comes into possession of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer. The question posed includes situations in which the sending lawyer has notified the receiving lawyer of the erroneous transmission and has requested return of the materials sent as well as those situations in which the inadvertent sending lawyer and his client remain ignorant that the materials were missent. It also extends to situations in which the receiving lawyer has already reviewed the materials as well as those in which the sending lawyer intercedes before the receiving lawyer has had such an opportunity. This opinion is intended to answer a question which has become increasingly important as the burgeoning of multi-party cases, the availability of xerography and the proliferation of facsimile machines and electronic mail make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 368 (1992), *withdrawn*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 437 (2005).

118. *Id.*

119. Formal Opinion 94-382 provides in pertinent part:

> The Committee has been asked to consider the obligations of a lawyer under the Model Rules of Professional Conduct (1983, as amended) when the lawyer is offered or sent, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or that appear on their face to be, subject to the attorney-client privilege of an adverse party or otherwise confidential within the meaning of Model Rule 1.6. The question posed addresses situations in which the lawyer has not solicited the production of such material and its production was not authorized by the owner of the materials. It includes situations in which the lawyer is offered such materials and has an opportunity to decline them, as well as situations in which, without notice, the materials are simply sent to, and received by, the lawyer. The question embraces both situations in which the lawyer has knowledge of the privileged and/or confidential nature of the materials before receiving them and situations in which the lawyer does not recognize the confidential nature of the materials until receipt.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 382 (1994) (footnotes omitted).

Opinion 92-368, Inadvertent Disclosure of Confidential Materials (November 10, 1992) . . . . The instant case is analogous."[120]

The committee recognized that the two situations were similar to the extent that in both situations the disclosure is nonconsensual from the adverse party's perspective.[121] However, the committee did note what it considered two dissimilarities. First, in the case of inadvertent disclosures, the transmitting party does not intend to send the materials to the receiving party; the situation is just the opposite in the case of unauthorized disclosure.[122] Second, the committee suggested that unauthorized disclosure may involve situations evidencing "improper or unjust conduct," which may give the receiving lawyer more leeway to use the materials.[123] Notwithstanding these perceived categorical differences, the committee concluded, as noted above, that a lawyer's obligations in either case were the same—notify the adverse party of the disclosure and abide by that party's instructions.[124] The issue is more complicated with unauthorized disclosure because the analysis may include questions of deception (e.g., surreptitious taping)[125] or complicity in client misconduct

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* When the committee revisited the issues after the 2002 revision of the Model Rules, it disavowed both opinions. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 437 (2005). The committee concluded that Formal Opinion 92-368 (Inadvertent Disclosure) was no longer consistent with amended Rule 4.4(b). *Id.* The committee also concluded that Formal Opinion 94-382 (Unauthorized Disclosure) could no longer be followed in light of amended Rule 4.4(b), even if the unauthorized disclosure was deemed "inadvertent" because the same considerations that led to the disavowal and withdrawal of Formal Opinion 92-368 by Formal Opinion 05-437 applied to the situation of unauthorized disclosure. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 440 (2006).

125. *See* Nissan Motor Co. v. Nissan Computer Corp., 180 F. Supp. 2d 1089, 1097 (C.D. Cal. 2002) (involving surreptitious taping of conversation with opposing counsel, which court characterized conduct as "inherently unethical"). The matter is complicated because, in *Nissan Motor Co.*, the taping was illegal. *See* CAL. PENAL CODE § 632 (Deering 2008) (requiring all parties to consent to recorded conversation). Whether this surreptitious taping should be deemed unethical in jurisdictions where it is not illegal has provoked significant disagreement within the legal community. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 422 (2001) (noting that Formal Opinion 74-337—concerning the electronic recording of conversations—had been "criticized by a number of state and local ethics committees"). The ABA, which initially chastised the practice, reversed itself in the face of significant state refusal to follow its interpretation. *See id.* (withdrawing Formal Opinion 74-337). The *Restatement (Third) of the Law Governing Lawyers* condones surreptitious taping when it is not illegal. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106 cmt. f (2000) ("When secret recording is not prohibited by law, doing so is

(theft).[126] Nonetheless, when the issues of inadvertent and unauthorized disclosure are laid side-by-side, the general approach is to notice the classification distinction, but resolve the issue the same way.[127]

Should inadvertent disclosure be distinguished from unauthorized disclosure? As noted previously, the ABA Standing Committee stated that both forms of disclosure were similar because both were nonconsensual.[128] That is true, but it is a meaningless statement. If a disclosure is consensual on the part of the privilege holder, it is of little interest insofar as the dissemination to, or use by, the receiving party is concerned. A lawyer does not violate professional norms by using, much less receiving, consensually disclosed information.[129] The issue is always over nonconsensual disclosures.

The Standing Committee suggested that inadvertent disclosures and unauthorized disclosures were different in two ways: (1) in the case of inadvertent disclosure, the sender did not intend to transmit the disclosure to the receiving party; and (2) in the case of an unauthorized disclosure the transmitted materials are more likely to evidence wrongful or unjust conduct.[130] The first observation distinguishes between the intent to transmit the physical document and the intent to transmit the information in the physical document. That is an elusive distinction. Privilege litigation almost always concerns whether the sender, directly or indirectly, intended to disclose the allegedly privileged information to the recipient or

permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form.").

126. *See supra* notes 89–91 and accompanying text (analyzing ethics surrounding misconduct of client and/or third party).

127. Sometimes courts use the terms "inadvertent" and "unauthorized" interchangeably. *See, e.g.*, Mfrs. & Traders Trust Co. v. Servotronics, Inc., 522 N.Y.S.2d 999, 1003 (App. Div. 1987) (referring to a disclosure as both inadvertent and unauthorized). Courts may use the term "unauthorized" under circumstances that suggest they mean "unconsented," which includes inadvertent disclosures. *See, e.g.*, Stempler v. Speidell, 495 A.2d 857, 864 (N.J. 1985) (arguing that a privilege holder's "interest focuses on prevention of inadvertent disclosure of information still protected by the privilege, since an unauthorized disclosure of such information may be unethical and actionable").

128. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 382 (1994).

129. Unless, of course, the receiving party agrees to maintain the confidentiality of the information—a practice that is common with joint defense agreements. *See, e.g.*, Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 219 (W.D. Ky. 2006) (holding that because documents had been shared pursuant to a joint defense agreement, waiver had not occurred).

130. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 382 (1994).

to others in addition to the recipient. The distinction begs the very question at issue—did disclosure cause the privilege to be lost? Alternatively, the focus may be on the identity of the sender or provider of the information: in the inadvertent disclosure case, disclosure is by the privilege holder or the holder's agent; whereas in the unauthorized disclosure case, the *perception* is that disclosure is by someone other than the privilege holder or the holder's agent. However, other than in clear cases of theft (e.g., the outside hacker), most cases of unauthorized disclosure involve individuals who have lawful access, in general, to the materials; the issue is whether the particular access, specifically by which the materials were obtained, was proper.[131] Therefore, the identity of the provider of the information is not truly meaningful in distinguishing between inadvertent and unauthorized disclosures. The inadvertent disclosure of materials occurs because someone erred, which is the same reason an unauthorized disclosure was made. In the inadvertent disclosure situation, someone failed to discern that the materials provided should not be provided. That is exactly the same situation as in the unauthorized disclosure case. The identity of the sender may be relevant when we examine whether the holder of the privileged information took suitable precautions to protect the confidentiality of the information or was authorized to waive the privilege, but that factor does not, by itself, distinguish between inadvertent or unauthorized disclosure.

The second dissimilarity the Standing Committee noted was the greater likelihood in the unauthorized disclosure cases that the information at issue evidenced improper or unjust conduct.[132] Again this position was asserted, not established. There is anecdotal evidence that unauthorized disclosure cases arise in whistleblower type actions and this may feed the belief that inadvertent and unauthorized disclosures separate on this point. There is, however, nothing about inadvertent disclosure—as opposed to unauthorized disclosure—that suggests the content of the disclosure is less likely to be the result of wrongdoing.[133] Evidence of wrongdoing may

131. This is because a party who seeks to successfully assert privilege must have asserted some affirmative measure to maintain the confidentiality of the information. Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 563 (S.D.N.Y. 2008).

132. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 382 (1994).

133. For example, *Jasmine Networks* is an inadvertent disclosure case that suggests fraud was

affect the ability to use the information, but that is a function of the extent to which the crime-fraud exception may defeat the information's protected status,[134] and the crime-fraud exception applies independent of the means of disclosure.[135]

Regardless of the form of disclosure (inadvertent or unauthorized), the best resolution of the issue, whether fixed as one of professional responsibility or evidentiary use, is to use a single approach when evaluating the consequences for both forms of disclosure. The recipient of the disclosure is unlikely to have a firm, factual basis for distinguishing between the two forms of disclosure until the recipient has reviewed the materials to some extent.[136] For example, assume the recipient lawyer receives an e-mail message or a package from the client or from opposing counsel. Is the lawyer in a position to determine her professional obligations before examining the disclosure sufficiently to determine if it is inadvertent, unauthorized, or neither? In either case the lawyer may seek more information before reviewing or may elect to review first until the status of the disclosure becomes clearer. In most cases, the lawyer simply reviews the materials without any preconception as to the material's possible protected status.[137]

What happens when some clarity is achieved either by prior notice, pre-review checking, or by actually reviewing the information? If the lawyer correctly determines that the disclosure is consensual (i.e., not inadvertent

afoot. *See supra* notes 65–77 and accompanying text (discussing *Jasmine Networks*).

134. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 82, 93 (2001) (establishing the crime-fraud exception to attorney-client privilege and work product privilege).

135. The crime-fraud exception only applies after the material at issue has been determined to be privileged under the attorney client privilege, *id.* § 82 cmt. f; or the work-product privilege, *id.* § 93 cmt. d.

136. *Cf.* Widger v. Owens-Corning Fiberglas Corp. (*In re* Complex Asbestos Litig.), 283 Cal. Rptr. 732, 742 (Ct. App. 1991) ("Since the purpose of confidentiality is to promote full and open discussions between attorney and client, it would be ironic to protect confidentiality by effectively barring from such discussions an adversary's confidences known to the client. A lay client should not be expected to make such distinctions in what can and cannot be told to the attorney at the risk of losing the attorney's services." (footnote omitted) (citation omitted)).

137. *See* United States v. Gangi, 1 F. Supp. 2d 256, 258, 265–66 (S.D.N.Y. 1998) (holding that inadvertent production of document with legend that stated "This Document Contains Grand Jury Material" did not sufficiently apprise recipient of its protected status because document did not otherwise indicate it was privileged); *cf.* Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 226–27 (E.D. Pa. 2008) (applying a five-factor test to determine if inadvertent disclosure amounted to waiver of privilege, but giving greatest weight to the "fairness" factor).

nor unauthorized), the lawyer is entitled to use the information.[138] If the lawyer correctly determines that a disclosure is sufficiently likely to be privileged enough to warrant preliminary protection, the lawyer must act in a professionally proper manner under the rules of her jurisdiction.[139] In jurisdictions that have adopted the Model Rules, this will require, as to both inadvertent and unauthorized disclosures, that the lawyer notify opposing counsel of the disclosure.[140] The lawyer may return the disclosed information if the lawyer is satisfied that the information is protected and was transmitted unintentionally[141] or seek judicial clarification on whether the information may be used if the issue cannot be resolved informally and privately.[142] If the court finds that disclosure

138. *See, e.g.*, United States v. Knoll, 16 F.3d 1313, 1322 (2d Cir. 1994) (holding that because the privilege holder disclosed information "to an individual with whom he had no relationship of confidentiality, any legitimate expectation of privacy he may have had in [it] was abandoned").

139. It should be noted that not all states have adopted the ABA Model Rules of Professional Conduct. *See, e.g.*, State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999) (stating that "the ABA Model Rules of Professional Conduct . . . have not been adopted in California and have no legal force of their own[; however,] the ABA Model Rules of Professional Conduct may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California" (citations omitted)).

140. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2002) ("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.").

141. *Cf. id.* R. 4.4 cmt. 3 (stating that "[s]ome lawyers may choose to return a document unread" upon learning, before receipt, that the document was sent inadvertently); Jonathan Groner, *Akin, Gump Returns 'Hot' Documents to Sender*, LEGAL TIMES (Washington, D.C.), Oct. 5, 1992, at 8 (reporting that a law firm had decided that leaked documents from a federal agency, relevant to one of the firm's client's matters, should be unused and returned to the agency). Whether the client must be informed of the lawyer's decision turns on whether the receipt of the information constitutes a significant development in the representation. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002). Under new Rule 502, *see supra* notes 8–9 and accompanying text (discussing adoption of Federal Rule of Evidence 502), does the inadvertent disclosure of privileged documents, which the lawyer believes retain their protected status notwithstanding the disclosure, and, therefore cannot be used, constitute a significant development? If the lawyer discloses the situation to the client, must the lawyer abide by the client's instruction to seek judicial resolution rather than return the materials without further review to the privilege holder? Comments 1 and 2 to Model Rule 1.2 effectively concede that when the lawyer and the client disagree over the means to be used to accomplish the representation, the Rule provides no clear standard for allocating authority to decide. *Id.* R. 1.2 cmt. 1–2. Comment 1 to Rule 1.3 does suggest that the "lawyer is not bound . . . to press for every advantage that might be realized for a client"; however, that admonition is found in the context of a lawyer's duty of diligence and promptness, not as to the lawyer's general duties owed to the client. *Id.* R. 1.3 cmt. 1.

142. *E.g.*, N.Y. Bar Comm. on Prof'l & Judicial Ethics, Formal Op. 04 (2003) ("A lawyer who receives a misdirected communication containing confidences or secrets should promptly notify the sender and refrain from further reading or listening to the communication, and should follow the sender's directions regarding destruction or return of the communication. However, if there is a legal

caused the information's protected status to be lost or if the court finds that the information is not privileged, as, for example, due to the crime-fraud exception, the lawyer may use the information and doing so raises no professional objection.[143] If the court finds that the disclosed materials retain their protected status, the lawyer cannot use the information in direct violation of a court finding that the information is privileged; doing so would constitute a violation of professional obligations.[144] If the court determines that the information is privileged, the court will then have to consider whether the lawyer's review of the disclosed materials required further action, such as disqualification because of the lawyer's exposure to the adversary's privileged information. In no case, however, do these determinations turn on the bare characterization of the disclosure as inadvertent or unauthorized; there is no separate test for each type of disclosure. In each context, courts today assess whether the privilege holder exercised reasonable precautions to prevent disclosure;[145] whether the disclosure was inadvertent or unauthorized simply describes how the disclosure occurred.

One way inadvertent disclosures may be perceived to differ from unauthorized disclosure is in the lawyer's complicity in effecting the disclosure.[146] Complicity may raise collateral issues of dishonesty and deception. Here I address what may be perceived as a structural distinction: the receiving lawyer usually has some forewarning in the unauthorized disclosure case whereas disclosure is usually a surprise in the inadvertent disclosure case. This distinction may be, however, more constructed then real. What do we mean by "surprise?" The words

dispute before a tribunal and the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may submit the communication for in camera consideration by the tribunal as to its disposition.").

143. For a general discussion regarding attorney-client communications that are not deserving of privilege, see 2 PAUL R. RICE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (2d ed. 2007).

144. MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2002).

145. *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979); *see also* D.C. Bar Legal Ethics Comm., Op. 318 (2002) (using balancing test to determine if materials that were misappropriated have lost their privileged status).

146. *See supra* note 91 (discussing lawyers who were disqualified and disciplined for knowingly accepting stolen privileged information). *But cf.* United States v. Gangi, 1 F. Supp. 2d 256, 258 (S.D.N.Y. 1998) (holding that a document marked as "Grand Jury Material" did not preclude inspection of the document by the receiving lawyer).

"unauthorized" and "inadvertent" carry different meanings, but does either word really capture the real world experience of the lawyer who encounters a situation primed for disclosure? What happens when a client says, "I have documents from my workplace that evidence my employer is engaging in illegal conduct, which caused my termination when I refused to participate in the wrongdoing." Alternatively, what if a lawyer is representing that same client in that same dispute and receives the same information in: (1) a brown paper package left with the lawyer's secretary,[147] (2) an e-mail, or (3) a voicemail. In what ways are the two scenarios meaningfully different for the lawyer?

The only meaningful difference is the point in time when the lawyer reasonably appreciates that the material is protected. Using the test expounded in *Rico*, this would be when the material's protected status "obviously" and "clearly" appears to a reasonably prudent lawyer.[148] When is that?

Does the lawyer have a duty to explore with the provider of the unauthorized information whether the information is protected before reviewing the information? Such an approach may appear on the surface to be prudent, but when should the provider's perceptions be preferred over the information's actual status? What if the provider's perceptions are inaccurate?[149] The best evidence of the information's status is the

147. Of course, opening brown paper packages may give rise to adverse consequences other than discipline or disqualification. *See* United States v. Kaczynski, 239 F.3d 1108, 1108 (9th Cir. 2001) (discussing the career of the infamous "Unabomber").

148. Rico v. Mitsubishi Motors Co., 171 P.3d 1092, 1099 (Cal. 2007) (quoting State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999)).

149. The provider may not be in a position to opine accurately as to the legal status of the materials and may be confused as to the legality of the means by which the information was obtained. *See* O'Brien v. O'Brien, 899 So. 2d 1133, 1138 (Fla. Dist. Ct. App. 2005) (holding that material obtained when a wife installed spyware program on the household computer that simultaneously copied her husband's e-mail messages should be excluded as illegally obtained evidence, despite the fact that the wife did not know her actions were illegal). For example, if the provider says she copied e-mails sent to her, is her conduct illegal? What if the client-wife knows the husband's computer password and uses it to access his e-mail account? What happens if she says her husband gave her his password or knows she has it and has accessed his e-mail in the past? Must the lawyer disbelieve the client? What type of a dialogue is the lawyer supposed to have before he may review the information, at least preliminarily, to ascertain if it is privileged? *See generally* Widger v. Owens-Corning Fiberglas Corp. (*In re* Complex Asbestos Litig.), 283 Cal. Rptr. 732, 742 (Ct. App. 1991) (noting the general inability of lay clients to make nuanced legal distinctions regarding what may and may not be disclosed to the lawyer).

information itself. Whether the information is privileged is determined initially by the character and nature of the information.[150] How the information was obtained by the provider and produced for the lawyer goes to the issue of whether the information's protected status has been lost due to waiver.[151] Questioning the provider of the information may do little to illuminate whether the provider had authority to disclose the information because that issue will often depend on the innate character of the information and how the information was accessed, which cannot be determined in many cases until the information is reviewed by the lawyer.[152] The dominance of the case-by-case approach to the

150. *See* Corrigan v. Methodist Hosp., 158 F.R.D. 54, 57 (E.D. Pa. 1994) (stating a claim of privilege should expressly "'describe the nature of documents, communications, or things not produced or disclosed'" (quoting FED. R. CIV. P. 26(b)(5))); *see also In re* Christus Health Se. Tex., 167 S.W.3d 596, 599 (Tex. App.—Beaumont 2005, no pet.) (asserting that a party who seeks to limit discovery by claiming privilege has the burden of proving that the nature of the document merits withholding from discovery); El Centro del Barrio, Inc. v. Barlow, 894 S.W.2d 775, 778 (Tex. App.—San Antonio 1994, no writ) (placing the burden on the party seeking to protect the communications to prove the elements of privilege).

151. Many of these unintended disclosure cases turn on the issue of "waiver." Did the disclosure reflect a failure to maintain the confidentiality of the information and, thus, amount to waiver of the privilege? *See* Francisco v. Verizon S., Inc., Civ. No. 3:09cv737-DWD, 2010 WL 4909554, at *9 (E.D. Va. Nov. 24, 2010) (allowing waiver where circumstances of inadvertent disclosure reflected gross negligence or failure to take reasonable precautions); *see also* Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 208 (M.D.N.C. 1986) (denying relief from waiver of privilege where party did not undertake reasonable precautions to prevent disclosure). The relationship between disclosure and waiver is, however, muddled. Does waiver allow the recipient to use the information freely? *See generally* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 778 (2005) (discussing a lawyer's rights and ethical obligations in acting upon receipt of inadvertently disclosed information that is subject to privilege). Does improper conduct in connection with the disclosure on the recipient's part prevent or compromise a finding of waiver? *See generally In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979) (citing J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(B)(02) (1977)) (noting a trend away from Wigmore and applying the principle that privileged status is not lost when the attorney and client take reasonable precautions to ensure confidentiality). Which is primary: the "disclosure" or the "waiver?" *See generally* Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 480–82 (E.D. Va. 1991) (addressing the different approaches taken to the question of "whether inadvertent disclosure waives attorney-client").

152. For example, courts are split over whether the Computer Fraud & Abuse Act, 18 U.S.C. § 1030(a)–(j) (2006 & Supp. II 2008) (CFAA) is violated when an employee who has been given access to the employer's computer system obtains information for a non-business related purpose. *Compare* LVRC Holdings, LLC v. Brekka, 581 F.3d 1127, 1129 (9th Cir. 2009) (holding that a former employee who accessed information and transferred it to his personal laptop did not violate CFAA), *with* Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418, 420–21 (7th Cir. 2006) (holding that employee's "breach of his duty of loyalty terminated his agency relationship . . . and with it his authority to access" employer's data). A similar split exists under the Wiretap Act, 18 U.S.C.

determination of whether disclosure (inadvertent or unauthorized) has resulted in a waiver of the material's privileged status evidences the substantial uncertainty that exists in this area. This puts the lawyer in a precarious position. If she reads too little she may be unable to accurately determine whether the information is privileged and may end up not using information that would be helpful to the client's cause. If she reads too much, she risks being disqualified for improperly accessing the adversary's privileged information. This is not an idle risk.[153]

Separating the issue of how the lawyer obtained the materials from the status of the materials does not mean that the lawyer always has a free hand to examine the materials to determine if they are protected. For example, if the provider of the materials admits to facts that put the lawyer on notice that the materials were stolen, the lawyer has to address how he will deal with stolen property.[154] Courts and ethics committees have agreed that a

§§ 2510–2522 (2006) when the intended recipient has the information also directed to another site by the actions of a third party, e.g., an employee causes her supervisor's e-mail to be forwarded to her e-mail account. *Compare* United States v. Szymuszkiewicz, 622 F.3d 701, 703 (7th Cir. 2010) (noting that surreptitiously causing an e-mail to be forwarded by modifying the e-mail system constituted a violation of the Wiretap Act), *with* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 113 (3d Cir. 2003) (finding the Wiretap Act requires contemporaneous "interception" of information intended for person other than interceptor). The issue is further complicated by the fact that the government is frequently encouraging individuals to report misconduct. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1842 (2010) (codified at 15 U.S.C. § 78u-6) (directing the SEC to pay awards to whistleblowers who provide information regarding violations of federal securities laws, while at the same time protecting the sources of information relied on by whistleblowers from unauthorized access or disclosure).

153. *See* Coral Reef of Key Biscayne Developers v. Lloyd's Underwriters at London, 911 So. 2d 155, 157–59 (Fla. Dist. Ct. App. 2005) (indicating that disqualification of counsel is appropriate where counsel reviews inadvertently disclosed information and, in doing so, gains an unfair advantage to such a degree that the advantage causes actual harm to the other party and the trial court does not have means to remedy the harm); *see also* Richards v. Jain, 168 F. Supp. 2d 1195, 1205 (W.D. Wash. 2001) (citing *In re* Meador, 968 S.W.2d 346, 351–52 (Tex. 1998)) (holding that whether a lawyer should be disqualified when the lawyer receives privileged information outside the normal course of discovery depends on an evaluation of the following six factors: (1) whether the lawyer knew or should have known the information was privileged; (2) the promptness with which the lawyer informed the opposing side that he had received privileged information; (3) the extent to which the lawyer reviewed and digested the privileged information; (4) the significance of the privileged information; (5) the extent to which the disclosure was the fault of the privilege holder; and (6) the extent to which the disqualification will harm the lawyer's client).

154. The lawyer may have an obligation to turn over the stolen property to law enforcement officials. *See* People v. Meredith, 631 P.2d 46, 48–49 (Cal. 1981) (requiring a defense investigator to disclose privileged communication when the investigator's actions in removing evidence from a certain location frustrated the possibility that police would recover the evidence); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 119 (2000) (allowing counsel to possess and

lawyer should not read materials that the lawyer knows were stolen when that knowledge exists prior to the time the lawyer would review the materials.[155] The courts and ethics committees have not been as clear when the situation is ambiguous; for example, what does stolen mean? Obtaining documents by rifling through opposing counsel's briefcase during a deposition break is one thing; obtaining documents by downloading them from computer files to which the person has lawful access may be another.[156] The lines are fine and courts often elide the issue. However, in this situation the *Rico* trigger of "obviously" and "clearly" privileged lends some instructional assistance. Once that trigger is met, the lawyer must notify opposing counsel.[157] The *Rico* trigger provides something of a safe harbor for the lawyer who is confronted with an ambiguous situation not of his making. In such situations, that lawyer should be given reasonable protection from after-the-fact second guessing.

examine evidence for a reasonable time before notifying prosecuting authorities of possession of evidence).

155. *E.g.*, D.C. Bar Legal Ethics Comm., Op. 318 (2002) (requiring the receiving lawyer to refrain from reviewing and using stolen privileged documents if the lawyer knows it "came from someone who was not authorized to disclose it"). *See generally* Ronald C. Minkoff & Amelia Seewann, *Ethics Corner: Putting the Genie Back*, FRANKFURT KURNIT KLEIN & SELZ, P.C. (Mar. 2010), http://www.fgkks.com/docs/Putting_Genie_Back_MediaLawLetter_March_2010.pdf (discussing generally the ethical problems and obligations for lawyers representing clients that are in possession of stolen documents).

156. This issue has provoked sustained disagreement among the Federal Circuit Courts of Appeal when an employee obtains confidential materials from the employer for use in a wrongful termination action. For example, in *Niswander v. Cincinnati Insurance Co.* the court identified six factors that should be considered to determine whether purloined documents could be used: (1) how the document was obtained; (2) to whom was it given; (3) the content of the document; (4) the reason for the disclosure of the document; (5) the scope of the employer's privacy policy; and (6) the employee's ability to preserve the evidence without violating the employer's policy. Niswander v. Cincinnati Ins. Co. 529 F.3d 714, 726 (6th Cir. 2008); *see also* Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 229 (N.J. 2010) (holding that an employee who surreptitiously took her employer's confidential materials to evidence her discrimination and retaliation claims could use those documents in litigation against her employer). It is clear that the issue cannot be resolved simply by labeling the materials as stolen. *Cf. id.* at 226 (declining to permit an employer to insulate itself from wrongful termination claims merely because the employer used the word "theft" in a termination letter).

157. *See* Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1099 (Cal. 2007) (quoting State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999)) (recognizing that a lawyer who receives materials that are obviously or clearly privileged or confidential must "immediately notify the sender that he or she possesses material that appears to be privileged").

IV. WHAT MAY THE LAWYER DO ON RECEIPT OF INFORMATION THAT IS UNINTENTIONALLY DISCLOSED

There is a professional consensus that the lawyer should notify opposing counsel when the lawyer receives material that is apparently privileged.[158] I do not question that point as it does not impose a significant burden on lawyers. If notification is required, what else must the recipient do after receiving the disclosure and ascertaining its apparent protected status of the materials in the recipient's possession? Four options are possible: (1) a return obligation; (2) a use opportunity; (3) a review option; or (4) clarification.

A. *Return*

Many of the early decisions and ethics opinions that addressed the inadvertent disclosure issue opted to impose a return obligation on the recipient.[159] The few cases that addressed unauthorized disclosure did not impose a similar obligation,[160] likely due to the contemporary view that theft or misappropriation defeated the information's protected status, as long as the lawyer did not encourage the theft or misappropriation.[161]

158. *See* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 150 (1999) (opining that a lawyer receiving privileged materials satisfies their professional responsibilities by, among other things, notifying the adverse party of receipt of the documents); Va. Bar Ass'n, Op. 1076 (1988) (approving the use of privileged materials but noting that opposing counsel should be notified as a matter of professional courtesy). *See generally* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 809–11 (2005) (discussing several state provisions and opinions regarding notifications).

159. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 368 (1992), *withdrawn*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 437 (2005); *see also* United States *ex rel* Bagley v. TRW, Inc., 204 F.R.D. 170, 187 (C.D. Cal. 2001) (ordering return of privileged documents); Transp. Equip. Sales Corp. v. BMY Wheeled Vehicles, 930 F. Supp 1187, 1188 (N.D. Ohio 1996) (requiring return of privileged documents).

160. *E.g.*, Cooke v. Superior Court, 147 Cal. Rptr. 915, 919 (Ct. App. 1978) (involving butler who overheard conversation between husband and his attorney and communicated same, along with copies of privileged documents to wife and her attorney). The court in *Cooke* refused to disqualify the wife's attorney because confidential information was not obtained from client-lawyer relationship between husband and his attorney by wife's attorney and no prohibition exists against third-party independent communication of confidential information. *Id.*

161. *See* Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 481 (E.D. Va. 1991) (noting the Wigmore principle that a privilege is destroyed by any disclosure). *See generally* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2325–26 (John T. McNaughton ed., 1961) (stating that involuntary disclosure of privileged documents, including stolen documents, are not protected by privilege).

Recent cases and ethics committee opinions, along with the ABA, have not included a "return" obligation as part of the receiving lawyer's duties, although they have included the return of allegedly privileged materials as an option the recipient may exercise to resolve the matter.[162]

As a practical matter, the issue of a return obligation is unlikely to generate much modern debate. The modern trend is to seek clarification from the court as to whether the disclosed materials are privileged.[163] When clarification is obtained, resolution of any return obligation will also be achieved.[164] The same is true if the parties privately resolve the issue without the need of judicial intervention.[165]

B. *Use*

Whether a lawyer can use unintentionally disclosed information presents a difficult issue because "use" is a significantly ambiguous term here. Use of information can range from review of the information to ascertain whether it is protected (knowledge use) to exploitation of that information strategically against the adversary (evidentiary use). Exploitation of the disclosed information may involve only knowledge use (e.g., trial or negotiation strategy), or it may involve evidentiary use (e.g., admissions or trial exhibits). Use of the information may predate notification or occur after notice of the disclosure is given.

162. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2002) (requiring attorneys to notify the sender of a mis-sent document, but deferring to courts to decide whether the document should be returned); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 442 (2006) (noting that a lawyer may return inadvertently sent materials, but is under no obligation to do so). *See generally* Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 942 n.119 (2002) (discussing proposed rules regarding disclosure and receipt of privileged information that do not require return of the disclosed information).

163. *See generally* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 776 (2005) (noting the increasing number of courts that have rejected the extreme views of "always waived" and "no waiver" in favor of a more intermediate approach).

164. *See, e.g.*, FED. R. CIV. P. 26(b)(5) (establishing provisions for handling disclosed privileged documents until a court makes a determination regarding the claimed privilege). *See generally* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 780 (2005) (describing provisions of the Federal Rules of Civil Procedure as an imposed stay on the determination of privilege until a court makes a final ruling).

165. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 437 (2005) (stating that the decision to voluntarily return a document is a matter of professional judgment).

The modern trend suggests that a lawyer who *ex ante* uses apparently privileged information against an adversary acts at his peril both in terms of professional responsibility[166] and in terms of disqualification[167] if it is determined *ex post* that the information was protected and the lawyer over-reviewed the information (i.e., reviewed beyond the point the information's protected status became "obvious" to the reasonably prudent lawyer).[168] The cases do not, however, carefully distinguish between the different ways the information can be used. Rather, judicial consideration of the issue tends to be case-by-case oriented, rather than rule oriented.[169]

C. *Review*

The critical issue here is whether the lawyer should be allowed to review materials that are "apparently" privileged or claimed to be privileged, or whether they should cease reading once the apparent threshold is met or a claim of privilege is tendered. There has been significant disagreement on this point. One camp argues that the lawyer's obligations to the client mandate that the lawyer read on to fully inform himself so he can better represent the client's interests.[170] This "zealous advocacy" argument has not, however, found much modern acceptance in this context.[171] On the

166. *See, e.g.*, Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 4 (1996) (instructing that a lawyer can retain, and not turn over to a client, privileged information that the client caused to be sent to the lawyer by deception practiced on a public authority holding the information); D.C. Bar Legal Ethics Comm., Op. 318 (2002) (suggesting that a lawyer who uses material the lawyer knows is privileged may be violating Rule 8.4(c) that prohibits a lawyer from engaging in conduct that is deceptive or dishonest); Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. 01 (2007) (opining that a lawyer properly segregated and did not use information the client's wife had improperly obtained from the adverse party (husband)).

167. *See* Maldonado v. New Jersey, 225 F.R.D. 120, 141–42 (D.N.J. 2004) (disqualifying a lawyer who used privileged information obtained by unauthorized disclosure without notifying the privilege holder).

168. *See* Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1099–1100 (Cal. 2007) (disqualifying a lawyer who admitted to realizing the document was privileged within a "minute or two of review" but continued to read and disseminated the privileged document to other lawyers).

169. *See* Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) (stating that most courts take a case-by-case approach in determining when a waiver has occurred rather than relying on a *per se* rule of waiver).

170. *See, e.g.*, Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179, 181 (2006) ("[A] lawyer who receives an erroneous disclosure should read it and make her own determination of whether the information would be useful in furthering her client's case.").

171. *See* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 790–91 (2005) (arguing that, despite the

other hand, numerous courts and commentators have argued that once the threshold or claim is made, the lawyer should cease reading ("read no further").[172]

The difficulty with the "read no further" rule is that it is unworkable as an *ex ante* rule and overly draconian as an *ex post* rule. As an *ex ante* rule, "read no further" fails because when the privileged status of information becomes "apparent" it is not tethered to any principled standard that can be applied consistently. The very fact that courts have generally opted for a case-by-case approach to the question of whether unintended disclosure constitutes a waiver demonstrates the difficulty of identifying pre-set points that identify whether information is privileged in fact.

The uncertainty surrounding an *ex ante* rule leads to the draconian consequences of an *ex post* rule. *Ex post* information was either privileged, which means the lawyer should not have read further, or it was not, which means the lawyer could have read further. In the first situation the lawyer is sanctioned for violating a professional norm; in the second situation the client suffers because the lawyer exercised unnecessary restraint. Neither option is reasonable or efficient.

The problem is compounded when we realize that the professionalism concern fails to distinguish between use of the information in the sense of exploitation and use of the information in the sense of knowledge as discussed in Part IV(B) of this Article. Gaining knowledge in order to effectively represent the client is not unprofessional in the same sense as exploitative use of the possibly privileged information is against the privilege claimant. The knowledge the lawyer gains from reading further allows the lawyer to counsel and advise his client, including arguing to a court that the information should be usable because the claim of privilege is erroneous. Unlike exploitative use, there is no deception practiced on the privilege claimant; instead, allowing the lawyer to read further encourages the lawyer to seek judicial clarification so that the information

appearance that zealous advocacy is the dominant model followed by attorneys today, in several circumstances it is "impl[ied] that lawyers should . . . pursue interests that do not advance a client's objectives").

172. *See, e.g.*, *id.* at 783–85 (noting jurisdictions that require the receiver of an inadvertent disclosure to cease reading once the privilege claim is made or the receiver realizes the information is privileged).

can be "used" in the full sense of the term.[173]

Instructing lawyers that they should "read no further" imposes on lawyers an obligation that is uncertain in scope and dimension because the obligation's trigger ("apparency") is undefined. There is no reason the recipient lawyer should be required to restrain his duty to the client of professional independence to benefit opposing counsel, particularly when opposing counsel is under no correlative duty of restraint in making the claim of privilege.

Rather than allowing either side unconstrained freedom to use (recipient) or to claim (privilege claimant), a fairer resolution is to place the matter before the court and require the parties to abide by the court's resolution of the claim. Because the critical issue is the alleged privileged status of the information, fundamental fairness would dictate that the receiving lawyer be allowed to review the material alleged to be privileged so that he may more effectively argue to the court that the material is not privileged or has lost its privilege.[174] If the receiving lawyer is able to review the material to be able to argue to the court, nothing is lost if the lawyer is allowed to "read further" at an earlier point in time, as long as the privilege claimant is apprised that the lawyer is reading further.

D. *Clarify*

The dangers associated with using possibly protected information incentivizes the recipient of the disclosure to obtain judicial clarification before doing so. A judicial decision resolves the open question of the information's status and protects the lawyer from the threat of sanction

173. A California appellate court stated:

> There are a number of California decisions that have discussed the issue of whether an attorney should be disqualified after being exposed to an adverse party's confidential information. These cases, which articulate controlling neutral principles of law, are directly pertinent to the disqualification motion at issue. The cases have consistently concluded that mere exposure to confidential information of the opposing party does not require disqualification.

Neal v. Health Net, Inc., 123 Cal. Rptr. 2d 202, 210 (Ct. App. 2002) (citations omitted).

174. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(a) (2000) ("The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct."). Moreover, by voluntarily introducing the privileged communications into the proceedings, the privilege holder waives the protection of the privilege. *Id.* § 79 cmt. e, illus. 3.

arising from a court's subsequent disagreement with the lawyer's unilateral resolution of the issue.[175]

Clarification prevents the lawyer from surreptitiously exploiting the information to the adversary's disadvantage, and it will necessarily serve as notice that disclosure has occurred. Refraining from using the information until the court acts to clarify its status will have little effect beyond that imparted by the disclosure. If the disclosed information is knowledge-based only, notice discounts the information's strategic value because the owner of the information knows the information is not confidential.[176] Knowledge use may be contained if the lawyer is disqualified and ordered not to divulge the information to successor counsel;[177] however, knowledge cannot be unlearned. Even if the court declares the information protected, the court can do little to allay the harm disclosure has caused other than disqualifying counsel. All the knowledge harm that the owner-adversary will incur was sustained as a result of the disclosure; all rectification of the benefit disclosure could provide the recipient is obtained by requiring the recipient to give notice.

Once the adversary realizes that its information has been shared with the recipient, the adversary will take what action it can to mitigate damage associated with disclosure. If the information has evidentiary-use value, obtaining clarification before use has no meaningful impact on the parties' rights because a ruling on the right to use the evidence will occur at some point prior to use.[178] For example, if the recipient seeks to use the

175. While requested sanctions may be denied or overturned, by seeking judicial clarification prior to using the material, the receiving lawyer would avoid the need to defend himself in an action brought by the sending party. *Cf.* Aerojet-Gen. Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862, 868 (Ct. App. 1993) (declining to uphold sanctions imposed against a lawyer who examined a privileged document that was innocently received and who did not notify sender of the error or seek judicial clarification); Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, 2009 WL 982456, at *4–6 (S.D. Fla. Apr. 10, 2009) (denying sanctions against a lawyer who allegedly used inadvertently produced privileged information).

176. *See, e.g.*, Wichita Land & Cattle Co. v. Am. Fed. Bank, 148 F.R.D. 456, 459–60 (D.D.C. 1992) (stating that the confidentiality of a document is destroyed once it has been inadvertently disclosed and the recipient has ascertained substantial knowledge of its contents).

177. *Cf.* San Diego Cnty. Bar Ass'n Ethics Comm., Op. 01 (2008) (stating that a discharged in-house lawyer who wishes to sue her former employer based on her acts as a lawyer, may share client confidential information of the employer with her lawyer, but may not reveal the information in the litigation unless disclosure is authorized by court order or a professional rule exception).

178. *See* Mfrs. & Traders Trust Co. v. Servotronics, Inc., 522 N.Y.S.2d 999, 1004 (App. Div. 1987) ("[A] court can repair much of the damage done by disclosure by preventing or restricting use

information obtained at an evidentiary trial or deposition exhibit, the owner-adversary may object and force consideration of the right to use the information in the proceedings.[179] Clarification simply moves that point up earlier in the litigation process.

While restraining oneself from using the information until clarification is obtained does not impose meaningful costs on the recipient, notification does. Notification deprives the recipient of the element of surprise—the ability to find out what the adversary knows without the adversary knowing that the recipient knows. It is a significant benefit to know the adversary's position when the adversary is unaware of that fact. Notification, however, puts the recipient at risk of disqualification, which is the only effective remedy a court has when a lawyer has been exposed to protected information that has informational value (e.g., trial strategy) but no evidentiary-use value (e.g., establishes or helps establish part of the litigant's case).[180] This reality entices a lawyer not to notify, albeit at the cost of losing evidentiary use of the information, but retaining knowledge use.

The desirability of a notification duty suggests, however, that courts and bars should not create rules that discourage notification. Imposing disqualification whenever a lawyer is exposed to protected, unintentionally disclosed information would discourage lawyers from notifying. This might also result in lawyers not fully advancing client interests if the lawyer failed to use information for evidentiary purposes that a court would allow them to use because the lawyer erroneously believed the court would rule otherwise (i.e., the information was protected), and disqualify the lawyer because she had been exposed to the information. To avoid that problem, a lawyer might elect not to use the information as evidence, and may also elect not to notify the adversary of what the lawyer knew.

This course of conduct would itself be precarious. For example, the

of the document at trial.").

179. *See id.* ("[T]here is no reason to apply the harsh traditional approach [of waiver] to a litigant who inadvertently discloses a document, at least prior to the time that remedying an accidental production would cause the adversary any prejudice.").

180. Klein v. Bristol Hosp., 915 A.2d 942, 945–46 (Conn. 2006) ("'Disqualification of counsel is a remedy that serves to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information. . . .'" (quoting Bergeron v. Mackler, 623 A.2d 489, 493 (Conn. 1993) (alteration in original))).

adversary might become suspicious and ask the lawyer questions as to how the lawyer gained the knowledge she had. Silence on the lawyer's part would raise suspicion; lying on the lawyer's part would involve the lawyer in dishonesty and potential sanction independent of the status of the information.[181]

If courts and professional bars want lawyers to notify, they should create incentives to do so. Hanging a Damoclean sword over the lawyer who notifies will discourage the type of conduct courts and bars want to encourage. Creating safe harbors for lawyers who notify and seek clarification before using the information by limiting sanctions (disqualification) to situations in which the lawyer did more, such as sought to use the information surreptitiously,[182] would encourage notification and private or public resolution of the claim of protected status of the information.

A strict notification rule followed by efforts to clarify would avoid the problem created by the suggestion that a lawyer can read too much when reviewing a disclosure to determine if it is protected and was disclosed unwontedly. Attempts to limit how much a lawyer should read are not only difficult to enforce, they are unwise to implement. When a lawyer receives information that may be protected, the lawyer needs the leeway to ascertain the validity of that claim. Moreover a lawyer should not be subject to second-guessing over whether she read too much of a protected document. The notification trigger ("obviously and clearly protected" and "apparently misdelivered") is not precise.[183] Reasonable minds may disagree on whether the threshold was reached. While the receiving lawyer may be situationally incentivized to read more than she should,[184] a post-

181. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 422 (2001); *see also* Miss. Bar v. Att'y ST, 621 So. 2d 229, 232–33 (Miss. 1993) (holding that an attorney who falsely denied a conversation was being recorded would be subject to discipline even though the secret recording was not itself illegal).

182. *See supra* note 91 (discussing situations in which attorneys were sanctioned for unethical use of disclosed materials).

183. *See* State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999) (formulating a standard for guidance in situations where disclosed information is obviously or clearly protected by privilege).

184. This incentive may be created by the law of privilege waiver. *See In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 156 F.R.D. 507, 513 n.9 (D.D.C. 1994) (noting that a privileged document is deemed "disclosed" when the recipient reads enough to get the "gist" of the document's contents; thus, if the lawyer ceases reading before that point, no disclosure, and hence, no

review determination on whether the lawyer read too much might be unfairly influenced by hindsight bias.[185] While there are costs to allowing lawyers leeway in reading materials that may be privileged, those costs are, in my opinion, outweighed by the benefits a "read, notify and clarify, but do not use for evidentiary purposes" approach would bring to this area of the law.

V. CONCLUSION

Some lawyers no doubt wish that more would follow the saying: "gentlemen do not read each others mail."[186] Our legal system remains, however, an adversarial process and it is unrealistic to expect lawyers to behave like angels rather than advocates. It is also unproductive to have balancing tests based on open-ended criteria that subject lawyers to disqualification if they make a judgment error. Competing interests are balanced when a legal system requires a lawyer to promptly notify opposing counsel when he comes into receipt of privileged material, but allows the lawyer to read the material (unless the lawyer has aided or abetted a breach of a duty of confidentiality) to determine if it is privileged.

Whether information is privileged should be decided in court, not in a vacuum. The receiving lawyer needs to know what she has received in order to effectively advocate for the client. A "read no further" rule will not advance the goal of judicial resolution of privilege disputes. It will discourage notification and encourage evasion, neither of which advances the goals of the legal system. Decisions in this area should be fully informed, which they cannot be if the lawyer, in possession of materials

waiver, has occurred).

185. "Hindsight bias" is a cognitive heuristic that encourages individuals to overestimate one's ability *ex post* to have anticipated or predicted future events *ex ante*. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, *in* BEHAVORIAL LAW & ECONOMICS 95–115 (Cass R. Sunstein ed., 2000) (discussing hindsight bias).

186. *Quote of Henry Louis Stimson*, QUOTATIONS BOOK, http://quotationsbook.com/quote/44728/#axzz1LtEIlOwR (last visited May 9, 2011) (attributing quote to United States Secretary of State Henry Stimson as his justification for closing down a State Department code-breaking operation in 1929); *see also* Md. State Bar Ass'n Comm. on Ethics, Op. 04 (2000) (acknowledging that no Rule of Professional Conduct created or specified a legal duty on the part of a lawyer who receives inadequately disclosed privileged information, but concluding that the Rules "imply a higher standard of conduct").

claimed to be privileged, cannot test the claim by reading and reviewing the materials.