APPLYING THE REVISED ABA MODEL RULES
IN THE AGE OF THE INTERNET:
THE PROBLEM OF METADATA

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I. INTRODUCTION

Symposiums are a tradition that date to the dawn of Western Civilization. The ancient Greeks often gathered for a convivial meeting where they leisurely dined and drank while engaged in intellectual conversation about a particular topic. The word “symposium” derives from the Greek word meaning to come together and drink.1 Plato called one of his dialogues, the Symposium.2 The Jewish Seder evolved into a symposium reflecting on the Exodus from Egypt.3 It is an honor to participate in this Symposium on Legal Ethics.

The topic of this Symposium focuses on the Ethical Infrastructure and Culture of Law Firms. The culture of every law firm must emphasize competence. Indeed, the first rule of legal ethics, the prime directive, if you will, is competence. To emphasize that point, the Model Rules of Professional Conduct (“Model Rules” or “Rules”)4 designates its first rule, Rule 1.1, “Competence.”5 Competence requires the lawyer to “keep abreast of changes in the law and its practice,” and means that lawyers must learn about “the benefits and risks associated with relevant technology.”6 That technology increases exponentially the risks of

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1. PETER GARNSEY, FOOD AND SOCIETY IN CLASSICAL ANTIQUITY 129 (1999); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1269 (11th ed. 2007).
2. PLATO, SYMPOSIUM (Alexander Nehamas & Paul Woodruff trans., Hackett Pub’g Co. 1989). This dialogue discusses the nature of love based on discussions at a dinner or drinking party that Socrates attended. Id. at xi. The book dates from about 385–380 B.C.E. Id. at xi–xii.
5. Id. R. 1.1 & cmt. 6.
6. Id.; ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES,
inadvertently losing the attorney-client privilege when sending emails, transferring documents, or responding to discovery.

The American Bar Association (“ABA”) may try to lessen the impact of these mistakes, but its proposed changes in the Model Rules are ill-considered because they do not take into account that the Rules cannot prevent lawyers from using evidence that has lost its privilege. Lawyers in litigation can limit the risks of inadvertent disclosure by using clawback agreements, but one would be hard-pressed to find such agreements in the context of negotiation that one does not expect to lead to litigation. The solution is not to rely on the Model Rules, but to focus on the prime directive of legal ethics—competence. Lawyers who worry over what to do about disclosing documents, including the metadata within documents, should take care not to make the disclosures in the first place, unless the documents have forensic value so that removing metadata will unlawfully alter evidence.

Over the last few years, the ABA has been engaged in an extensive self-evaluation of its Model Rules. One of the primary purposes of the ABA Commission on Ethics 20/20 (“Commission 20/20”)—the entity charged with this evaluation—is to bring the Model Rules up to date and to help law firms keep pace in this age of computers, technology, and the Internet. I will discuss several of these changes and analyze how they may affect lawyers complying with their ethical obligations.

As every lawyer knows, it is difficult to draft legislation or rules. Because lawyers are drafting about a topic with which they are intimately familiar—rules that govern the practice of law—one might think that they should have an easier time when drafting those rules, as opposed to drafting rules about safety issues in chicken production or protocols for animal testing.

That, however, is not the case. Whatever advantage we lawyers have with intimate knowledge about the subject matter—the practice of law—we must counterbalance with the self-interest inherent when lawyers draft rules governing their own behavior. Being too close to an issue can cloud our vision. Hence, please do not mistake my criticisms


8. See Monroe H. Freedman, Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements, 26 HOFSTRA L. REV. 641, 643-44 (1998) (pointing out that the views of lawyers are not always the products of disinterested objectivity).
of the current product for any criticism of the drafters, who labored many hours. They labored, burdened by this inherent problem, and perhaps that explains some of the drafting peculiarities.9

Commission 20/20’s proposals, which the ABA House of Delegates approved in August of 2012, focus largely on making sure that the Model Rules take into account the changing world of technology, computers, electronic discovery, metadata, and the Internet.10 Yet, the most significant changes, dealing with recurrent issues like metadata within documents, do not appear to appreciate the significance of the new technology.11

To a large extent, the ABA’s attitude to modern technology reminds me of the famous Australian folk song, Waltzing Matilda: the song is not a waltz, and it is not about a woman named Matilda.12 The ABA’s recent changes to the Model Rules purport to make the Rules up-to-date and contemporary in light of high technology,13 but they do not. They refer to modern technology, but they are not about it. For that reason, these revisions may not be very influential.

Prior to Commission 20/20, the most recent effort of the ABA to come to terms with high technology was its regulation of Internet chat rooms.14 The ABA sought to ban lawyers from chat rooms, but many

9. The ABA House of Delegates, during its August 2012 meeting, also approved of other revisions that Commission 20/20 advocated. For example, Rule 1.6, Comment 13 states that lawyers moving from one law firm to another may need to disclose some client information in order to determine if there are any conflicts of interest. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 13 (2013). It includes a strange phrase that appears nowhere else in the Rules: “Any such disclosure should ordinarily include no more than the identity of the persons and entities involved . . . .” Id. (emphasis added). Normally, we think that the term “person” (unlike “individuals,” who are human beings) includes “entity” or “aggregate.” Gary S. Rosin, The Entity–Aggregate Dispute: Conceptualism and Functionalism in Partnership Law, 42 ARK. L. REV. 395, 405, 425 (1989). Partnerships are aggregates in some states and entities in others. Id. at 402 & n.33, 403. So, is the point of the language to indicate that the disclosure requirements do not apply to aggregates? Commission 20/20 does not say that. See generally COMMISSION 20/20 RESOLUTION, supra note 6 (proposing changes to the Model Rules). Commission 20/20 does not point out that Rule 1.13 covers the “organization” as a client, and “organization” includes both entities and aggregates. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 1 (2012); COMMISSION 20/20 RESOLUTION, supra note 6, at 1-5. One would think that Commission 20/20 means to say something different when it uses new language. If so, Commission 20/20 should tell us what they are trying to say.

10. COMMISSION 20/20 RESOLUTION, supra note 6, at 1.

11. See, e.g., id. at 5-6.


14. See infra Part II.
states have rejected that ABA Model Rule. Let us briefly look at the ABA experience with chat rooms, because that incident is a harbinger of things to come.

II. INTERNET CHAT ROOMS AND REAL-TIME ELECTRONIC COMMUNICATIONS

The ABA’s response to Internet chat rooms and the changes it wrought have not been influential.

A. The Constitutional Background

First, a little background. We can think of lawyers seeking clients on a wholesale level—using advertising—or lawyers seeking clients on a retail level—using solicitation. For many years, the ABA banned lawyer advertising as well as all lawyer solicitation. Eventually, the ABA changed its Rules in belated response to the U.S. Supreme Court cases that invalidated, on First Amendment grounds, the ban on lawyer advertising.

The restrictions on solicitation are more complicated because lawyers typically approach the prospective client in a face-to-face encounter. The ABA has expressed concern that the lawyer may overwhelm the client and that, given the verbal nature of the exchange, it may be unclear what the lawyer said or what the prospective client reasonably inferred. The Supreme Court has accepted this distinction, even though it later invalidated comparable state rules that banned solicitation by accountants. The Court accepted the ABA’s argument that lawyers are different because law schools purportedly train them in the art of persuasion, while accountants do not have that training. That

15. See infra Part II.
19. See infra notes 24-27 and accompanying text.
20. See Edenfield v. Fane, 507 U.S. 761, 763 (1993); see also ROTUNDA & DZENKOWSKI, supra note 17, § 7.0-4(b).
distinction, apparently of constitutional import, justifies some rules that
limit lawyer solicitation.

Yet, the ABA went too far by using its ethics Rules to ban almost
all solicitation, and to apply that ban even when the encounter involved
written communications. Thus, the Court did not uphold an ABA ban
on all lawyer solicitation. In the leading case, the Court allowed the
ban when the factual situation showed that the particular lawyer’s
actions were misleading, bullying, and offensive. Yet, in a companion
case, the Court invalidated the solicitation ban when the
circumstances were more innocent. Between those two extremes, the
law was unclear.

The first major test arose in connection with the issue of mail
advertising. The Supreme Court held that lawyers engage in
“advertising,” and not solicitation, when they send mass mailings to
prospective clients. That conclusion makes sense. Unlike a lawyer’s
encounter with a prospective client that is face-to-face (what the Model
Rules now call “in-person” contact), the lawyer never sees the
prospective client to whom he sends the mailing. All of the
communication is in writing. Because there is a “writing,” we
know exactly what the lawyer said, promised, or implied, so it is easy
for the Bar to discipline the lawyer if the lawyer’s communication
was misleading.

In addition, because the recipient never sees the lawyer, it is easy to
throw away the letter. There is a reason why we call advertising material
“junk mail”—because the decision to deposit it in the circular file (that

23. ROTUNDA & DZIENKOWSKI, supra note 17, § 7.0-2.
24. See Ohralik, 436 U.S. at 467-68. In Ohralik, the lawyer “approached two young accident
victims at a time when they were especially incapable of making informed judgments or of
assessing and protecting their own interests.” Id. at 467. One prospective client was in a hospital
room in traction, and “[the lawyer] employed a concealed tape recorder, seemingly to insure that he
would have evidence of [the victim’s] oral assent to the representation.” Id. Later, when one client
tried to fire him, he refused to withdraw. Id.
25. See In re Primus, 436 U.S. 412, 422, 438-39 (1978). The Court noted in Primus that the
lawyer did not attempt to “pressure” the prospective client into filing the suit. Id. at 417 n.7. In
addition, “[the lawyer’s] letter cannot be characterized as a pressure tactic.” Id. at 435 n.28. That
suggests that Primus turned on the lack of pressure, as opposed to the nature of the representation
for non-pecuniary gain.
28. See id. at 206-07.
29. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2012).
30. Id. (including live telephone and real-time electronic communications but not mailings
when restricting in-person solicitation).
31. Id. R. 1.0(n) (defining the term “writing”).
32. See id. R. 7.1.
is, wastebasket) is one that people make every day. The recipient does not have to walk away from the lawyer, who is not physically there. One is not concerned that she will offend anyone by turning her back, because there is no back to turn. The recipient does not have to ask anyone to leave. One might be reluctant to hang up on a telephone caller, even a rude one. There is, however, no hesitancy in throwing away a letter.

Moreover, if direct mail by lawyers annoys the recipients, the free market should provide a self-corrective cure. Prospective clients will not hire lawyers who have annoyed them with junk mail. If junk mail works, if it brings in the clients, those clients must not be annoyed.

If mass mailings are “advertising,” and not solicitation, then targeted mailings should be in the same category. It would be hard to fashion a rationale that says that the First Amendment only protects lawyers in mailing letters as long as they do so in an economically inefficient manner. Yet, the ABA did not see it that way and its Rules did not protect targeted mail. Some courts agreed, and applied their version of the ABA Model Rules to restrict such advertising. Others allowed targeted direct mail.

33. See, e.g., Adams v. Att’y Regis’n & Disciplinary Comm’n of the Supreme Court of Ill., 617 F. Supp. 449, 455 (N.D. Ill. 1985) (holding, in anticipation of the U.S. Supreme Court’s review of the issue, that there is no “principled reason for allowing direct mailing to the public at large, but not to target audiences”), aff’d, 801 F.2d 968 (7th Cir. 1986).

34. MODEL RULES OF PROF’L CONDUCT R. 7.3 (1983) (prohibiting lawyers from using mailings to solicit clients with whom they have no previous relationship).

35. Judicial antagonism towards lawyers advertising is well illustrated. See, e.g., Allison v. La. State Bar Ass’n, 362 So. 2d 489, 496 (La. 1978) (holding that lawyers had no free speech right to send letters to employers soliciting contracts under which employers would collect money from their employees’ wages and give it to lawyers who, in exchange, promised to perform specified legal services for these employees, as this was an illegal solicitation under the canons of ethics); see also Comm. on Prof’l Ethics & Conduct of Iowa State Bar Ass’n v. Humphrey, 355 N.W.2d 565, 566 (Iowa 1984) (holding that the “rule on lawyer advertising expressly prohibit[ing] television advertisements which contain background sound, visual displays, more than a single, nondramatic voice or self-laudatory statements” is constitutional), vacated, 472 U.S. 1004 (1985) (relying on Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), in vacating the Iowa Supreme Court’s decision). On remand, and reinstating its previous decision, the Iowa Supreme Court upheld a rule expressly prohibiting the aforementioned lawyer advertising. Comm. on Prof’l Ethics & Conduct of Iowa State Bar Ass’n v. Humphrey, 377 N.W.2d 643, 644-47 (Iowa 1985). Iowa only allowed lawyers to publish advertisements that had all the flair of tombstones.

36. For instance, the New York Court of Appeals held that targeted mailing is advertising, not solicitation. In re Von Wiegen, 470 N.E.2d 838, 841 (N.Y. 1984). In-person solicitation “permits the exertion of subtle pressure and often demands an immediate response,” while targeted direct mail gives the recipient time to reflect about—or, indeed, ignore—the offer of services, and “the process of decision-making may actually be aided by information contained in the mailing.” Id.
Finally, there came Shapero v. Kentucky Bar Ass’n. In Shapero, the lawyer applied to the Kentucky Attorneys Advertising Commission to secure approval of a letter he planned to send to persons whom he believed were subject to foreclosure suits. Although “[t]he Commission did not find the letter false or misleading,” it cited a Kentucky Supreme Court Rule that prohibited sending letters “precipitated by a specific event or occurrence involving or relating to the addressee” rather than to the public generally. Kentucky followed the ABA, but the ABA was behind the curve.

Shapero held that this targeted direct mail was advertising and constitutionally protected. The lawyer clearly could have published his truthful letter in a newspaper or mailed it in bulk throughout the community, the Court said. Nothing in the First Amendment requires that lawyers use an inefficient method of distribution.

In addition, there could be no legitimate concern that these letters would make the targets of the letters feel “overwhelmed.” Whether or not letters are overwhelming has nothing to do with whether lawyers send them randomly. Written communication also does not present the same dangers of overreaching. The recipient of this letter, like the recipient of any printed advertisement (but unlike the recipient of a lawyer’s personal visit), “can readily . . . put [the letter] in a drawer to be considered later, ignored, or discarded.” Because some targeted direct mail may be misleading, that does not authorize the state to ban all targeted direct mail. The state can simply sanction lawyers who send out misleading letters, just as it can sanction lawyers who publish misleading newspaper advertisements.

The following year, in 1989, the ABA reacted to Shapero by revising Rules 7.2 and 7.3 to codify the constitutional ruling and allow targeted mailing.

38. Shapero, 486 U.S. at 469.
39. Id. at 469-70 (quoting KY. SUP. CT. R. 3.135(5)(b)(i) (1986)).
40. See id. at 470-71.
41. Id. at 472-73.
42. Id. at 473.
43. Id. at 473-74.
44. Id. at 474 (quoting Shapero v. Ky. Bar Ass’n, 726 S.W.2d 299, 301 (Ky. Sup. Ct. 1988)) (internal quotation marks omitted).
45. Id. at 475-76.
47. ROTUNDA & DZIENKOWSKI, supra note 17, §§ 7.0-4(c), 7.0-5. At the time, “the ABA Model Rules prohibit[ed] mailings to specific individuals as opposed to general mailings.”
B. Chat Rooms and Solicitation After Shapero

This background leads us to the next chapter, “chat rooms.” This term is one that anyone under age thirty will recognize. Are chat rooms like “face-to-face” encounters or more like junk mail, or targeted mail, which the recipient can simply ignore?

Chat rooms typically are a form of synchronous conferencing, that is, “real-time” communication. The term typically refers to forms of instant messaging and online forums where participants (typically more than two) can communicate with the entire group. However, a chat room can also involve asynchronous conferencing, such as a group of people corresponding by email.

If I send an email to one or more people, the recipient can answer it later, or not at all, or immediately, that is, in real-time. I can send an email to a group of people, and each of them can “reply all” to any questions or ask questions of their own. Typically, we tend to think of chat rooms as a real-time online interactive discussion group on a particular topic. The ABA is much more concerned with “real-time” communication, which it bans, than with email discussions, which can take place in real-time if the parties copied on the email have good connections and receive their replies almost instantly.

A chat room is a lot like direct mail advertising. Participants in the chat room read what the other participants write. Because there is a “writing,” albeit one that is electronic, there is a record of what everyone says. We know exactly what the lawyer said, promised, or implied, so it is easy for the Bar to discipline the lawyer if her communication in the chat room is misleading.

In direct mail advertising or targeted mail, the lawyer will initiate the communication by sending a letter. In contrast, in a chat room, an


49. Id.


51. Hence, Rule 7.3(a) bans “real-time electronic contact.” MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2012).

52. See id. R. 7.3 cmt. 3.

53. Id. R. 1.0(n).

54. See id. R. 7.1.
individual interested in the topic of the chat room (pop music, Star Wars, automobile accident victims looking for lawyers) initiates contact by joining the chat room. We may also think of a chat room as analogous to interactive yellow pages. Individuals seek out advertisements when they turn to the yellow pages. Individuals seek information when they turn to a chat room. The participants converse with each other by typing at the keyboard.

Like mail advertisements, there is no face-to-face communication in a chat room. If we chatted in your living room, the only way I could avoid the conversation would be to leave the room, and people might regard that as impolite. If we chatted in my living room, I would have to ask you to leave, and you might think that is impolite.

Not so in a chat room. Just as Waltzing Matilda is not a waltz and not about a woman named Matilda, there is no “chatting” in a chat room and there is no room. It is more like the comment section following a newspaper article that the newspaper posts online. In the comments section, people type messages and post their comments.

Whoever does not want to participate in a chat room discussion does not have to turn his back on the lawyer, who is not physically there. No one is physically there, because there is no “there.” No one offends anyone by turning his back, because there is no “back” either. The chat room participant does not have to ask anyone to leave.

One might be reluctant to hang up on a telephone caller, even a rude one. There is, however, no such hesitancy in not responding in a chat room. Indeed, some people are “lurkers”—people who read or observe the chat room’s ongoing discussion but who seldom, if ever, participate in it.55

Chat rooms are like interactive bulletin boards. The lawyer enters a chat room, honestly discloses that he is a lawyer, and offers services that some people in the chat room might find useful. No one has to respond to the lawyer’s comments. If the lawyer asks if anyone is interested, no one needs to reply. Anyone can leave the chat room without turning away because there is no room and no human being. This is all occurring in cyberspace. The lawyer providing truthful information in an electronic chat room is engaged in “real-time” contact, but no one has to respond. Leaving a chat room is not abruptly hanging up a phone. If anyone in a chat room says he does not want to be solicited, Rule 7.3(b)(1) already requires the lawyer to stop.56

Nonetheless, the ABA did not see it that way. In 2002, the ABA amended Rule 7.3(a), to ban “real-time electronic” communication.\textsuperscript{57} That, says the ABA, is a prohibited type of solicitation.\textsuperscript{58} An email is not necessarily, or always, “real-time,” so Rule 7.3(a) does not ban it.\textsuperscript{59} Yet, the ABA made clear in Rule 7.3(c) that every “electronic communication” by a lawyer to a prospective client that solicits employment must indicate at the beginning and end of the electronic communication that it is advertising.\textsuperscript{60} This requirement certainly warns the reader that the lawyer is trolling for clients.\textsuperscript{61} However, the ABA has decreed that this requirement, while good enough to protect people who receive emails, is simply not good enough to protect people who read or participate in the discussion in a chat room.\textsuperscript{62} If the lawyer makes the disclosure that he or she is a lawyer and has expertise in the area that is the topic of the chat room, that lawyer will still violate Rule 7.3(a).\textsuperscript{63} The question is why: Why does the ABA greet the new technology by banning real-time solicitation but not email solicitation?\textsuperscript{64}

Protection of prospective clients in the form of full disclosure that the lawyer is seeking business applies to all advertising emails, of course, and similar forms of communication, like a text message.\textsuperscript{65} Similar protection applies to other forms of Internet posting, such as a blog, when the lawyer is soliciting for clients.\textsuperscript{66} Nevertheless, chat rooms

\textsuperscript{57} Rotunda & Dzienkowski, supra note 17, § 7.3-2(a); see Model Rules of Prof’l Conduct R. 7.3(a) (2012).

\textsuperscript{58} Rotunda & Dzienkowski, supra note 17, § 7.3-2(a).

\textsuperscript{59} Model Rules of Prof’l Conduct R. 7.3 cmt. 3 (2012). Rule 7.3(b)(1) requires the lawyer to stop sending the email if the recipient has so indicated. Id. R. 7.3(b)(1).

\textsuperscript{60} Id. R. 7.3(c).

\textsuperscript{61} See id.

\textsuperscript{62} Id. R. 7.3 cmt. 3.

\textsuperscript{63} Id. R. 7.3(a).

\textsuperscript{64} See id. R. 7.3 cmt. 3.


\textsuperscript{66} See Model Rules of Prof’l Conduct R. 7.3 cmts. 3–4 (2012); see also Hunter v. Va. State Bar ex rel. Third Dist., 744 S.E.2d 611, 617 (2013). In Hunter, the court held that a lawyer’s blog that primarily discussed cases where he obtained successful outcomes for clients constitutes commercial speech (not political speech, even though it “contain[s] some political commentary”) that is subject to regulation under Virginia’s professional conduct code for lawyers. Hunter, 744 S.E.2d at 617. The court said that the lawyer “admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominantly describe cases where he has received a favorable result for his client.” Id. The majority held that the Bar could require the lawyer to post a disclaimer on all case-related posts. Id. The court remanded so the lower court could impose a disclaimer that sufficiently warns readers of the blog that case results depend upon a variety of factors and do not guarantee or predict a similar result in any future case. Id. at 621.
are different in kind, according to the ABA. The ABA bans lawyers seeking clients in chat rooms no matter how much disclosure the lawyer gives and no matter how much the lay participants in the chat room would appreciate the lawyer’s presence.

The ABA buries the answer to that question in its official Comments. In response to the changing world of the Internet, the ABA revised its Comments to assert that “real-time electronic solicitation” of prospective clients is as abusive as “in-person,” that is, face-to-face encounters. These chat rooms (“real-time electronic solicitation”) “may overwhelm the client’s judgment.” That is why “real-time electronic solicitation of prospective clients justifies its prohibition.”

The ABA mistakes an assertion for a rationale. The ABA argues that one is not overwhelmed when reading a posting on a blog or a webpage, but that same person is overwhelmed, beleaguered, or fraught when reading the same statement in a chat room. Why is it proper for the lawyer to send, directly to a prospective client, an email soliciting legal business (if the lawyer fully discloses at the beginning of his message that the email is an advertisement), but it is improper for the lawyer to write the exact same language in a chat room? The email is proper but the exact same language in the chat room will subject the lawyer to discipline, including disbarment.

One would think that it is relevant that there is no “chatting” in a chat room. There are no people in a chat room, because there is no room. Instead, everything that anyone “says” is something that someone has written by using the keyboard. They are typing messages in the exact same way they would type a letter or type an email. There is no face-to-face encounter. There is no “in-person” solicitation.

The ABA discusses none of this. Instead, it simply announces that there is no writing: the contents of “real-time electronic conversations . . . can be disputed and may not be subject to third-party scrutiny.” That is a strange assertion because there is a digital record of all the “chatting” in a chat room. Any third party, such as disciplinary authorities, can scrutinize what the lawyer has said, claimed, or implied.

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68. See id.
69. See id. R. 7.3 cmts. 2–3.
70. Id. R. 7.3 cmt. 2.
71. Id.
72. Id. R. 7.3 cmts. 2–3.
73. See id.
74. See id.
75. See id. R. 7.3 cmt. 3.
76. Id.
Earlier, the Model Rules explicitly defined “writing” to include an “electronic record of a communication” or an email.\footnote{Id. 1.0(n).} That definition in Rule 1.0 appears to contradict the assertions of Rule 7.3. Model Rule 7.3 takes care of that problem by ignoring it and making no mention of the Model Rules’ definition of “writing.”\footnote{See id. R. 7.3.} What one writes on the Internet is written in ink, not erasable pencil. Yet, the ABA asserts there is no “writing” in a chat room conversation.\footnote{See id. R. 7.3 cmt. 3.}

Indeed, a later ABA Formal Ethics Opinion concedes that “[t]here are obvious differences between in-person and digital social interactions.”\footnote{ABA Comm. on Ethics \\& Prof’l Responsibility, Formal Op. 462 (2013).} Face-to-face conversations are “fluid,” while material on the Internet has “long, perhaps permanent, digital lives,” so that these “statements may be recovered, circulated or printed years after being sent.”\footnote{Id.} Yet, this Formal Opinion is oblivious that its arguments are contrary to the ABA Model Rules that it interprets.\footnote{See id.; see also MODEL RULES OF PROF’L CONDUCT R. 7.3 (2012).}

C. The Muted Influence of the ABA’s Ban on Chat Rooms

The Supreme Court has not ruled on chat rooms, but there is substantial evidence that the ABA’s antagonism toward chat rooms—like its earlier objections to advertising, mass mailings, and targeted mailings—have not been persuasive with the jurisdictions in charge of actually enforcing ethics rules. Many jurisdictions have simply refused to adopt the ABA version of Rule 7.3(a), with its prohibition of “real-time electronic contact.”\footnote{The relevant rule in some jurisdictions uses a different numbering system than the ABA Model Rules, but the particular rules below correspond to ABA Model Rule 7.3(a). See, e.g., ALA. RULES OF PROF’L CONDUCT R. 7.3 (2013); ARK. RULES OF PROF’L CONDUCT R. 7.3 & cmt. (2012); FLA. RULES OF PROF’L CONDUCT R. 4-7.11, 4-7.18 (2013); GA. RULES OF PROF’L CONDUCT R. 7.3 (2012); HAW. RULES OF PROF’L CONDUCT R. 7.3 (2011); LA. RULES OF PROF’L CONDUCT R. 7.4 (2011); MASS. RULES OF PROF’L CONDUCT R. 7.2(a) & cmt. 3-3A, R. 7.3(c) (2013); MICH. RULES OF PROF’L CONDUCT R. 7.3(b) (2013); MINN. RULES OF PROF’L CONDUCT R. 7.3 (2011); NEV. RULES OF PROF’L CONDUCT R. 7.3 (2011); N.J. RULES OF PROF’L CONDUCT R. 7.3 (2010); P.R. CÓDIGO DE ÉTICA PROFESIONAL Canon 36 (2010); VT. RULES OF PROF’L CONDUCT R. 7.3 (2012); VA. STATE BAR PROF’L GUIDELINES R. 7.3 (2013); W. VA. RULES OF PROF’L CONDUCT R. 7.3 (2006). Although some jurisdictions have adopted the language of the ABA ban, one cannot find any cases testing it. See, e.g., N.M. RULES OF PROF’L CONDUCT R. 16-703 & cmts. 1–2 (2013); PA. RULES OF PROF’L CONDUCT R. 7.3 (2013). Washington, D.C. has no version of Rule 7.3. See generally D.C. RULES OF PROF’L CONDUCT (2013).}

Bar Association ethics opinions that consider the issue often do not view chat rooms or “real-time” communication the same as a face-to-
face encounter. For example, the Philadelphia Bar Association examined lawyer involvement in blogging, email, and chat room posts. It concluded that each of these forms of communication could occur in real-time, but the important test was whether the prospective client could “turn off” the lawyer’s communications by not responding or logging off. Thus, the Philadelphia Bar Association found that blogging, email, and posts in chat rooms are not prohibited solicitations.

The Washington, D.C. Bar has come to similar conclusions. Its ethics committee discussed a variety of ways that lawyers operate in chat rooms. In one chat room, inquirers may write questions and lawyers who visit the site may write answers. At this site, the lawyers often invite the questioner to call for a brief, initially free, consultation. The opinion recommends that lawyers give “legal information” on such websites, but not “legal advice.” The former involves discussion of legal principles, trends, and considerations—such as one might give in a speech or newspaper article. The opinion treats the lawyers’ information on the Internet the same way it treats the information that lawyers may offer in a legal advice newspaper column (or the advice of Ann Landers in a personal advice column).

Giving legal advice “involves offering recommendations tailored to the unique facts of a particular person’s circumstances.” Offering advice in this chat room, the opinion warns, may embroil the lawyer in an attorney-client relationship with someone the lawyer does not know and create obligations greater than the lawyer means to assume. Giving


85. Id.

86. Id.

87. Id. The opinion warned lawyers not to participate in real-time voice conversations in chat rooms, and, of course, not to engage in false and misleading statements. See id.


89. Id.

90. Id.

91. Id.

92. Id.

93. See id.

94. Id.

95. Id.
legal information is different from giving legal advice. For example, a law professor not admitted to the Bar in the relevant jurisdiction can still teach about torts (legal information), but cannot offer particularized legal advice and apply the law to the facts faced by a client or prospective client.96

California is yet another jurisdiction (and a rather large one) that has rejected the ABA ban.97 California opined that chat room contact with prospective fee-paying clients does not necessarily constitute improper solicitation under California Rule 1-400.98 This ethics opinion considered the situation of a personal injury lawyer who entered a chat room created for the specific purpose of providing emotional support for the victims and families of a recent disaster.99 The lawyer who offered advice conceded that she had hoped to enlist clients.100 The opinion agreed that the lawyer’s conduct was a “communication,” because she entered the chat room and identified herself as a lawyer to show her “availability for professional employment.”101 In addition, the lawyer’s pecuniary gain was a “significant motive.”102 However, the opinion found that the conduct was not a “solicitation” for purposes of Rule 1-400(B) because chat room communication occurs via a computer, and, thus, is not “in person.”103 There is no California rule that

96. See Model Rules of Prof’l Conduct R. 5.5 cmts. 1, 3 (2012).
100. Id.
101. Id. (quoting Cal. RULES OF PROF’L CONDUCT R. 1-400 (2008)) (internal quotation marks omitted).
102. Id. (quoting Cal. RULES OF PROF’L CONDUCT R. 1-400 (2008)) (internal quotation marks omitted). ABA Rule 7.3(a) defines solicitation, in part, as relying on the case where “a significant motive for the lawyer’s [direct contact with the prospective client] is the lawyer’s pecuniary gain.” Model Rules of Prof’l Conduct R. 7.3(a) (2012).
103. Cal. State Bar Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-166 (2008) (quoting Cal. RULES OF PROF’L CONDUCT R. 1-400 (2008)) (internal quotation marks omitted). However, this opinion added that the communication in this particular case was presumptively impermissible under Rule 1-400(D)(5). Id. The Rule prohibits communications transmitted in a manner involving “intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.” Cal. RULES OF PROF’L CONDUCT R. 1-400 (2008). The very purpose of this particular chat room was to support disaster victims, and a lawyer should know that disaster victims are likely to be relatively less able to make careful judgments about hiring a lawyer. See Cal. State Bar Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-166 (2008).
corresponds to the ABA’s Model Rule 7.3(a), which prohibits “real-time” electronic contact for purposes of solicitation. 104

III. THE MISDIRECTED FAX OR EMAIL

The ABA’s ban on chat rooms has not persuaded many Bar Associations. Let us turn to the problem of the misdirected fax and the search for metadata to see if the ABA’s most recent viewpoint will have greater influence with state Bars.

A. The 2012 ABA Revisions to Rule 4.4(b)

In 2012, the ABA House of Delegates made two minor changes to Rule 4.4(b), approving what Commission 20/20 proposed. 105 This Rule, with the changes in italics, now reads as follows: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.” 106

Before this revision, no one seriously thought that electronic documents were not “documents.” It appears that this change to the black letter rule merely states that, if the lawyer inadvertently sends a hardcopy document or an electronic document—for example, the lawyer intends to send an email to his client, but inadvertently sends that particular email to the opposing lawyer—then the lawyer must advise the sender of his mistake. 107 If that is what the change in the black letter rule means, it means little because lawyers already know that “document” includes “electronic document.” Yet, Commission 20/20 makes a rather odd assertion in its Report to the ABA House of Delegates. That Report claims that the term “documents” is “a word that has left lawyers with limited guidance when they receive inadvertently sent electronic information.” 108

105. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2013); MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2012); COMMISSION 20/20 RESOLUTION, supra note 6, at 5.
106. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2013) (emphasis added); MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2012); see COMMISSION 20/20 RESOLUTION, supra note 6, at 5.
107. COMMISSION 20/20 REPORT, supra note 13, at 6; see MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2013).
108. COMMISSION 20/20 INTRODUCTION AND OVERVIEW, supra note 7, at 9. ABA Commission 20/20 announced: “Model Rule 4.4 (Respect for Rights of Third Persons) and its Comments currently describes a lawyer’s obligations when in receipt of inadvertently disclosed ‘documents,’ a word that has left lawyers with limited guidance when they receive inadvertently sent electronic information.” Id. at 9. However, the factual assertion that lawyers had “limited guidance” is like
The ABA’s own Model Rules belies the strange claim that lawyers had “limited guidance” in trying to determine what the term “documents” meant. Long before Commission 20/20 came into existence, the Terminology section of the Model Rules defined “writing” to include “tangible or electronic” records of any communication. Moreover, Rule 4.4, before the revisions of Commission 20/20, already said quite explicitly in Comment 2 that “document’ includes e-mail or other electronic modes of transmission subject to being read or put into readable form.” Rule 3.4 prohibits lawyers from concealing evidence, and neither that Rule nor its associated Comment saw the need to explain that “documents” includes electronically stored information.

Nonetheless, Commission 20/20 represented to the ABA House of Delegates that the term “documents” “has left lawyers with limited guidance” as to whether it includes “electronic information.”

seeing a fly in my soup: it is hard to swallow. Lawyers knew that writings include electronic writings, as Rule 1.0(n) already provided. MODEL RULES OF PROF’L CONDUCT R. 1.0(n) (2012). Moreover, the ABA has long applied Rule 4.4 to faxes (in particular, the problem of the misdirected fax). See id. R. 4.4 cmt. 2. A “fax” is an electronic document, with the fax machine sending data through cyberspace, and the receiving fax machine interpreting those symbols and then translating them into language we can read. See MERRIAM-WEBSTER DICTIONARY 179 (2005); see also Fax Machine, THEFREE DICTIONARY, http://www.thefreedictionary.com/fax+machine (last visited Nov. 23, 2013).

109. COMMISSION 20/20 INTRODUCTION AND OVERVIEW, supra note 7, at 9; see COMMISSION 20/20 REPORT, supra note 13, at 2 (“[T]he Commission is proposing to amend Rule 4.4(b) to make clear that the rule governs both paper documents as well as electronically stored information.”).

110. Model Rule 1.0(n) provides that: ‘Writing’ or ‘written’ denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and email. A ‘signed’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

MODEL RULES OF PROF’L CONDUCT R. 1.0(n) (2003).

111. Id. R. 4.4 & cmt. 2.

112. MODEL RULES OF PROF’L CONDUCT R. 3.4(a) & cmt. 2 (2012).


115. COMMISSION 20/20 INTRODUCTION AND OVERVIEW, supra note 7, at 9.
Commission 20/20 does not indicate why it never told the House of Delegates that both the Model Rules Terminology section and Rule 4.4, prior to the revision, had already defined “documents” to include “electronic documents.”

One possible reason for this omission is that the members of Commission 20/20 never read the existing Rules carefully, particularly Rule 4.4, Comment 2. That hardly seems likely. However, if that explanation does not fly, then the alternative explanation—that Commission 20/20 was not candid in its Report to the House of Delegates—is not a pretty conclusion either. It suggests that Commission 20/20 wanted to make a change but would not, or could not, articulate its real reason.

The additional language to the black letter Rule that the ABA adopted after Commission 20/20’s recommendation makes this Rule verbose, but the Report to the ABA suggests that there is no intent to change the meaning of this Rule. Commission 20/20’s Report to the ABA House of Delegates indicates that the purpose of this change is merely to recognize the world of cyberspace. In addition, it helps lawyers who read Rule 4.2 but do not bother to read its Comments or Terminology—although lawyers who do not read the Comments or Terminology already have substantial competence problems.

However, the changes to the Comments of Rule 4.4 discussed below are more significant: they indicate that the drafters of the revisions to Rule 4.4 explicitly intend to prevent mining of metadata even when the lawyer intentionally turns over the electronic document. If so, that would mean that a lawyer could examine fingerprints on a physical document, but could not look at the metadata contained in an electronic document unless the lawyer jumps over the hoops that Rule 4.4(b) creates: the lawyer must “promptly notify” the sender. Moreover, the Comments proclaim that the lawyer receiving the document that the other lawyer intentionally sent him has a right (without client consent) to delete it unread, even if the information is very relevant and useful to the case. Let us turn to that issue.

116. MODEL RULES OF PROF’L CONDUCT R. 1.0(n), 3.4 & cmt. 2 (2003); see COMMISSION 20/20 RESOLUTION, supra note 6, at 5-6 (proposing changes to Model Rule 4.4).
117. COMMISSION 20/20 REPORT, supra note 13, at 6-7.
118. See id.
119. See id. at 6.
120. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2013).
121. Id. R. 4.4(b) & cmts. 2–3; COMMISSION 20/20 REPORT, supra note 13, at 5-6.
B. The ABA Revisions to the Comments of Rule 4.4

The changes in the Comments to Rule 4.4 are substantially more significant than the addition to Rule 4.4(b). These revisions deal with, and relate to, what the literature often calls the problem of the misdirected email, the misdirected fax, and the mining of metadata.\(^{122}\)

The ABA made significant changes to Rule 4.4, Comments 2 and 3 (discussed below) that deal with metadata.\(^{123}\) Metadata is information about a document found in the computer code, often revealed with little effort, such as by clicking “show markup” (or “file properties”) in a Microsoft Word document.\(^{124}\) We shall turn to these two changes shortly, but first we have to discuss the ABA’s resolution of a related problem—inadvertently disclosed documents, emails, and faxes.\(^{125}\) Then, we shall analyze the difficulties that the ABA’s revisions to Rule 4.4’s Comments have created due to the ABA’s attempt to treat metadata the same as a misdirected fax.\(^{126}\)

C. Inadvertently Disclosed Documents, Emails, or Faxes

Once again, we first must consider the historical background. What are the ethics responsibilities, if any, when a lawyer receives from her opposing lawyer a document, or an email, or a fax that the opposing lawyer sent inadvertently, by accident? Does that question involve the law of ethics, or does it really involve the law of evidence?

Is there anything improper if a lawyer takes advantage of the opponent’s mistake, such as an opponent who mistakenly files a day after the statute of limitations? When legal ethics was in its infancy, it was easy to find unenforced homilies of a bygone era that considered that question as serious. David Hoffman, whose work led to the first ethics rules for lawyers, advised over 150 years ago: “I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery.”\(^{127}\)

That sentiment sounds archaic in the modern era. Nowadays, lawyers routinely take advantage of the mistakes of their opposing

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125. See *Model Rules of Prof’l Conduct R. 4.4(b)* (2013); *discussion infra* Part III.C.
126. See *discussion infra* Part IV.A.
counsel. 128 Sometimes they do so with unmasked glee. If the lawyer fails to raise a statute of limitations defense, to file a compulsory counterclaim, or to file a document on time, then the client pays for his lawyer’s mistake. 129 The client, in turn, may often sue the lawyer for malpractice. If lawyers could not take advantage of their adversary’s mistakes, the law of malpractice would often be unnecessary.

If a lawyer asks a question in a trial and the other lawyer (through incompetence or otherwise) fails to object on the grounds of hearsay, the judge and jury will hear the evidence. 130 The lawyer asking the question feels no ethical qualms about taking advantage of such an error. Similarly, if the plaintiff’s lawyer asks a question that calls for

128. See Monroe H. Freedman, Errorneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman, 14 GEO. MASON L. REV. 179, 180-83 (2006) (arguing that a lawyer should use information that is inadvertently disclosed to benefit her client). Professor Freedman analyzes and disagrees with Professor Andrew Perlman’s position that an attorney should ignore and delete any document gained through an inadvertent disclosure. Id.; see generally Andrew M. Perlman, Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures, 13 GEO. MASON L. REV. 767 (2005) (stating that, even where an inadvertent disclosure results in an automatic waiver of the attorney-client privilege, ethics rules should not necessarily allow the lawyer to take advantage of the legal right to use the document for reasons such as professionalism or morality).

129. See, e.g., Coleman v. Thompson, 501 U.S. 722, 752-53 (1991) (holding that the ineffectiveness of post-conviction appellate counsel could not qualify as a cause that excused the defendant from complying with the procedural rules). In Coleman, the jury convicted the petitioner of capital murder and sentenced him to death. Id. at 726-27. The Court did not excuse the petitioner simply because his lawyer’s error led to the late filing of his state habeas appeal. Id. at 752-53. There are exceptions to this rule, as discussed in Maples v. Thomas, 132 S. Ct. 912, 920-26 (2012). Two associates at Sullivan & Cromwell LLP, working pro bono, sought state habeas corpus relief for a defendant sentenced to death. Id. at 916. A local Alabama lawyer moved their admission pro hac vice. Id. at 919. However, the Alabama lawyer asserted that he “could not ‘deal with substantive issues in the case.’” Id. Later, the two associates left Sullivan & Cromwell, accepting new posts of employment which rendered them unable to represent the defendant. Id. Neither associate sought the trial court’s leave to withdraw (which Alabama law required), nor found anyone to assume the representation. Id. at 924-25. Moreover, no other Sullivan & Cromwell lawyer entered an appearance, moved to substitute counsel, or otherwise notified the court of a change in defendant’s representation. Id. at 925-26. The Court reaffirmed the basic principle that the negligence of a lawyer representing a client seeking post-conviction relief does not qualify as “cause,” which would excuse the prisoner from following a state procedural rule. Id. at 922 (quoting Coleman, 501 U.S. at 753). The lawyer is the prisoner’s agent. Id. Under “well-settled” agency law, the principal bears the risk of his agent’s negligent conduct. Id. (quoting Coleman, 501 U.S. at 753-54). Thus, a lawyer’s failure to meet a filing deadline binds his client, who cannot rely on that failure to establish cause for failure to comply with the state procedural rule. Id. (citing Coleman, 501 U.S. at 753-54).

However, the Court said that, as in Maples, “[a] markedly different situation is presented . . . when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client’s representative.” Id. at 922-23 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 cmt. f (2000)). Nor can the court blame the client for failing to act on his own behalf because he lacks reason to believe his attorneys of record, in fact, are not representing him. See id.

130. ROTUNDA & DZIENKOWSKI, supra note 17, § 3.4-6.
information from the defendant that the marital privilege or the attorney-client privilege may protect,\textsuperscript{131} it is the responsibility of the defendant’s lawyer to raise the objection.\textsuperscript{132} The same result applies to a lawyer who mistakenly turns over a damaging document that the other side did not subpoena.\textsuperscript{133} If lawyers were not liable for their mistakes, malpractice insurance would be less expensive.

\textbf{D. Mistakenly Disclosing Privileged Information:}
\textit{The Problem of Waiver in the Law of Evidence}

Should the same result apply to a lawyer who mistakenly turns over a damaging document that the other side did not subpoena, when a privilege (for example, the attorney-client privilege or the spousal privilege) protects that document? Alternatively, let us assume that the lawyer turns over a document subject to subpoena but for the fact that the attorney-client privilege would excuse its discovery. Can the opposing party take advantage of the other lawyer’s mistake? Assume, for example, the lawyer (or her secretary) accidentally staples a copy of a privileged letter from the client to the lawyer discussing the stance regarding settlement negotiations. Or, the lawyer turns over a series of documents and mistakenly fails to assert the privilege to one document. Many of the relevant cases concern the attorney-client privilege, so we will focus on them, but the principle applies to any evidentiary privilege.

How we deal with material that an evidentiary privilege protects (or may protect) is hardly a new issue. Lawyers and their secretaries and paralegals have made such mistakes long before we had fax machines and email. However, the existence of these technological advances, coupled with other technology—such as the possibility of sending a blast email or a blast fax to a host of lawyers all at once—magnifies the problem. The lawyer or secretary could press one button and the fax would go to (1) all lawyers instead of (2) all lawyers on the plaintiffs’ coordinating committee. The advent of this new technology means that large, very competent law firms can make the same mistakes that incompetent solo lawyers made in days of old.

One way to think of the problem is to ask whether, under the law of evidence, a privileged document loses its privileged status when the

\begin{itemize}
\item \textsuperscript{131} It is not unethical for a lawyer to ask a question that may call for evidence that the opposing lawyer claims is hearsay. \textit{See id.} (noting that hearsay does not fall into the category of information which a lawyer cannot ethically allude to if it is not reasonably believed to be relevant or admissible).
\item \textsuperscript{132} The lawyer objecting to the evidence has the obligation to invoke available protection on behalf of her client. \textit{Restatement (Third) Of The Law Governing Lawyers \S 63 cmt. b (2000).}
\item \textsuperscript{133} \textit{See id.}
\end{itemize}
client, the lawyer, or the assistant mistakenly turns it over. This is a complicated area and the cases do not agree.\(^\text{134}\) Some courts have been very antagonistic to the attorney-client privilege because it can derogate the search for truth.\(^\text{135}\) These cases are quick to find waiver.\(^\text{136}\)

Consider the situation where an eavesdropper overhears a privileged conversation between the lawyer and client. There are two major fact patterns. First, the holder of the privilege (or his agent) *acted reasonably*, but someone overheard the privileged conversation or received the privileged document anyway. The second situation is where the holder of the privilege (or his agent) *did not act reasonably* in protecting its confidentiality.

For the first variation of the eavesdropper rule, let us further assume the two parties to the conversation did not know that an eavesdropper was overhearing them. No less an authority than John Henry Wigmore believed that the privilege should not apply in that situation.\(^\text{137}\) The Model Code of Evidence of the American Law Institute (“ALI”) also adopted that position,\(^\text{138}\) and many common law jurisdictions outside the United States have adopted it.\(^\text{139}\) These authorities allow the

\(^{134}\) Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U. L. Rev. 59, 72 n.52 (2002) (stating that the number of federal cases on the attorney-client privilege doctrine exceeds 5000, and there is “a similar body of state case law”); *see Restatement (Third) of the Law Governing Lawyers § 71 reporter’s n. to cmt. b (2000) (“The approach of modern evidence codes varies. Some are consistent with a subjective (intent) concept; others seem to refer to circumstances reasonably apparent.”).\(^{135}\) E.g., Doe v. Poe, 664 N.Y.S.2d 120, 122 (App. Div. 1997), aff’d, 700 N.E.2d 309 (N.Y. 1998) (“The attorney-client privilege must be narrowly construed, and generally does not extend to communications between a client and his or her counsel which are made in the known presence of a third party.” (citations omitted)). In this case, the court did not apply the privilege to communications by the former law partner of the bank’s chief executive officer (“CEO”) to the bank’s lawyers. *Id.* This former law partner was not acting as the bank’s lawyer in making communications at a meeting between the CEO and the bank’s lawyers because he was not present to provide legal advice or services to the bank or its lawyers. *Id.*\(^{136}\) See, e.g., *id.*\(^{137}\) 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW § 2339* (John T. McNaughton ed., rev. ed. 1961). Wigmore believed that the risk of eavesdropping is so far from the minds of the communicating parties that allowing eavesdroppers to testify has little effect on their willingness to communicate with each other. *Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence § 6.6.3* (Richard D. Friedman ed., 2002); 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE § 5489* (1986) (“Wigmore defended the common law limitation on the instrumental ground that it reduced the evidentiary loss caused by the privilege . . . .” (citing *Wigmore*, supra, § 2326)).\(^{138}\) MODEL CODE OF EVIDENCE R. 210 & cmt. b (1942). The ALI later rejected this eavesdropper rule, asserting that the new lawyer-client privilege “goes further than the Model Code by preventing disclosure of communications overhead by eavesdroppers.” *Uniform Rules of Evidence* R. 26 cmt. (1953).\(^{139}\) SUZANNE B. McNICOL, *LAW OF PRIVILEGE* 26 (1992) (noting that loss of privilege because of eavesdroppers overhearing is still the “general rule”). As the Supreme Court acknowledged, in a different context, “[t]he risk of being overheard by an eavesdropper . . . is
eavesdropper to testify to what he had overheard in a conversation even though the participants did not know, and reasonably could not have known, about the eavesdropping.\footnote{140}

\textit{In re Grand Jury Proceedings}\footnote{141} is an instructive case. While under investigation, Berkley and Co., Inc. ("Berkley") complained that the grand jury should not be able to consider certain documents because the attorney-client privilege protected them.\footnote{142} The court conceded that the documents were within the attorney-client privilege.\footnote{143} Nonetheless, the court then held that Berkley lost the privilege because an employee had \textit{stolen} the documents: "The protection afforded by the privilege, however, does not apply to the documents obtained from Berkley's former employee, for the privilege does not apply to stolen or lost documents."\footnote{144} The court relied on Wigmore's \textit{Evidence in Trials at Common Law}:

\begin{quote}
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 parties. The risk of insufficient precautions is upon the client. This principle applies equally to documents.\footnote{145}
\end{quote}

\footnote{140} The early position in the case law was that the surreptitious eavesdropper (but not the lawyer) could testify to what he had overheard even though the conversation was otherwise within the attorney-client privilege. \textit{IMWINSELRIED, supra} note 137, § 6.6.3; \textit{see e.g., Clark v. State}, 261 S.W.2d 339, 340-43 (Tex. Crim. App. 1953). In \textit{Clark}, the court allowed a telephone operator to testify to the contents of a telephone conversation between the defendant charged with murder and his lawyer. \textit{Id.} The telephone operator's eavesdropping was admitted in violation of company rule, but that did not preclude the testimony. \textit{Id.} at 341. The court relied on Wigmore in admitting the evidence. \textit{Id.} at 342; \textit{see also United States ex rel. Mayman v. Martin Marietta Corp.}, 886 F. Supp. 1243, 1252 (D. Md. 1995). In \textit{Mayman}, the defendant government contractor disclosed to the government (during settlement negotiations over a billing dispute) that it had relied on contemporaneous memoranda from in-house counsel in its belief that its billing practices were legal. \textit{Id.} at 1247-48. The contractor thereby waived the attorney-client privilege as to the entire subject matter dealing with that controversial billing practice, including internal memorandum from in-house counsel that a former employee had \textit{stolen}. \textit{Id.} at 1246, 1252-53.

\footnote{141} \textit{466 F. Supp. 863} (D. Minn. 1979), \textit{aff'd as modified}, 629 F.2d 548 (8th Cir. 1980).

\footnote{142} \textit{Id.} at 868.

\footnote{143} \textit{Id.} ("The company appears to be correct in its assertion.").

\footnote{144} \textit{Id.} at 868.

\footnote{145} \textit{Id.} (quoting \textit{WIGMORE, supra} note 137, § 2325 (citation omitted)). Cases have applied this rule in criminal settings to remove the privilege from an incriminatory letter that the accused wrote to his wife, but which accidentally fell into the hands of another. \textit{See e.g., Hammons v. State}, 84 S.W. 718, 719 (Ark. 1905). In \textit{Hammons}, the court held that the letter was admissible against the defendant. \textit{Id.} at 719. In that case, the defendant was sentenced to death. \textit{Id.}
Note that the holder of the privilege acted reasonably. The third party stole the documents. Still, the court held, initially, that the privilege was lost. Modern American cases tend to reject Wigmore’s position.

Nonetheless, some cases hold that, if a litigant inadvertently or even involuntarily turns over a document to the opposing party, the privilege is lost forever. In such cases, a plaintiff’s claim that production “was inadvertent and involuntary or if it is deemed voluntary that the privilege is waived only as to the piece of paper but nothing else,” is “an untenable position.” Under these cases, if the opposing side inadvertently turned over a privileged document, the lawyer who received that document may use it, under the law of evidence, because the document has lost its privilege. Keep that in mind. If the document has lost its privilege under the law of evidence, why would it be unethical, under the Model Rules, for the receiving lawyer to use that document? If the other side inadvertently files a compulsory counterclaim two days after the statute of limitations has passed, we know that it would be ethical for the receiving lawyer to plead the statute of limitations. Indeed, it would be incompetent for the lawyer not to produce the document.

147. Id. at 869. The court, in response to a motion for consideration, allowed Berkley to show that it took reasonable precautions to protect the confidentiality of the documents. Id. at 870.
148. Id. at 869. In response to Berkley’s motion for consideration, the court ruled:

While the cases concerning stolen privileged documents are rare, eavesdropper cases are somewhat more common, and the modern trend appears to be away from Wigmore and toward a principle that the privileged status is not lost when the attorney and client take reasonable precautions to ensure confidentiality but nonetheless are overheard by a surreptitious eavesdropper. The same principle presumably would apply to stolen documents.

. . . Thus, modern precedent would seem to suggest that the documents disclosed by [the third party] should not lose their privileged status simply because of the manner in which they were disclosed.

Id. (citation omitted); 2 J ACK B. W EINSTEIN, M ARGARET A. B ERGER & J OSEPH M. M C LAU GHLIN, W EINSTEIN’S E VIDENCE, ¶ 503[b][2] (1997). The court then allowed Berkley to show that it engaged in reasonable procedures to protect the confidentiality of the documents. In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. at 870; see also RESTAT EMENT (THIRD) OF THE LA W GO VERNING LA WYERS § 71 reporter’s n. to cmt. c (2000) (“Older authority held that an eavesdropper could testify to privileged conversations even if client and lawyer took reasonable precautions to achieve privacy. That is the traditional English view.”) (citation omitted)).

plead the statute of limitations, unless his client knowingly decides to waive the limitations defense.\footnote{152}{See Model Rules of Prof'L Conduct R. 1.1 (2012).}

The second type of eavesdropper involves the situation where the parties communicating in confidence did not act reasonably. For example, they knew or reasonably should have known that an eavesdropper or snooper could overhear their conversation. This line of cases, typically reflecting the more recent case law, holds that the court will not uphold the privilege if the client and lawyer did not take reasonable precautions to treat the information as privileged and confidential.\footnote{153}{See, e.g., Bowles v. Nat'l Ass'n. of Home Builders, 224 F.R.D. 246, 253 (D.D.C. 2004).} For example, the Restatement (Third) of the Law Governing Lawyers adopts this approach.\footnote{154}{Restatement (Third) of the Law Governing Lawyers § 71. Section 71 provides: A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege. Id. (emphasis added); see also Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981) ("[E]ven inadvertent communication to third parties, such as bystanders or eavesdroppers, destroys the privilege, at least where the eavesdropping is not surreptitious and the attorney and client have made little effort to insure that they are not overheard."); People v. Castiel, 315 P.2d 79, 83 (Cal. Dist. Cl. App. 1957) (noting that a third person openly present who overhears a conversation may testify); State v. Vennard, 270 A.2d 837, 849 (Conn. 1970) (confirming that police officer who overheard conversation in police station may testify where no evidence indicated that defendant sought to insure confidentiality of the communication); Schwartz v. Wenger, 124 N.W.2d 489, 491-92 (Minn. 1963) (noting that a third person who overheard a conversation in a public corridor, without resort to surreptitious methods, may testify); Clark v. State, 261 S.W.2d 339, 343 (Tex. Crim. App. 1953) (holding that a telephone operator may testify to the contents of an otherwise privileged conversation).} In contrast, if the parties did not act reasonably, these courts will treat the privilege as waived.\footnote{155}{See, e.g., United States ex rel. Mayman v. Martin Marietta Corp., 886 F. Supp. 1243, 1246 (D. Md. 1995). This court stated that: "[T]he Court finds that the Defendant did not fail to take reasonable precautions to preserve the confidentiality of a privileged document. The document in issue was maintained in a secure building and all who had authorized access to it were under a legal obligation to maintain it as confidential. The only way that confidentiality was breached was due to the unauthorized action of a trusted employee . . . in obtaining a copy of part of a document and the outright theft of a copy . . . ."

\footnote{Id.}{See Bowles, 224 F.R.D. at 253.}
client will lose the privilege because the circumstances indicate that the client does not “reasonably” expect secrecy.157 The circumstances reasonably evident to the person communicating, not to the eavesdropper, are relevant.158 “Thus, the presence of a surreptitious eavesdropper does not destroy confidentiality.”159 The parties speaking in confidence could not reasonably know of a surreptitious, hidden eavesdropper.

Negligent handling of privileged documents and conversations will destroy the privilege.160 This loss can be particularly significant because, under the law of evidence, the loss of the privilege of one document also extends to related documents, as well as “to all other communications relating to the same subject matter.”161

The Restatement provides two helpful Illustrations that exemplify what constitutes reasonable efforts to keep a conversation confidential.162 The same principle would apply to keeping a document confidential.163 These Illustrations provide:

1. Client and Lawyer confer in Client’s office about a legal matter. Client realizes that occupants of nearby offices can normally hear the sound of voices coming from Client’s office but reasonably supposes they cannot intelligibly detect individual words. An occupant of an adjoining office secretly records the conference between Client and Lawyer and is able to make out the contents of their communications. Even if it violates no law in the jurisdiction, the secret recording ordinarily would not be anticipated by persons wishing to confer in confidence. Accordingly, the fact that the eavesdropper overheard the Client-Lawyer communications does not impair their confidential status.

2. During a recess in a trial, Client and Lawyer walk into a courthouse corridor crowded with other persons attending the trial and discuss Client’s intended testimony in tones loud enough to be readily overheard by bystanders. As Lawyer knows, the courthouse premises include several areas more appropriate for a confidential conversation than the corridor. The corridor conversation is not in confidence for the purposes of the privilege, and the privilege does not bar examining either Client or Lawyer concerning it.164

158. Id.
159. Id.
160. See Bowles, 224 F.R.D. at 253.
161. In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982).
163. See id.
164. Id.; see Schwartz v. Wenger, 124 N.W.2d 489, 491-92 (Minn. 1963) (holding that the
Under this line of cases, if the opposing party inadvertently disclosed the privileged document, that inadvertent turnover would not waive the privilege if the opposing party acted reasonably. Reasonable people can make reasonable mistakes, but not unreasonable ones. Logically, there is a third alternative that, under the law of evidence, inadvertent disclosure never results in a waiver even though the party acts unreasonably because there is no subjective intention to waive if the disclosure was inadvertent. Under this view, one cannot waive the privilege without specifically intending to do so. That position would allow lawyers and clients to act unreasonably and still secure the benefits of the attorney-client privilege. Such a rule does not comply with the general principle that the party claiming the privilege must be engaged in a confidential communication and must take reasonable precautions that indicate the communication is, in fact, confidential.

E. Applying the Law of Evidence to the Misdirected Fax or Email

Now, let us apply the law of evidence to the case of the misdirected fax, or the email mistakenly sent by the client, or lawyer, or their agents. Whether the opposing lawyer or party could use the information sent to them by the adversary will depend on how the law of evidence treats this turnover. If the issue arises in a jurisdiction where the courts will not

testimony of an eavesdropper who overheard client-lawyer conversation in a crowded courthouse hallway was admissible because neither the client nor the lawyer made any effort to ensure secrecy); see also People v. Harris, 442 N.E.2d 1205, 1208 (N.Y. 1982) (holding that a police officer may testify to a statement he inadvertently overheard the defendant blurt out to her lawyer over the telephone).


166. One can find general and broad language in several cases that appears to support that position. Kan.-Neb. Natural Gas v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983) (stating that an “inadvertent” disclosure does not operate as a waiver of the privilege unless the “failure to catch” the document prior to its production in a mass of documents was a “deliberate” act or “the result of conscious but erroneous decision”); see also Conn. Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). In Shields, the court used expansive language in holding that no waiver occurred:

One of their counsel . . . swears that any documents seen and copied by plaintiffs were permitted to be disclosed only by inadvertence . . . [Counsel], in defendants’ behalf, stated on the record that such documents should never have been seen by plaintiffs and that defendants intended no waiver. I find that plaintiffs’ acquisition of these documents was not under such circumstances as to constitute a waiver by defendant.

Id. In this case, the party communicated the information in the presence of a third party, thus indicating that the information was not confidential. Id.

167. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2012).
apply the privilege, no matter how careful the parties were, then the lawyer receiving the information should have no problem using it.

It would be similar to the case where the law of evidence in a particular jurisdiction holds inadmissible a certain type of hearsay, even though most jurisdictions allow that hearsay. Assume that plaintiff’s lawyer asks a question calling for this type of hearsay and the opposing lawyer does not object, perhaps because the opposing lawyer mistakenly thinks that this jurisdiction would allow for the hearsay. The plaintiff’s lawyer will have no ethical qualms if she uses the hearsay. The issue for the plaintiff’s lawyer is not an issue of the law of ethics; it is only an issue of the law of evidence. 168

F. Applying the Law of Ethics to the Misdirected Fax or Email

Rule 4.4 of the Model Rules treats the issue of the misdirected fax or email as one of ethics. 169 It acknowledges that it does not address whether the information retains its “privileged” status. 170 Therefore, even if the document, testimony, electronic information, and so forth, loses its privileged status under the law of evidence, the ABA claims that the lawyer is still subject to discipline if she fails to follow Rule 4.4. 171

Moreover, even if the law of evidence finds that the inadvertent disclosure serves to waive the privilege and “applicable law” does not require the lawyer to return that document, the Model Rule claims that “the decision [by the lawyer] to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.” 172

That is an astonishing, illogical, and bewildering statement. The privilege rule is paramount: if the sending lawyer’s negligence causes the evidence to lose its privileged status, then the receiving lawyer can use it, just as he can take advantage of the opponent’s failure to plead

168. In contrast, the opposing lawyer (the one who did not object) appears to have an issue under the law of ethics—the issue of competence. See id. R. 1.1.
169. Id. R. 4.4.
170. Id. R. 4.4 cmt. 2.
171. Id. R. 4.4; Trina Jones, Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making, 48 EMORY L.J. 1255, 1272-73 (1999). Trina Jones notes that “courts tend to focus on the ultimate question of waiver and on prospective use of the information,” but in considering “the appropriateness of the receiving side’s behavior in reviewing and utilizing the material,” the rules of waiver under the law of evidence has “limited utility.” Jones, supra, at 1272-73. On the other hand, Jones notes that “clear resolution of the legal issue of whether disclosure waives the attorney-client privilege is relevant to determining the ethical obligations of recipients of inadvertently disclosed information. If inadvertent disclosure waives the privilege, then no ethical issue arises because there is nothing to protect.” Id. at 1276 (footnote omitted).
laches. Yet the Reporter for Commission 20/20 actually says that, “the degree of the sender’s negligence is typically irrelevant to the ethics inquiry.”

Let us assume that the document loses its evidentiary privilege because we are in a jurisdiction that finds waiver if the lawyer or party acted unreasonably. The ABA actually claims that, under the law of ethics, the lawyer—without securing any client consent—may refuse to use highly relevant, admissible evidence that would significantly help his client’s case. The client may waive its rights, but the client may be surprised to know that the lawyer can waive it for the client and never tell the client about it.

Remember, the other side inadvertently turns over a document that is very damaging to their case. The court may well decide that, under the law of evidence, the other side lost the attorney-client privilege, because its inadvertence was negligent. In fact, the lawyer will not really know whether the court will hold that the other side’s mistake was “unreasonable” until the court rules on the claim. That is because the lawyer who receives the document will not know all the facts that led to its disclosure. The court will not know if the mistake was negligent until after discovery and a hearing, where the parties can present their arguments to the court.

The ABA claims that, even if the law of evidence allows the lawyer to use this damaging information because the other lawyer was negligent, the lawyer receiving this information should not use it because that is an area “of professional judgment ordinarily reserved to the lawyer.” To support this claim, the ABA cites Rule 1.4, but that Rule says the exact opposite—that the lawyer “shall promptly consult with the client about the means by which the client’s objectives are to

173. See id. R. 4.4.
175. We might be in a jurisdiction that holds that even a reasonable mistake results in loss of the privilege. The same analysis applies to that situation.
177. See id.
178. See id.
179. See id.
180. See id.
181. See id.
be accomplished.”\textsuperscript{183} The ABA also cites Rule 1.2, which says substantially the same thing, and thus does not support the ABA’s position in Rule 4.4.\textsuperscript{184}

Let us assume the lawyer complies with Rules 1.2 and 1.4, and therefore consults with the client about this document. The conversation would go something like this:

The other side made a mistake and turned over to us a document that is very damaging to their case and very helpful to ours. The opposing law firm may claim that it is privileged, but the court would likely rule that it lost its privilege because the lawyers or client were negligent. I would like to return the document and not use it. Do you agree? By the way, if we return this document, it will hurt our case. Oh, by the way, the opposing law firm made another mistake: it filed a compulsory counterclaim. The law firm calculated the days incorrectly and therefore missed the statute of limitations by a day. I would like to waive that argument too, because that would not be sporting.\textsuperscript{185}

Any reasonable client would like to know why he should waive a valid argument. Perhaps the client could secure some benefit from the adverse party by agreeing not to use this document. Or, perhaps the parties already agreed that they would return to each other (and not use) any documents produced in error, even unreasonable errors.\textsuperscript{186}

On the other hand, if the client is securing no benefit by returning the document, then the party who benefits from the other side’s negligence might well prefer to take advantage of the adversary’s mistake for the same reason that the client would prefer not to waive the statute of limitations. After all, the point of the lawsuit from the perspective of the litigant is to win. Most litigants would not understand why they should not use a document that has lost its privilege, and that is because most lawyers would not be able to offer an explanation.

\textsuperscript{183} \textit{Id.} R. 1.4(a)(2) (emphasis added).

\textsuperscript{184} See \textit{id.} R. 1.2(a) (stating that a lawyer shall, “as required by Rule 1.4, . . . consult with the client as to the means by which [its objectives] are to be pursued”); \textit{id.} R. 4.4. cmt. 3.

\textsuperscript{185} After I created this hypothetical conversation, I discovered that Professor Freedman created a somewhat similar conversation. See FREEDMAN & SMITH, supra note 17, app. C, at C-402 to C-403.

\textsuperscript{186} In document-intensive litigation, parties sometimes consent to “claw-back agreements,” which “allow parties to forego a privilege review . . . in favor of an agreement to return inadvertently produced privileged documents.” Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003); see also Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 235, 244 (D. Md. 2005) (quoting EDNA SELAN EPISTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 287-88 (4th ed. 2001)) (stating that parties are not excused from undertaking any preproduction privilege review based on their having negotiated a “nonwaiver” electronic records production agreement, and further, that parties are free to contract around the general rule that partial disclosure on a given subject matter will require total disclosure).
Moreover, litigants would not understand what authorizes the lawyer to conclude that waiving an important right of the client is an “area of professional judgment ordinarily reserved to the lawyer.”

The ABA sees this issue as one of legal ethics, not of the law of evidence. Rule 4.4 explicitly provides that it governs this situation, no matter how the court might decide the evidence question. Yet, the question whether the document accidentally turned over loses is privilege under the law of evidence is the crucial question—the only real question.

Consider this thought experiment. The plaintiff’s lawyer accidentally produces in discovery a damaging, privileged document. The ABA claims that the defendant’s lawyer, when he discovers his opponent’s mistake, has the discretion as “a matter of professional judgment ordinarily reserved to the lawyer” to “choose to return the document unread.”

Now, assume the same facts except that the defendant is pro se. While the defendant’s lawyer must follow the procedures of Rule 4.4 and has the right to refuse to use the document without securing his client’s consent, the pro se litigant does not labor under that burden. The ABA is seeking to impose a burden on clients who are not pro se. Pro se litigants carry no similar burden; they only have to follow the law of evidence.

The principle that the ABA appears to embrace is that people do not read the mail of other people, even if the other person (mistakenly but voluntarily) places the opened letter on your desk. That principle is counter to the prime directive of the ABA Model Rules and our adversary system of justice. As Professor Monroe Freedman has astutely noted:

188. See id. R. 4.4 cmt. 2.
189. Id. (stating that “the question of whether the privileged status of a document has been waived” is “beyond the scope of these Rules”).
190. See id.
191. Id. R. 4.4 cmt. 3.
193. See Frederick, supra note 192, at 50-52.
194. See id.
195. Secretary of State Henry L. Stimson said, “gentlemen don’t read other gentlemen’s mail.”
196. See id.; see also, e.g., Model Rules of Prof’l Conduct pmbl. (2012).
The lawyer’s fiduciary obligation to her own client is one of several ethical duties that are often ignored or minimized in discussions of erroneous disclosure of damaging information. Indeed, some discussions of civility and professionalism seem to suggest that the lawyer’s fiduciary duty runs not to her client but to her “brother lawyers.”

Nowhere else do the Model Rules provide that lawyers should protect adversary lawyers from the risks of their malpractice liability. Yet, here the Rules provide that lawyers—but not pro se litigants—may not take advantage of the mistakes of their adversaries.

This position is even more mysterious when we consider that, in similar circumstances, the Model Rules place no restriction on one lawyer taking advantage of his adversary’s mistake, whether reasonable or not. For example, if a client voluntarily reveals a portion of his privileged communications, courts typically find that he may not withhold the remainder. One cannot open the door a crack; once a litigant has started to divulge his privileged communications with his lawyer, he cannot slam the door shut. Some courts even find a permanent loss of the evidentiary privilege if the client or lawyer inadvertently discloses part of the privileged communication. They argue that, “if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels.”

197. Freedman, supra note 128, at 180.
198. Id. at 179. In discussing erroneous disclosure, Professor Freedman notes that: [T]he principal concern that lawyers have with taking advantage of an adversary’s error is that the lawyer who has committed the error may be subject to a malpractice action by his client should the client find out. . . .

One of the clearest expressions of this collegial conspiracy is in an article by Lawrence Fox titled, “Take Care of Each Other,” in which Fox argues that a lawyer receiving a misdirected fax should not read it, much less use it for the benefit of her own client. Id. at 179 (footnotes omitted) (citing Lawrence J. Fox, Take Care of Each Other, Litigation, Fall 1995, at 1, 1-2).
200. See id.
201. See id.  
202. In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989). Here, in more detail, the court explained that:  
The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost "even if disclosure is inadvertent."  

. . . .  

[I]f a client wishes to preserve the privilege, it must treat the confidentiality of the attorney-client communication like jewels—if not crown jewels. Short of court-compelled disclosure . . . or other equally extraordinary circumstances, we will not
The case law does not support the ABA position. Consider *S.E.C. v. Cassano.* 203 In the course of disclosing many documents at its office, the Securities and Exchange Commission ("SEC") inadvertently included a nearly one hundred-page draft of its "action memo," which discussed its evidence, analyzed its legal theories, and laid out the strengths and weaknesses of its case. 204 Normally, the work product privilege protects this document. 205 When the defense counsel saw the document, he asked the SEC for a copy. 206 The SEC paralegal asked the responsible lawyer whether to copy it, and the lawyer (who did not ask what it was) obliged. 207 Another twelve days passed before the SEC discovered its mistake and tried to get the document back. 208

*Cassano* held that this bell simply could not be unrung. 209 The court concluded that, "[a]lthough the SEC acted promptly once it determined the document had been produced, . . . the time taken to rectify the error, in all the circumstances, was excessive." 210 As a result of the SEC’s carelessness, the court denied its motion to require defense counsel to return the memorandum. 211

*Amgen Inc. v. Hoechst Marion Roussel, Inc.* 212 is yet another case reaching the same conclusion. Defense counsel inadvertently produced a box of over 3200 pages of privileged material among boxes with 70,000 pages of unprivileged material. 213 The court first discussed three different alternatives to deal with this issue. 214 The first alternative is the "never waived" rule, which would require returning the documents. 215 Second is the "strict accountability" rule, which would treat all such situations as waivers. 216 The third, or middle ground, is the position of the ALI, which looks at the circumstances to determine whether the

distinguish between various degrees of "voluntariness" in waivers of the attorney-client privilege.

*Id.* (footnote omitted) (citations omitted) (quoting *In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984)*) (citing Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978)).

204. *Id.* at 83-84.
205. *See FED. R. EVID. 502(g)(2).*
207. *Id.* at 84-85.
208. *Id.* at 85.
209. *Id.* at 86.
210. *Id.*
211. *Id.*
213. *Id.* at 288-89.
214. *Id.* at 290-91.
215. *Id.* at 290.
216. *Id.* at 290-91.
mistake was reasonable.\textsuperscript{217} Under the third alternative, the court looks at “(1) the reasonableness of precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.”\textsuperscript{218} In this case, the defendant did not realize what had happened until the plaintiff called the situation to its attention, and little could be done to avoid damage.\textsuperscript{219}

\textit{Amgen} held that the defendant waived the privilege because it would be unjust to reward counsel’s “gross negligence.”\textsuperscript{220} Lawyers must treat confidential papers with reasonable care, or the court is likely to treat the privilege as surrendered.\textsuperscript{221} Ultimately, the lawyer can comply with the law of evidence and avoid malpractice by notifying the court and asking it to determine if the opposing party has waived the privilege.\textsuperscript{222} When the lawyer asks the court to determine if the documents have lost their privilege, he or she will also be complying with Rule 4.4(b).\textsuperscript{223}

\subsection*{G. The Influence of the ABA on Inadvertent Faxes and Emails}

It may be no coincidence that the ABA ignored this issue until the advent of new technology. For years, lawyers have been making mistakes, and, as the prior discussion showed, the courts simply decided those cases based on the law of evidence.\textsuperscript{224} Then came high technology. First, this changed the nature of discovery.\textsuperscript{225} Now, the chances of mistakes, whether reasonable or unreasonable, increase when parties seek thousands of electronic documents.\textsuperscript{226} In addition, with the slip of a

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{217} Id. at 291.
\item \textsuperscript{218} Id. (citing City of Worcester v. HCA Mgmt. Co., 839 F. Supp. 86, 89 (D. Mass. 1993)).
\item \textsuperscript{219} Id. at 292-93.
\item \textsuperscript{220} Id. at 293.
\item \textsuperscript{221} See id.
\item \textsuperscript{222} See FED. R. EVID. 502(d).
\item \textsuperscript{223} Model Rule 4.4(b) provides that a “lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.” \textit{Model Rules of Prof’l Conduct} R. 4.4(b) (2012) (emphasis added).
\item \textsuperscript{224} See supra Part III.D.
\end{footnotesize}
finger, one can broadcast a fax to the wrong party or transmit an inadvertent email to an entire listserv. A cynic might conclude that when lawyers in big firms were as likely to make mistakes as solo practitioners, the ABA became concerned.

As in the case of chat rooms, the ABA has not been as influential as it would like. The ABA issued three Opinions on the topic of lawyers who have received misdirected faxes. In the earliest of these Opinions, Formal Opinion 92-368, the ABA opined that, when a lawyer receives a fax that the opposing lawyer has clearly sent inadvertently, the lawyer should refrain from reviewing the materials, notify the sending lawyer, and abide by that lawyer’s instructions. The lawyer who followed that advice may find himself a defendant in a malpractice action, as discussed above.

Two years later came Formal Opinion 94-382. The ABA realized that, sometimes, a whistle-blower or disgruntled employee will intentionally send the fax or email to the adversary. Under those circumstances, said the ABA, the lawyer should either inform the adversary’s lawyer and follow her instructions, or refrain from using the unsolicited material until a court makes a definitive resolution of the proper disposition of the materials.

These two ABA Formal Opinions distinguished between situations where the lawyer or client sent the fax inadvertently, compared to the situation where a disgruntled employee (or whistle-blower) sent the information advertently. That raises another issue: in some cases, the receiving lawyer will not know if the sender is a disgruntled employee or an inattentive one. Not all whistle-blowers announce their intention in

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230. See supra Part III.C.


232. Id.

233. Id.

the cover memorandum attached to the fax. Some whistle-blowers do not attach their names to the documents.

In response, the Restatement (Third) of the Law Governing Lawyers has advised that it “is not a violation to accept the advantage of inadvertent, and even negligent, disclosure of confidential information by the other lawyer, if the effect of the other lawyer’s action is to waive the right of that lawyer’s client to assert confidentiality.” In addition to the Restatement, many state Bar Opinions and court cases rejected the ABA solution. The ABA view of the Model Rules was not the model that many states embraced.

Consequently, in 2005, the ABA withdrew Formal Opinion 92-368 because the language in Model Rule 4.4, as modified by the ABA after 1992, conflicted with the outdated Opinion: “Rule 4.4(b) thus only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.”

As for the lawyer or her agent sending the material inadvertently, they should obviously avoid the problem by taking reasonable care to ensure that they do not misdirect faxes or emails. Then, the sender can hope to take advantage of the general trend in the law that holds that inadvertent disclosure does not waive the attorney-client privilege if the lawyer and client have taken reasonable precautions to guard against inadvertent disclosure.

235. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-382 (1994) (discussing similar state ethics opinions that use wording such as “unidentified source” and “unknown third party” instead of whistle-blower).

236. Id.


238. See, e.g., Aerojet-Gen. Corp. v. Transp. Indem. Ins., 18 Cal. App. 4th 996, 1005-06 (Ct. App. 1993) (holding that, even if the documents were sent inadvertently, the lawyer who received them through no wrongdoing on his part may keep them and need not inform opposing counsel).

239. See, e.g., id.; see also Va. State Bar Ass’n, Legal Ethics Op. 1076 (1988), available at http://www.vacle.org/opinions/1076.htm (stating that the lawyer may retain, read, and make use of material from his opponent’s file that was sent to him by an unknown third party).


241. Model Rules of Prof’l Conduct R. 1.6 cmts. 16–17 (2012). If the fax is misdirected, then both the receiving lawyer and the sending lawyer must turn to their local jurisdiction to determine what happens next under the law of evidence. See, e.g., Fed. R. Evid. 502(b).

is “reasonable” depends on the circumstances, including the sensitivity of the information.\textsuperscript{243}

We know, from the discussion above, that some courts will allow the receiving lawyer (the first lawyer) to take advantage of the sending lawyer’s mistake (the second lawyer), even if the mistaken disclosure was not negligent.\textsuperscript{244} Other courts will only allow the first lawyer to take advantage of the second lawyer’s error if that inadvertent disclosure was not negligent.\textsuperscript{245} Hence, it makes the most sense for the first lawyer to inform the court and the second lawyer (which is what Rule 4.4, Comment 2 now advises), in order to secure a court ruling.\textsuperscript{246} If the court rules that the inadvertent disclosure did not waive the privilege, the first lawyer cannot take advantage of her opponent’s mistake without fear that her client will criticize her for failure to prosecute the case zealously. And, if the court concluded that the inadvertent disclosure serves to waive the privilege, the first lawyer can take advantage of her opponent’s mistake without worrying that she is violating any ethical rule.

IV. INADVERTENTLY DISCLOSED METADATA

A. Introduction: ABA Formal Opinion 06-442 and Metadata

Metadata is information embedded in a computer-created document that one can find in the computer code.\textsuperscript{247} Often, we can discover it with little effort, such as by clicking “show markup” in a Microsoft Word document. The metadata may tell us the author or authors of a document, when the authors created it, what prior versions of the document looked like, and so forth. A computer expert will be able to uncover even more information about the document.\textsuperscript{248}

The concept of “inadvertently” disclosed metadata is a peculiar one. The 2012 revisions to the Comments of Rule 4.4 introduced the strange concept that an obligation is created under this Rule only if the receiving lawyer knows or should know that the metadata was inadvertently sent.\textsuperscript{249} It is “inadvertent” if the lawyer “accidentally” included

\begin{itemize}
  \item \textsuperscript{243} \textit{Restatement (Third) of the Law Governing Lawyers} § 79 cmt. h (2000).
  \item \textsuperscript{244} See supra Part III.E.
  \item \textsuperscript{245} See supra Part III.E.
  \item \textsuperscript{246} See Model Rules of Prof’l Conduct R. 4.4 cmt. 2 (2012).
  \item \textsuperscript{247} Perlman, supra note 174, at 786.
  \item \textsuperscript{248} Sometimes the other party may find this metadata of great interest because, for example, a redlined change may suggest how much more the opposing party is willing to pay for a settlement. The date that someone created a document may also be important for discovery purposes. \textit{Id.} at 792.
  \item \textsuperscript{249} Model Rules of Prof’l Conduct R. 4.4 cmt. 2 (2013).
\end{itemize}
“electronically stored information with information that was intentionally transmitted.” Yet, as commentators have pointed out, “[t]he ‘fact’ that counsel did not intend the lawyer to receive the ‘hidden’ information is therefore not at all obvious, since by exercising reasonable care the counsel would have reviewed and removed such material at her discretion.”  

Should there be a different rule when the sending lawyer is sending an electronic document inadvertently, but the lawyer does not know that the document also contains metadata? Should this different rule apply even though any lawyer, “by exercising reasonable care,” could just remove the metadata? The ABA Comment to Rule 4.4 says no. If the lawyer intentionally sends a document that includes metadata (the “track changes” option allows the receiving lawyer to read earlier versions of the document), and the sending lawyer does not realize that he sent a document with track changes embedded in the document, then the receiving lawyer must promptly notify the sending lawyer and/or return the document.

If the lawyer were sending a hard copy—a non-electronic document—advertently, the other party can certainly examine data embedded in the hard copy, like fingerprints, even though the other lawyer did not intentionally transmit the fingerprints. It is irrelevant that the sending lawyer did not intend to send the fingerprints. No one has ever raised an ethical problem with looking at fingerprints. Why should the rule be different if we are considering digital “fingerprints”? There is a simple solution to that issue, and it is the answer in Formal Opinion 06-442. This Opinion concluded that the Model Rules

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250. Id.
253. Id.
254. See id.
255. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006). A Pennsylvania Bar Association Ethics Opinion thoroughly canvassed various ethical opinions dealing with mining metadata and concluded the following:

[U]nder the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer’s judgment and the particular factual situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy. Although the waiver of the attorney-client privilege with respect to privileged and confidential materials is a matter for judicial determination, the Committee believes that the inadvertent transmissions of such materials should not constitute a waiver of the privilege, except in the case of extreme carelessness or indifference.
do not prohibit lawyers from discovering and using metadata found in documents that other lawyers transmit to them, even though the other lawyer may not know that the electronic version of the document contains metadata.\footnote{256} The Commission 20/20 Report to the ABA House of Delegates cited to this Opinion and then announced that the Commission’s proposal permits lawyers to look at metadata, “at least under certain circumstances (for example, with the opponent’s or a court’s permission).”\footnote{257}

However, that is not what ABA Formal Opinion 06-442 said.\footnote{258} It imposes no such restriction.\footnote{259} The Report to the ABA does not explain why it is rejecting the ABA’s own Formal Opinion.\footnote{260} ABA Formal Opinion 06-442 advised, in contrast to Commission 20/20, that lawyers who do not wish to give metadata to their opponents should avoid creating the metadata in the first place.\footnote{261} For example, they might decide not to use the redlining function in a word processing program, or they might not embed comments in a document.\footnote{262} Lawyers may also fax a copy of the document, or they may only provide a hard copy to the adversary.\footnote{263} Alternatively, the lawyers can use computer software programs to scrub metadata from a document before they email it to their opponents.\footnote{264} It is the duty of the lawyer to “safeguard information relating to the representation,”\footnote{265} assuming, of course, that the evidence

\footnote{257} Commission 20/20 Report, supra note 13, at 6.
\footnote{259} Id.
\footnote{260} See Commission 20/20 Report, supra note 13, at 5-7.
\footnote{262} Id.
\footnote{263} Id.
\footnote{264} Id.
\footnote{265} Id. (quoting Model Rules of Prof'l Conduct R. 1.6 cmt. 16 (2012)); see also N.Y. State Bar Ass’n Comm. on Prof'l Ethics, Op. 782 (2004) (stating that, to the extent that metadata contains confidential client information, a lawyer must exercise reasonable care not to disclose confidential client information, and such care may require that the lawyer keep up with technological advances to “clean” the metadata from the electronic file).
does not have forensic value. Altering a document would constitute obstruction of justice under some circumstances.\footnote{ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006) (emphasizing that, when responding to discovery, in regards to a document with forensic interest, "a lawyer must not alter a document when it would be unlawful or unethical to do so, e.g., Rule 3.4(a)").}

One would think that should end the matter. However, Commission 20/20 had a different view.\footnote{See id.} It rejected ABA Formal Opinion 06-442 and announced that henceforth, “if a lawyer uncovers metadata that the lawyer knows the sending lawyer did not intend to include, Model Rule 4.4(b)’s notification requirement is triggered.”\footnote{Id.} In other words, even when the sending lawyer intentionally turns over a document but acts negligently and does not take care to remove metadata (assuming such removal does not obstruct evidence), the receiving lawyer must “promptly notify the sender.”\footnote{MODEL RULES OF PROF’L CONDUCT R. 4.4(b) cmt. 2 (2013) (defining “inadvertent” as including a document that the sender turned over quite intentionally).}  

B. The 2012 Changes to the Comments

Let us now look at the Comments to Rule 4.4 that create this new notification requirement. These Comments impose a very different duty on the lawyer who receives an electronic document that the opposing party intentionally sent him, when the opposing party somehow did not know that it contained metadata.\footnote{Professor Freedman offers an excellent example of the ABA’s preference to treat metadata much more favorably than analogue data: \[T\]ake an actual case, where a defense lawyer in a personal injury case checked his voice mail one morning and found on it a message from the plaintiff himself, who thought he was calling his own lawyer but had mistakenly called the defense lawyer. What the plaintiff said was, "Is it okay if I shoot some baskets with the guys? I thought I should ask you because you got so angry with me when I went bowling."’\footnote{Monroe H. Freedman, Whatever Happened to the Search for Truth?, 60 MERCER L. REV. 851, 854 (2008).} Now, does anybody have any question about whether that admission by the plaintiff can be used? Why is it different, then, if the same kind of information comes in a misdirected e-mail or in metadata that has been mined, or in a misdirected fax from the lawyer for the plaintiff saying, for example, "I understand you went bowling. If you ever do anything like that again, you’re going to have to find another lawyer. I have told you that they are going to be watching and we can’t afford to have them catch you.” Why should that not be useable just as much as when it comes from the client, from the principal, himself?} 

In 2012, the ABA amended Rule 4.4, Comments 2 and 3 to protect the turnover of metadata embedded in a computer-generated
document.\textsuperscript{272} The drafters claimed that they were treating metadata similar to conventional documents.\textsuperscript{273}

That is incorrect. The Comments treat digital data quite differently from what we can call analogue data, that is, plain old hard copy paper.\textsuperscript{274} The Resolution that contains Commission 20/20’s proposed changes underlines the new language and marks the deleted language with strikeout. Note the following Commission 20/20 changes displayed in Comments 2 and 3 to Rule 4.4:

[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that were mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then [Rule 4.4] requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information

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 or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been wrongfully inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or electronically stored information unread, for example, when the lawyer learns before receiving it the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable

\textsuperscript{272} See COMMISSION 20/20 REPORT, supra note 13, at 6.
\textsuperscript{273} See id.
\textsuperscript{274} See COMMISSION 20/20 RESOLUTION, supra note 6, at 5-6.
law to do so, the decision to voluntarily return such a document or electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.  

C. Applying Rule 4.4, Comments 2 and 3

Lawyers have pointed out that they should have a right to examine a file for metadata, just as they could examine a paper document to determine the age of the paper, or to see if someone has altered it, or to discover fingerprints. Let us apply Rule 4.4, Comments 2 and 3 to two hypothetical situations: one involving a hard copy document, and one involving an electronic document. For simplicity, we can refer to the first group of documents as analogue (hard copy), and the second group as digital (computer-generated, containing metadata). How do Rule 4.4 and the 2012 changes to its Comments treat those two situations?

1. Analogue Data and Digital Data Embedded in Documents

Consider this situation (which comes from an actual, unpublished case). A lawyer (“Alpha”) sues his former client (“Client”) for unpaid fees. Alpha claims that he kept careful contemporaneous handwritten time records in ink over the course of a year, and those records support his case. Client subpoenas Alpha’s billing records. Alpha does not know that his paper records have embedded data in them, the analogue version of metadata. The Client’s lawyer hires an expert who advises Client and his lawyer that the longer ink is on a paper, the deeper the ink sets into the paper. The expert mines this information, which shows that Alpha did not mark his hours contemporaneously, day by day, over the course of a year. Instead, the transfer of the ink through the paper shows that Alpha wrote down all of his billable hours on the same recent day (based on how much the ink seeped through each page).

Pursuant to the subpoena, Alpha intentionally turned over the billing records. He did not know about ink seeping through a page, and only expert investigation of the document could uncover this seepage. Still, neither Rule 4.4 nor any other ethics rule prohibits the Client’s lawyer from retaining an expert to mine data on the hard copy document. Nothing in Rule 4.4 remotely requires that the Client’s lawyer ask for Alpha’s permission before mining the data. If the expert finds information (for example, Alpha did not enter the data over the

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275. Id.
course of a year) that is useful. Rule 4.4(b) does not require the lawyer “to promptly notify the sender,” for example, the lawyer representing Alpha, who responded to the subpoena. The adverse party intentionally turned over the billing records, even though he did not advertently intend to turn over the embedded information.

Other law, such as civil procedure or evidence rules, may require, at some point, that Alpha’s lawyer make disclosures to the plaintiff. However, the law of ethics, properly understood, requires no notification; much less does it require any “prompt notification.”

We can consider a variant of this hypothetical situation, instead occurring in the period before any litigation commences. Client complains that the fees are excessive and his lawyer, Alpha, threatens to sue Client if the fees are not paid. Client asks Alpha for the billing records, and Alpha shows them to Client. Client then consults another lawyer (“Second Lawyer”) for her opinion as to whether the fees are excessive. Second Lawyer gives the billing records to the expert who discovers, after complicated testing, that Alpha did not prepare the billing records contemporaneously as he had claimed, but all on the same day. Second Lawyer confronts Alpha with the information and Alpha agrees to drop his claim for unpaid legal fees. Nothing in the Model Rules suggests that Second Lawyer did anything unethical. Indeed, we should congratulate her for very competent work that saved her Client the need to litigate.

Now, let us turn to the digital equivalent of this analogue data. We can assume the same facts as the prior paragraph, except that Alpha kept his billing records on a computer. Hence, Alpha turns over a copy of the computerized records. Rule 4.4, Comment 2 apparently requires Second Lawyer “to promptly notify” Alpha before mining the electronic document because Alpha did not specifically intend to send the metadata: he sent it “accidentally.” Of course, promptly notifying Alpha gives Alpha the time to create or invent an explanation to explain the metadata. Moreover, Second Lawyer would prefer to hire the expert

278. See id.
279. Consider, also, State v. Athan, 158 P.3d 27 (Wash. 2007). The Washington Supreme Court effectively held that an ostensible client’s saliva, which he used to seal a letter to an ostensible lawyer (as distinct, say, from saliva given to the lawyer to run a DNA test) does not constitute a confidential communication. Id. at 33. The case did not involve Model Rule 4.4(b), although the court did hold that (1) the defendant did not have a reasonable expectation of privacy (under the Fourth Amendment) in the saliva he put on envelope, and (2) the detectives did not violate due process or any other constitutional right when they posed as lawyers creating a fictitious law firm to obtain the defendant’s DNA. Id. at 34-44.
281. Id. R. 4.4 cmt. 2.
first (before notifying Alpha), and see if the expert finds anything. If the billing records are in order and do not appear excessive, Client may simply wish to pay and not even tell Alpha that Client doubted Alpha’s bona fides.

If the situation involved litigation that has already commenced, Rule 4.4, Comment 2 imposes burdens regarding the embedded metadata that do not apply to the embedded data in hard copy.\textsuperscript{282} When a lawyer requests the production of computer files or hard drives in discovery, and the electronic files contain metadata that provides confidential information about changes made by the client, we should not think that the lawyer inadvertently disclosed this information. Often, the whole point of subpoenaing a computer document, or computer disk, or a hard drive is to see the metadata. Yet, the revised Comment 2 sneaks in a new definition of “inadvertent,” a definition one does not find in the Terminology section of the Model Rules, where one would normally expect to find it.\textsuperscript{283} Instead, the following Comment in Rule 4.4 creates a new definition, which only applies to Rule 4.4:

A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.\textsuperscript{284}

This sentence is entirely new. The first clause offers the normal definition of “inadvertently sent,” such as mailing a letter to the wrong person or mailing an email to the wrong person.\textsuperscript{285} The second clause is not a natural definition of “inadvertent.”\textsuperscript{286} One party subpoenas or requests a computer document, and the other party intentionally turns it over but negligently forgets to scrub the metadata from the document. The ABA allows lawyers to examine a hard copy document for fingerprints, but prohibits them from examining a computer-generated document for digital fingerprints \textit{unless} they first promptly notify the opposing party and warn them.\textsuperscript{287}

Let us apply this new ABA definition to our factual situation. We assume that, pursuant to the subpoena, Alpha turns over the computer billing records, and Client’s lawyer hires a computer expert to mine the

\textsuperscript{282} See id.
\textsuperscript{283} Id.; see also id. R. 1.0.
\textsuperscript{284} Id. R. 4.4 cmt. 2.
\textsuperscript{285} See id.
\textsuperscript{286} See id.
\textsuperscript{287} Id.
data. Rule 4.4, Comment 2 apparently requires Second Lawyer “to promptly notify” Alpha before mining the electronic document because the metadata was sent “accidentally.” Of course, promptly notifying Alpha gives Alpha time to create an explanation to explain the metadata. It also warns Alpha that he has to be careful to scrub the next set of computer documents. Moreover, this warning requirement applies even though Client may not want Alpha to know that he is mining because that investigation may not turn up anything on this particular document and he does not want Alpha to know what he has been doing.

Let us consider yet another variant of this hypothetical—one that does not involve litigation, at least not yet. Again, our hypothetical can include an analogue and a digital version of the embedded metadata. Assume we have a pro se individual, prone to litigation, who has filed many pro se lawsuits. We can assume that she (let us call her “Jane Poe” or “Poe”) is so litigious that the Supreme Judicial Court of Massachusetts has enjoined her from filing further litigation. Jane Poe mails a letter to a lawyer (“Beta”) living in Virginia, threatening to sue Beta for defamation because of a comment Beta made that a Pennsylvania newspaper later published. Beta had discussed the judicial decision enjoining Poe from filing more lawsuits in Massachusetts. Poe’s letter says that she is acting pro se, worried about her reputation, and will sue Beta for defamation unless he apologizes in writing. Poe is litigious and so Beta is concerned that it will be expensive for him, living in Virginia, to hire a lawyer to defend the threatened lawsuit in Pennsylvania. However, he does not want to apologize because he knows that he can prove his comments were truthful.

Assume that Poe emails a copy of the letter to Beta in Microsoft Word format. Then, Beta can look at the metadata (one can see some data quite easily by clicking on the “File” tab, and then clicking “Info” to view the document’s properties). Beta discovers from the metadata that Poe is not really pro se and that another lawyer was the real author of the document. Poe discovered that this other lawyer had a particular personal agenda against Beta. Beta then responds to Poe and explains that she appears to be less than candid when she says that she is acting pro se because another person is the real author of the letter. Beta says that her threats ring hollow for various reasons, one of which is that she appears to be lying about her motive. The facts in this hypothetical situation are derived from a real case that never came to litigation, because Poe simply slipped away quietly after being confronted with the facts.

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288. Id.
Did Beta violate any ethical duty when he mined the metadata without first “promptly” notifying Poe? Rule 4.4, Comment 2 appears to argue so. However, the Rule does not disclose the rationale for its conclusion.

Now, consider the hard copy variant of this hypothetical. First, Poe mails a hard copy to Beta, who hires someone to examine it for fingerprints and discovers that there are fingerprints of a person other than Poe on that letter. Further research shows that the fingerprints belong to another lawyer—a disbarred lawyer on parole for fraud. That type of data mining causes no issues under Rule 4.4. One can mine data as long as it is not computer data. One type of mining is ethical and the other is not, unless the lawyer promptly notifies the adversary, which will warn him, give him time to develop a story, and allow him time to scrub the data in the future.

One of the unanswered questions that the drafters of Rule 4.4 do not answer is why they want to give far greater protection to digital data than analogue data, even when the lawyer mines that metadata to uncover sharp practices. Granted, opponents of mining metadata compare it to rummaging about the opponent’s garbage or looking into his briefcase when he takes a break from the deposition. However, these analogies are false. The lawyer is not trespassing on the garbage or the briefcase. The lawyer is merely examining the document that the adversary intentionally turned over to him. Instead of examining the document for analogue fingerprints, the lawyer is examining it for digital fingerprints. Mining a digital document is no different from mining an analogue document. The lawyer may use an ink specialist in one case versus a computer specialist in the other. Neither case involves sneaking into the opponent’s briefcase or rummaging through his garbage.

289. See id.
290. See id. R. 4.4(b) & cmt. 2.
291. Id.
292. See id. R. 4.4(b) & cmts. 2–3.
293. See id. R. 4.4(b) cmts. 1–3.
Let us consider another thought experiment. In the hypothetical cases that we have been considering—the digital billing records, the Microsoft Word letter threatening defamation—the lawyer is either directly, or through an expert, mining data. Now, let us assume that the client does not hire a lawyer but is acting pro se. There is no rule of ethics, evidence, or procedure that prohibits the non-lawyer from mining the data, digital or analogue, and there is no rule that requires the non-lawyer to notify anyone. The drafters of the changes to Model Rule 4.4 do not explain why they wish to give such a competitive advantage to the layperson.

Let us vary this experiment a bit more. Now we assume that the client has hired a lawyer, but the lawyer is not examining anything and not hiring any expert. In the first case, the Client (who is suing Alpha, his former attorney, for fees) asks his new lawyer to give Alpha’s billing records to him. The Client, after all, is the client, and he has a right to look at the evidence. In the second case, where Poe threatens Beta for defamation, let us now assume that Poe threatens a non-lawyer with defamation. Poe, for example, may email this Microsoft Word document to a news reporter. In both cases (the defendant-former client and the reporter), the non-lawyer examines the metadata in the document. None of that data mining is wrong in either case and the person examining the document need not first inform the court.295

The Model Rules govern lawyers, not lay people, so the Model Rules do not prevent Client from mining for metadata.296 Similarly, the Model Rules do not prevent the news reporter from mining the electronic document for metadata. In both cases, the law of evidence would treat the data mining information as admissible.297 In both cases, no other law requires Client or the news reporter to promptly notify either Alpha or the litigious Ms. Poe before beginning the data mining.

D. The Amendments to Rule 4.4 Versus the ABA Formal Opinions

1. Company Mining of Employees’ Emails

Let us turn to two ABA Formal Opinions that relate to the issue of mining metadata. The first, on the “Duty to Protect the Confidentiality of

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E-Mail Communications with One’s Client,” is ABA Formal Opinion 11-459.298

The typical situation involves employees who sue employers over race discrimination, sexual harassment, and so forth. In such cases, the employer often seeks access to the employee’s email account so that it can see the emails without issuing a formal request for documents. Alternatively, a third party may subpoena the employer for emails by the employee. In each case, the employee may have some expectation of privacy, such as when the email account is a personal email account that is password protected. The employer (or third party subpoenaing the employer) may argue that it should be able to see these emails—without respecting any privilege from the employee—because the server, on which the emails are stored, is in the possession and control of the employer.

The ABA has come down on the side of the employer.299 Formal Opinion 11-459 notes that:

[T]he employer may be able to obtain an employee’s communications from the employer’s email server if the employee uses a business e-mail address, or from a workplace computer or other employer-owned telecommunications device on which the e-mail is stored even if the employee has used a separate, personal e-mail account.300

The ABA’s Formal Opinion does not impose any ethical duty on the employer or its lawyer to notify the employee or the employee’s lawyer, even though it acknowledges that the employees may be unaware that employers can access the employee’s emails to their personal lawyer—emails that may fall within the attorney-client privilege.301 Instead, Formal Opinion 11-459 imposes a duty on the employee’s lawyer to warn his or her client that the employer or third party can access these emails.302 Commission 20/20 does not explain why the employer can rummage through the database without first notifying the opposing counsel.303

The case law often does not follow the ABA on this issue. Consider Thyroff v. Nationwide Mutual Insurance Co.304 The court treated the employee’s office computer as analogous to a file cabinet where the

299. See id.
300. See id. (emphasis added).
301. Id.
302. Id.
303. See COMMISSION 20/20 REPORT, supra note 13, at 5-6.
employee stored personal communications. Thyroff held that an employee or agent has a cause of action of conversion applicable to intangible electronic records that are stored on a computer, and that these records are indistinguishable from printed documents.

Cases often hold that an employee’s emails are privileged if the employee had a reasonable expectation of privacy, which should normally be the case if the employee used a password protected personal email account. Granted, the email is in the employer’s possession via its server, but so is the employee’s purse sitting unattended in the locked office, even though the employer’s janitor also has a key. The fact that the employer can access the server, and even crack the password using the wonders of its information technology experts, does not mean that the material is freely available. That is particularly true if the employee is communicating with her lawyer.

In Stengart v. Loving Care Agency, Inc., Marina Stengart, a former employee, sued her employer for alleged discrimination. The trial court denied plaintiff’s motion seeking the return from the employer of all copies of employee’s emails sent from the plaintiff to her lawyers through her personal email account, which was accessed on her work-issued laptop. After Stengart filed her complaint, her employer took a picture of her work-issued computer’s hard drive (that is, a “forensic image of the hard drive”), which allowed the employer to review the employee’s Internet browsing history and read the communications that she wrote to her lawyer. On appeal, the court held that the employee had an objectively reasonable expectation of privacy regarding pre-suit emails exchanged between her and her lawyers. Moreover, the attorney-client privilege protected these emails.

305. Id. at 1278.
306. Id.
309. Id. at 393.
310. Id.
311. Id.
312. Id. at 402.
313. Id.; see also Curto v. Med. World Commc’ns, Inc., No. 03-CV-6327, 2006 WL 1318387, at *1 (E.D.N.Y. May 15, 2006). On the other hand, another court found that an employee waived the attorney-client privilege by communicating with her attorney over her work email system where the company policy clearly notified all employees that emails were “subject to monitoring, search or interception at any time.” Kaufman v. SunGard Inv. Sys., No. 05-CV-1236, 2006 WL 1307882, at *4 (D.N.J. May 10, 2006); see also Alamar Ranch, LLC v. Cnty. of Boise, No. CV-09-004-S-BLW, 2009 WL 3669741 (D. Idaho Nov. 2, 2009). In Alamar Ranch, Jeri Kirkpatrick, an employee of the Idaho Housing and Finance Association (“IHFA”), “did not attempt to protect the confidentiality of
The employer had a policy (in the company handbook) stating that the company reserves and will exercise “the right to review, audit, intercept, access, and disclose all matters on the company’s media systems and services at any time, with or without notice.” This policy added that emails and voicemail “are not to be considered private or personal to any individual employee.” Nonetheless, the court concluded that, notwithstanding the company policy, the attorney-client privilege protects the former employee’s personal emails to her lawyer.

The court broadly rejected the employer’s argument that, by buying its employee’s talents throughout the workday and by owning its own servers, it necessarily caused anything done by those employees during work hours to become company property. The employer has no more right to examine the employee’s personal documents stored on a computer than to rifle through a folder in an office file cabinet containing an employee’s private papers, or to examine the contents of an employee’s pockets. The court concluded that the employer’s lawyer had violated New Jersey Rules of Professional Conduct (“NJRPC”) Rule 4.4. The opposing lawyer read emails that: (1) the employee did not voluntarily turn over; and (2) the attorney-client privilege protected.

The employee could reasonably expect that email communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the messages by using a web-based password-protected e-mail account. She simply used her work e-mail.” Alamar Ranch, LLC, 2009 WL 3669741, at *4. The court found a waiver of the attorney-client privilege for some emails but not for others, as “Kirkpatrick waived the privilege for those messages she sent from her work computer.” Id. In contrast, the privilege was not waived as to emails upon which the employee was “merely copied” at her work email address, and which were retrieved by the employer:

There is no evidence that the [clients] were aware—or should have been aware—that by copying Kirkpatrick on their e-mails to [their attorney] they were exposing their e-mails to IHFA scrutiny. As far as the [clients] were concerned, they were having a confidential discussion with their attorney. The Court refuses to extend the constructive knowledge that [the attorney] had about the monitoring of work-based e-mails to the [clients]—laypersons are simply not on ‘high-alert’ for such things as attorneys must be.

Id. at *5.

314. Stengart, 973 A.2d at 394 & n.2. The authors of the company handbook may have meant “server” instead of “services.” Id.

315. Id. at 394.

316. Id. at 402.

317. Id. at 401.

318. Id. at 399.

319. Id. at 403 (citing N.J. RULES OF PROF’L CONDUCT R. 4.4 (2009)).

320. Id.
the attorney-client privilege that protected them.\footnote{321} By reading emails that were at least arguably privileged, and failing to notify the employee promptly about them, Loving Care’s counsel breached NJRPC Rule 4.4(b).\footnote{322}

On appeal, the New Jersey Supreme Court also held that employer’s counsel acted unethically by failing to stop reading email messages.\footnote{323} The law firm hired a computer forensic expert who retrieved emails that her company-issued laptop had automatically saved on its hard drive in a “cache” folder of temporary Internet files.\footnote{324} Stengart did not know that her browser software made copies of each webpage she viewed.\footnote{325} Therefore, when she accessed her personal, password protected email account on Yahoo’s website, the laptop kept a record even though she never saved her Yahoo identification or password on the company laptop.\footnote{326} She used that Yahoo account to communicate with her lawyer about her problems at work.\footnote{327}

The court held that the employer’s law firm acted unethically: the law firm’s “review of privileged e-mails between Stengart and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories” violated NJRPC Rule 4.4(b).\footnote{328} The employer’s law firm did not act in bad faith: in fact, the court agreed that the law firm did not hack into plaintiff’s personal account, nor did it “maliciously seek out attorney-client documents in a clandestine way.”\footnote{329} The employer “legitimately attempted to preserve evidence to defend a civil lawsuit.”\footnote{330} Nevertheless, the court noted, “the Firm should have promptly notified opposing counsel when it discovered the nature of the

\footnotesize{\begin{itemize}
\item \footnote{321} Id. at 401.
\item \footnote{322} Id.; see Quon v. Arch Wireless Operating Co., 529 F.3d 892, 904 (9th Cir. 2008), cert. granted, 130 S. Ct. 1011 (2009), cert. denied, 130 S. Ct. 1011 (2009) (holding that there was a reasonable expectation of privacy in text messages stored by a service provider), cert. granted sub nom., City of Ontario v. Quon, 558 U.S. 1090 (2009). The case was finally decided on the merits in City of Ontario v. Quon, 130 S. Ct. 2619 (2010). The Supreme Court held that a city’s review of a police officer’s text messages was reasonable under the circumstances, and thus did not violate the Fourth Amendment. Id. at 2628. The Court specifically noted that people do not lose Fourth Amendment rights merely because they work for the government instead of a private employer; however, special needs, beyond the normal need for law enforcement, “make the warrant and probable-cause requirement impracticable for government employers.” Id.
\item \footnote{323} Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 666 (N.J. 2010).
\item \footnote{324} Id.
\item \footnote{325} Id.
\item \footnote{326} Id. at 665.
\item \footnote{327} Id. at 665.
\item \footnote{328} Id. at 666 (citing N.J. RULES OF PROF’L CONDUCT R. 4.4 (2009)).
\item \footnote{329} Id.
\item \footnote{330} Id.
\end{itemize}}
e-mails.’’\textsuperscript{331} The law firm’s ‘‘error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further.’’\textsuperscript{332}

The court then remanded so that the trial court could determine the appropriate sanction, such as ‘‘disqualification of the Firm, screening of attorneys, the imposition of costs, or some other remedy.’’\textsuperscript{333} The court explained that, ‘‘[i]n deciding what sanctions to impose, the trial court should evaluate the seriousness of the breach in light of the specific nature of the e-mails, the manner in which they were identified, reviewed, disseminated, and used, and other considerations noted by the Appellate Division.’’\textsuperscript{334}

Now, compare that result to ABA Formal Opinion 11-460, on the ‘‘Duty when Lawyer Receives Copies of a Third Party’s E-mail Communications with Counsel.’’\textsuperscript{335} This Opinion is the companion to Formal Opinion 11-459, both released the same day.\textsuperscript{336} Formal Opinion 11-460 covers the comparable ethical duties of the employer’s lawyer when he has access to the employee’s emails because the employer, using computer skills, accesses those emails.\textsuperscript{337} The lawyer knows that these emails are the employee’s private, privileged communications with her lawyer.\textsuperscript{338}

ABA Formal Opinion 11-460 assumes that the employer uncovered these privileged emails located in the employee’s business email file or on the employee’s workplace computer or other device.\textsuperscript{339} The ABA advises, ‘‘neither Rule 4.4(b) nor any other Rule requires the employer’s lawyer to notify opposing counsel of the receipt of the communications.’’\textsuperscript{340} The Opinion acknowledges that other law might prohibit the lawyer from reading these attorney-client privileged documents of the employee that the employer was able to uncover from the employer’s computer system, but no ABA Rule limits the lawyer.\textsuperscript{341} These computer documents, like the emails between the employee and her lawyer, are ‘‘not ‘inadvertently sent’ when they are retrieved by a

\textsuperscript{331} Id. (footnote omitted).
\textsuperscript{332} Id.
\textsuperscript{333} Id.
\textsuperscript{334} Id.
\textsuperscript{336} Id.; see ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-459 (2011).
\textsuperscript{338} See id.
\textsuperscript{339} Id.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
third person from a public or private place where they are stored or left.\textsuperscript{342}

Commission 20/20’s Report to the ABA makes no mention of ABA Formal Opinion 11-460.\textsuperscript{343} Similarly, it makes no mention of ABA Formal Opinion 11-459.\textsuperscript{344} Yet, one would think they are both relevant. Both deal with computer-generated documents.\textsuperscript{345} Formal Opinion 11-460 is particularly material because it offers a very different definition of “inadvertently sent.”\textsuperscript{346} Commission 20/20 does not say whether it is rejecting that definition.\textsuperscript{347} Nor does it explain if its revisions are overruling Formal Opinion 11-460.\textsuperscript{348}

Moreover, Formal Opinion 11-460 goes on to say that, if other law (such as the law of civil procedure) requires the employer’s lawyer to notify the employee’s lawyer that the employer has retrieved the employee’s attorney-client email communications, then the lawyer, of course, must obey that other law.\textsuperscript{349} However, if other law does not impose this notification (the employee may be in pre-litigation with the employer, so discovery rules do not yet apply), then the ABA position is that it is ethically permissible for the employer’s lawyer not to inform the opposing lawyer that the employer’s lawyer is reading privileged emails that the employer could never subpoena, but that the employer could obtain using its computer experts.\textsuperscript{350}

These ABA Opinions offer an interesting contrast with the new Comments to Rule 4.4. For example, the employer can search an employee’s hard drive using complicated computer technology to break any passwords and read the employee’s privileged communications with

\textsuperscript{342} Id. (emphasis added).
\textsuperscript{343} See COMMISSION 20/20 REPORT, supra note 13, at 5-6.
\textsuperscript{344} See id.
\textsuperscript{347} See COMMISSION 20/20 REPORT, supra note 13, at 6.
\textsuperscript{348} See id. (discussing the ambiguity surrounding the phrase “inadvertently sent” and proposing a clear definition, but not mentioning any prior definition presented in Formal Op. 06-440). Formal Op. 06-440 advised that Rule 4.4(b) does not obligate a lawyer to notify her opposing counsel that the lawyer has received privileged or otherwise confidential materials of the adverse party from someone who was not authorized to provide the materials, as long as the lawyer did not receive the materials because of the sender’s inadvertence. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) (“Unsolicited Receipt of Privileged or Confidential Materials.”). Commission 20/20 also does not discuss or even cite this Opinion. See COMMISSION 20/20 REPORT, supra note 13, at 5-6.
\textsuperscript{350} See id. (stating that it is up to the employer-client to determine whether to report if no law establishes a reporting obligation).
her lawyer. However, if the employer intentionally turns over an electronic document to the employee’s lawyer and that lawyer discovers metadata on it that the employee’s lawyer “reasonably should know” was inadvertently sent, the employee’s lawyer must promptly tell the employer’s lawyer. If the sending lawyer does not want to send metadata, it is his obligation not to send it, according to the ABA Opinion, but if he does send it, the new ABA Comments say that the receiving lawyer should “promptly notify the sender,” and has the professional right to delete it unread. Meanwhile, another part of the ABA is publishing material to lawyers advising them how and why they should use computer experts to uncover metadata.

We are left with a set of rules that are, frankly, hard to rationalize, unless one is a legal realist and assumes that the establishment members of the Bar are the ones developing the ethics rules in these situations. If we become cynical legal realists, we can find a rationale. Let me elaborate.

As litigation has become more complex (with class action lawsuits, particularly in the areas of product liability, employment discrimination, and securities fraud), so also has discovery become more complex. Nowadays, thousands and thousands of documents are in electronic form. Sometimes, computer programs, rather than individual lawyers, are the entities that make the decision to turn over these documents. Other computer programs search for keywords because no one lawyer could read and evaluate all of these electronic documents.

351. See id.
353. See id. R. 4.4(b) cmts. 2–3.
354. Joan E. Feldman, Top Ten Things to Do when Collecting Electronic Evidence, FAM. ADVOCATE, Winter 2007, at 9, 9-12. The article states that: With the pervasive use of computers as business and communication tools, data generated and stored electronically has become the de facto target for discovery. Your goal is to find useful information and collect it in a manner that assures it can be admitted into evidence. Id. at 12.
355. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-368 (1992). The Opinion states that “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.” Id. This is the Opinion that also embraced the position that the receiving lawyer “should abide by sending lawyer’s instructions.” Id. Rule 4.4 now rejects that position and the ABA has withdrawn Formal Opinion 92-368 in Formal Opinion 05-437. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 05-437 (2005).
In the nature of things, often it is the plaintiff’s lawyers who discover a lot more material than defense lawyers would discover. There is only so much information that a disgruntled employee, or stock purchaser, or tort victim of a product would have. In contrast, defendants have a great deal of reasonably relevant information, much in electronic form.

Defendants, thus, are more likely to make a mistake in turning over information. The ABA’s Commission 20/20 responded by proposing a new Rule—with the crucial language buried in a Comment—that prevents the opposing party (the plaintiff’s lawyer) from examining the documents or metadata without first “promptly notifying” the defense counsel.\(^\text{357}\) However, there is no comparable Rule regarding information embedded in non-computer-generated documents, for example, a hard copy, and therefore Commission 20/20’s regulation does not extend to hard copies.\(^\text{358}\)

Commission 20/20 told the ABA House of Delegates that it designed its changes to treat hard copy and electronic documents the same.\(^\text{359}\) However, Commission 20/20 ends up treating electronic documents quite differently. Lawyers can examine information embedded in analogue documents, but lawyers cannot examine information embedded in digital documents (metadata) without first going through the notice requirement of Rule 4.4(b).\(^\text{360}\) In both cases, the lawyers secure the documents by subpoena, and, in both cases, the other side has voluntarily turned them over.\(^\text{361}\) However, in the case of digital documents, Commission 20/20 tells us that the voluntary turnover is not really voluntary because the lawyer may not have understood that he was turning over the metadata.\(^\text{362}\)

\(^{357}\) See Model Rules of Prof’l Conduct R. 4.4 cmt. 2 (2013).


\(^{359}\) Commission 20/20 Report, supra note 13, at 2. Commission 20/20 stated:

> The Commission is proposing to amend Rule 4.4(b) to make clear that the Rule governs both paper documents as well as electronically stored information . . . [and] to define the phrase ‘inadvertently sent’ in Comment [2] to give lawyers more guidance as to when notification requirement of Model Rule 4.4(b) is triggered.

id. (emphasis added).

\(^{360}\) Id. at 6; see Model Rules of Prof’l Conduct R. 4.4 cmt. 2 (2013).


What of ABA Formal Opinion 06-442 advising lawyers who do not want to turn over digital data to scrub the document, assuming that doing so would not obstruct evidence? That Opinion puts the ethical obligation on the sending lawyer, not the receiving lawyer. Commission 20/20 offers no explanation why it is rejecting the ABA’s formal interpretation of its Rules. Instead, Commission 20/20 creates an obligation to protect lawyers who make mistakes.

The net result is that some lawyers who make mistakes have an ethical argument that their adversary lawyer should have warned them rather than take advantage of their mistake. However, this result only applies to digital documents, so defense lawyers are more likely to benefit.

V. CONCLUSION

When lawyers receive a document—whether a hard copy or an electronic document—that they know the adversary sent them inadvertently (for example, a fax or email mistakenly sent to an adversary lawyer instead of to co-counsel), the black letter rule in Rule 4.4 requires the lawyer to notify the other side but does not require the receiving lawyer to return the document unread. Whether the receiving lawyer can use that document depends, in essence, on the law of evidence. If the court decides that the document lost its privileged status (perhaps because the sending lawyer acted unreasonably), the receiving lawyer can use the document.

In some cases, the sending lawyer sends a document advertently (for example, in response to a discovery request). In that situation as well, the lawyer should be able to use the document, unless some other law, such as the law of evidence, says otherwise. For example, the sending lawyer advertently sent over a large group of documents, one of which is a privileged document that the sending lawyer did not intend to disclose. In many cases, courts will hold that the document in question remains privileged if the sending lawyer acted reasonably. Hence, the receiving lawyer should not use that document in that particular circumstance. As stated in Formal Opinion 05-437, “Rule 4.4(b) thus only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.”

364. See id.
As the Restatement (Third) of the Law Governing Lawyers has advised, it “is not a violation [of legal ethics] to accept the advantage of inadvertent, and even negligent, disclosure of confidential information by the other lawyer, if the effect of the other lawyer’s action is to waive the right of that lawyer’s client to assert confidentiality.” Moreover, if the receiving lawyer may use the document, the receiving lawyer should be able to examine and use all of the information within the document, including information embedded within the document. That information may be embedded in a hard copy document (such as fingerprints, the age or type of the paper), or it may be embedded in a digital document (metadata). If the sending lawyer does not want the receiving lawyer to look at metadata, he or she should not send it. As ABA Formal Opinion 06-442 advised, the Model Rules do not prohibit lawyers from discovering and using metadata found in documents that other lawyers transmit to them, even though the other lawyer may not know that the electronic version of the document contains metadata.

In 2012, the ABA added a new Comment to Rule 4.4, which provides that Rule 4.4 creates an obligation on the receiving lawyer “to promptly notify the sender” only when “the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.” The concept of sending metadata inadvertently is peculiar when applied to a lawyer who inadvertently intends to turn over the particular document that contains the metadata. One wonders how the receiving lawyer should know that the sending lawyer sent the document inadvertently but sent the metadata “inadvertently,” when the sending lawyer voluntarily turns over the digital document pursuant to discovery and does not claim that the document itself (as opposed to the metadata within it) was sent by accident. After all, no ethics Rule requires the receiving lawyer “to promptly notify” the sending lawyer that an analogue document has other data embedded within it—such as fingerprints, the age of the paper, and the age of the ink on the paper.

In the midst of these Opinions, language in the Comments to ABA Model Rule 4.4, which the ABA House of Delegates added in 2012, confuses the matter. The Comments suggest that metadata in a digital document has an exalted position, in contrast to analogue data in a hard copy. The Report to the ABA House of Delegates did not make clear

367. See supra Part IV.C.
370. Yet, Rule 4.4, Comment 2 does require prompt notification regarding metadata. See id.
371. See id.
that it is exalting metadata or intending to overrule any ABA Formal Opinion. Yet, the changes in the Comments to Rule 4.4 treat metadata differently.372

Courts in the several states may amend their rules in order to conform to the ABA Model Rules, and they may even give metadata an exalted position. However, given past history, many courts may simply refuse to follow the ABA’s lead on this issue,373 just as they refused to follow the ABA’s efforts to ban non-misleading lawyer participation in Internet chat rooms. Other courts may adopt these Comments, but may interpret them to mean very little by always concluding that the sending lawyers meant to include the metadata in electronic documents that they voluntarily turned over to the other side.

372. If the lawyer sent the document advertently, it is hard to understand how the lawyer sent over the metadata “inadvertently.” Yet, the intent of Commission 20/20 appears to be to ban mining metadata if the sending lawyer did not know that the metadata existed. COMMISSION 20/20 REPORT, supra note 13, at 6.

373. See Jones, supra note 171, at 1270 n.47 (collecting ethics opinions of numerous states that have rejected the ABA’s lead and do not require the receiving lawyer to notify the sending lawyer).