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ETHICS AND EVIDENCE TOO HOT TO HANDLE

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ETHICS AND EVIDENCE TOO HOT TO HANDLE

DOUGLAS R. RICHMOND*

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I. INTRODUCTION

Once civil litigation is underway, lawyers have the right on behalf of parties they represent to discover real and documentary evidence that is relevant to the parties' claims or defenses.[1] For example, lawyers may serve another party with requests for production of documents, electronically-stored information, or other tangible things.[2] They might also subpoena documents from an organization that is not a party to the case.[3] But both before and after litigation has begun, lawyers may further attempt to collect evidence or engage in activities that may lead to the discovery of evidence outside or apart from the formal discovery process governed by rules of civil procedure.[4] Such informal discovery tactics may be variously advantageous or beneficial.[5] For example, informal discovery is often more expedient than formal discovery, it is not constrained by court-imposed deadlines or time limits, it may cost less than formal discovery devices, it may avoid disputes with other parties over the discoverability of information, it may enhance subsequent formal discovery efforts, it may uncover critical evidence without alerting other parties to its existence, and it may even unearth evidence that

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1. "Documentary evidence," as the name indicates, refers to "a writing or other document." *Documentary Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009). "Real evidence" applies to "[p]hysical evidence," such as a weapon or a device or implement of some sort, "that itself plays a direct part in the incident in question." *Real Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009)

2. *See, e.g.*, FED. R. CIV. P. 34 (regulating production of documents, electronically stored information, and other tangible things).

3. *See, e.g.*, FED. R. CIV. P. 45 (governing subpoenas).

4. *See, e.g.*, Brado v. Vocera Commc'ns, Inc., 14 F. Supp. 3d 1316, 1318–21 (N.D. Cal. 2014) (discussing a litigation-related investigation in which an investigator for the plaintiffs' law firm interviewed a former employee of the defendant and obtained potentially privileged documents belonging to the defendant from the former employee, and concluding that there was no reason to sanction the plaintiffs' lawyers because they did not "cause any wrongful act"); Kyko Glob. Inc. v. Prithvi Info. Sols. Ltd., No. C13-1034 MJP, 2014 WL 2694236, at *1–2 (W.D. Wash. June 13, 2014) (deciding that the plaintiffs acted ethically in purchasing a computer previously owned by one of the defendants at a public auction, having the computer examined by a forensic expert, and then seeking a determination as to whether they could use potentially privileged documents stored on the computer's hard drive).

5. "Informal discovery" as used here is a shorthand description of the fact investigation a lawyer performs or supervises outside the scope of procedural rules and mechanisms to analyze a case, collect evidence that supports a client's claims or defenses, learn unfavorable information concerning the client's claims or defenses, or simply to unearth sources of information that may potentially bear on the case.

an unprincipled party wrongfully concealed during formal discovery or might have been tempted to destroy to avoid discovery. In fact, lawyers' informal discovery endeavors frequently are essential to their clients' cases.

For that matter, lawyers may effectively be required to pursue informal discovery in some cases. For instance, *qui tam* relators rely heavily on documentary evidence gathered outside the formal discovery process to support their allegations; indeed, formal discovery channels are unavailable while a False Claims Act case is under seal.[6] To use another example, a plaintiff suing for fraud must allege at least some aspects of the fraud with particularity.[7] Plaintiffs pleading federal securities fraud claims must satisfy heightened particularity requirements regarding defendants' alleged misrepresentations and scienter.[8] Regardless of the specific cause of action subject to a heightened pleading standard, it may be impossible or nearly so for the plaintiff to meet that standard absent reasonable pre-suit investigation; that is, without informal discovery.[9] In other cases, lawyers may need informal discovery to comply with Model Rule of Professional Conduct 3.1, which provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous,

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6. *See, e.g.*, United States *ex rel.* Thomas v. Duke Univ., No. 1:17-CV-276, 2018 WL 4211372, at *5–7 (M.D.N.C. Sept. 4, 2018) (finding no evidence that the relator's counsel either initiated improper ex parte communications between the relator and Duke employees or mishandled Duke's privileged information); United States *ex rel.* Frazier v. Iasis Healthcare Corp., No. 2:05-cv-766-RCJ, 2012 WL 130332, at *13–15 (D. Ariz. Jan. 10, 2012) (declining to dismiss a case where the relator's counsel obtained the defendant's privileged documents, but concluding that the lawyers committed misconduct by withholding the documents and failing to seek either a court ruling while the case was sealed or failing to alert the defendant after the case was unsealed).

7. *E.g.*, FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

8. *See* Fan v. StoneMor Partners LP, 927 F.3d 710, 714 (3d Cir. 2019) (discussing the Private Securities Litigation Reform Act (PSLRA)); Masel v. Villarreal, 924 F.3d 734, 747 (5th Cir. 2019) (explaining the PSLRA pleading standard).

9. *See, e.g.*, Pension Tr. Fund for Operating Eng'rs v. Kohl's Corp., 895 F.3d 933, 943 (7th Cir. 2018) (Hamilton, J., concurring) ("As a practical matter, the PSLRA requires plaintiffs' lawyers to conduct extensive pre-complaint investigations. They must investigate without the help of formal discovery tools.").

which includes a good faith argument for an extension, modification or reversal of existing law."[10]

As important, valuable, or necessary as informal discovery may be, some related efforts present significant professional responsibility challenges for lawyers. Unlike formal discovery, where lawyers collect materials in accordance with procedural rules and under court supervision, lawyers who obtain evidence through informal discovery tempt accusations that they obtained or retained the evidence unethically, unlawfully, or otherwise so unfairly as to necessitate punitive action.[11] Misconduct allegations may be lodged against lawyers even where they acquire evidence seemingly fortuitously, as where, for example, an ally of the party a lawyer represents delivers an adversary's confidential or privileged documents to the party or the lawyer without prompting by the lawyer.[12] In any event, if misconduct accusations are judged to be true—depending on the facts—offending

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10. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020). A lawyer may also need to conduct informal discovery to comply with Federal Rule of Civil Procedure 11(b) and state analogs. *See* FED. R. CIV. P. 11(b) (listing the factors or issues that a lawyer certifies by signing a pleading).

11. *See, e.g.*, Knitting Fever, Inc. v. Coats Holding Ltd., No. 05CV1065(DRH)(MLO), 2005 WL 3050299, at *1–4 (E.D.N.Y. Nov. 14, 2005) (discussing, in exasperated fashion, the plaintiffs' lawyer's receipt of the defendant's confidential documents that were provided by a person who the plaintiffs' lawyers refused to identify, and overruling the plaintiffs' objections to the magistrate's order to submit to intrusive discovery so that the defendant could identify the source of the documents); Richards v. Jain, 168 F. Supp. 2d 1195, 1208–09 (W.D. Wash. 2001) (disqualifying the plaintiffs' law firm because the firm had asked the plaintiffs to supply it with any information supporting his claims and the plaintiffs provided the firm with a computer disk containing privileged documents that belonged to the defendants); *In re* Shell Oil Refinery, 143 F.R.D. 105, 108 (E.D. La. 1992) (opining that the plaintiffs' acquisition of confidential Shell documents from a Shell employee "was inappropriate and contrary to fair play," and stating that the plaintiffs had "effectively circumvented the discovery process and prevented Shell from being able to argue against production"), *amended by* 144 F.R.D. 73, 74–75 (E.D. La. 1992); *In re* Eisenstein, 485 S.W.3d 759, 763–64 (Mo. 2016) (suspending a lawyer whose divorce client improperly tapped into his wife's e-mail account and provided documents he found there to the lawyer).

12. *See, e.g.*, Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *1–5, *9 (W.D. Pa. Jan. 29, 2010) (criticizing the conduct of the defendant's lawyers who received documents belonging to the plaintiff from an anonymous source and prohibiting the defendant from using the documents at trial); Maldonado v. New Jersey, 225 F.R.D. 120, 136–42 (D.N.J. 2004) (disqualifying the plaintiff's lawyer after he accepted a letter from his client—the plaintiff—written by the two defendants and sent to their lawyer, that allegedly was placed in the plaintiff's workplace mailbox by an unknown person; the letter was privileged and protected as work product).

lawyers may face serious consequences.[13] These potentially include monetary sanctions; case-altering sanctions, such as the exclusion of key evidence or striking claims or defenses; terminating sanctions; disqualification from further participation in the case; professional discipline; and in a worst-case scenario, perhaps even criminal charges.[14] Unfortunately for lawyers, the line between unethical or unlawful behavior and permissible (if arguably aggressive) conduct in the course of informal discovery can be unclear.

To appreciate the predicament in which lawyers may find themselves when they receive another party's documents over the

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13. *See, e.g.*, Gifford v. Target Corp., 723 F. Supp. 2d 1110, 1116–22 (D. Minn. 2010) (disqualifying a law firm that elicited privileged documents from a former executive of the defendant); Glynn v. EDO Corp., No. JFM-07-01660, 2010 WL 3294347, at *1, *9 (D. Md. Aug. 20, 2010) (imposing a $20,000 sanction jointly and severally on a plaintiff and his lawyers for surreptitiously acquiring a defendant's documents through one of the plaintiff's former co-workers before a *qui tam* action was filed); Arnold v. Cargill Inc., No. 01-2086 (DWF/AJB), 2004 WL 2203410, at *13–14 (D. Minn. Sept. 24, 2004) (disqualifying the plaintiffs' lawyers who obtained privileged and confidential documents from a former Cargill manager); Castellano v. Winthrop, 27 So. 3d 134, 136–37 (Fla. Dist. Ct. App. 2010) (disqualifying the mother's lawyers in a paternity action who reviewed scores of privileged materials belonging to the father that the mother improperly obtained and saved to a USB thumb drive that she gave the lawyers).

14. *See* SUSAN J. BECKER, DISCOVERY FROM CURRENT AND FORMER EMPLOYEES 4 (2005) ("It is critical that attorneys conduct formal and informal discovery properly, as one inappropriate step may result in disqualification of counsel, exclusion of evidence, monetary sanctions, disciplinary action, and other serious penalties." (citation omitted)). Parties that improperly obtain documents or other materials for use as evidence in their cases likewise risk serious consequences. *See, e.g.*, Xyngular v. Schenkel, 890 F.3d 868, 875 (10th Cir. 2018) (affirming a terminating sanction against a shareholder who colluded with a corporate information technology consultant to surreptitiously review and collect internal corporate documents for use in anticipated litigation with the corporation); Am. Unites for Kids v. Lyon, No. CV 15-2124 PA (AJWx), 2015 WL 9412099, at *7–10 (C.D. Cal. Dec. 21, 2015) (sanctioning the plaintiffs in a toxic tort case against a school district after the plaintiffs' employees entered schools and destructively sampled window caulking to prove the existence of carcinogens; the plaintiffs had previously lost motions to conduct such testing); *Glynn*, 2010 WL 3294347, at *1, *9 (holding the plaintiff jointly and severally liable with his lawyers for a $20,000 sanction based on the plaintiff's surreptitious acquisition of a defendant's documents through one of his former co-workers); State v. Saavedra, 117 A.3d 1169, 1179–82 (N.J. 2015) (affirming a board of education employee's indictment for theft and official misconduct; the employee impermissibly removed documents from board files for use in her employment discrimination lawsuit against the board).

transom, consider this scenario.[15] Lawyer *L* represents Company *A* in trade secret litigation against Company *B*. Witness *W*, a former employee of *B* who is familiar with the litigation from having worked for one of *B*'s senior executives, calls *L* and asks to meet. Other than identifying herself and indicating her familiarity with the litigation, *W* does not say why she wants to meet. *L* sets the meeting. At the meeting, *W* claims that *B* has wrongfully withheld important documents from production in discovery. *W* removes a USB flash drive from her jacket pocket and gently slides it across the table to *L*. According to *W*, the flash drive contains electronic duplicates of documents stored in a folder on *B*'s computer system that will establish *B*'s theft and exploitation of *A*'s trade secrets. *W* does not volunteer how she acquired the electronic data on the flash drive. When *L* asks how she did so, *W* politely declines to answer. *W* leaves without saying why she volunteered to assist *A* in its case with *B*.

What is *L* to do with the flash drive and its precious contents? To be sure, *L* might have refused *W*'s offer of the flash drive and thus avoided potential trouble arising out of *W*'s attempt at covert assistance. But could *L* have done so without first consulting the person at Company *A* to whom she reports? What if her contact at *A* instructed her to accept the flash drive and use the documents in the litigation? If *L* quickly reviews the documents on the flash drive either on her own or at *A*'s direction, what are her duties if some of the documents appear to be subject to *B*'s attorney-client privilege or are *B*'s lawyers' work product? In any event, must *L* inform *B* that she has the documents on the flash drive? What if she does so and *B* demands their destruction or return, coupled with a promise not to use information gleaned from them in the litigation?

Next, consider the same case but change the delivery of the flash drive. Rather than *L* meeting with *W*, assume that *L* is in her office when a padded manila envelope with no return address arrives in the mail. *L* opens the envelope and finds a flash drive accompanied by a note that says only, "Important information concerning the lawsuit between Company *A* and Company *B*." *L* gives the flash drive to one of her law firm's information technology specialists who, after determining that it does not contain malware, prints copies of the documents saved on the flash drive and gives the copies to *L* for her review.

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15. This scenario is based on the facts underlying a 2019 Los Angeles County Bar Association ethics opinion. *See* L.A. Cnty. Bar Ass'n Pro. Resp. & Ethics Comm., Op. 531 (2019) (involving evidence retained by an opposing party's former employee who revealed to the lawyer that relevant documents have been concealed from production).

Much like the situation presented in the first scenario, *L* might have discarded the flash drive without considering the possible importance of its contents to Company *A*'s case. But now that she has read at least some of the documents and recognizes both their impact on the case and the complications they potentially pose because at least some of them appear to be privileged or work product, what are her obligations and options? Does it matter that the flash drive arrived anonymously?

Finally, for now, consider a situation in which Lawyer *L2* represents Plaintiff *P* in employment litigation against Company *C*.[16] *L2* receives a telephone call from Human Resources Consultant *H*. *L2* and *H* know each other from a prior case in which *H* was an expert witness for *L2*'s adversary. *H* informs *L2* that he has confidential information belonging to *C* that would help *P*'s case against *C*. He obtained the information when consulting with *C* on an unrelated matter. *H* explains that he is obligated to keep the information quiet under a confidentiality agreement that *C* required him to sign in the other matter. Because he is concerned that his consulting business will suffer if his breach of the confidentiality agreement is revealed or that *C* may sue him for the breach if it comes to light, *H* demands payment for the information. *H* assures *L2* that any settlement *L2* will extract from *C* by using the information or any judgment that results should the case go to trial will far exceed the cost of the proposed payment.

In evaluating whether to acquire the information, should *L2* be concerned about *H*'s confidentiality agreement with *C*? Although the agreement may bind *H*, neither *L2* nor *P* are parties to it. Should it matter to *L2* that *H* has demanded payment for the information?[17] Could *L2* make payment for the information contingent on the

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16. This hypothetical scenario is based on a 2019 Alaska Bar Association ethics opinion. *See* Alaska Bar Ass'n Ethics Comm., Op. 2019-1 (2019) (analyzing a lawyer's solicitation or acceptance of evidence from a person where the lawyer knows or reasonably should know that doing so violates a third person's legal rights).

17. *See id.* (cautioning that payment for the evidence might be construed as an impermissible payment for the witness's testimony); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 997 (2014) (opining that it is generally permissible for a lawyer to pay for physical evidence in pending or contemplated litigation and may even make any payment contingent upon the outcome of the case, but cautioning that the lawyer's ability to pay for evidence may be constrained if the conduct also involves witness payments or possible false evidence).

outcome of the case?[18] In deciding whether to acquire the information while at the same time avoiding any taint that might come from reviewing it personally, could *L2* engage as a consulting expert a second HR professional or an experienced employment lawyer to confidentially review the information to evaluate its possible worth to *P*'s case?[19] The consulting expert or second lawyer would not reveal in detail the contents or substance of the information to *L2*; the expert or lawyer would merely advise *L2* whether, based on a general description of the information, it was likely worth acquiring.

These are not cases in which a lawyer received an opponent's allegedly privileged or confidential documents or information inadvertently. Rather, the materials in question were intentionally offered or provided to the lawyer. The owner of the documents or information did not authorize their disclosure or accidentally allow their release; indeed, the owner may well characterize the material as having been converted or stolen. The substantial body of law addressing inadvertent disclosures is of no value to lawyers who must evaluate their duties when potentially privileged or other confidential materials are purposely provided to them. Furthermore, in contrast to the situation in which a lawyer receives real evidence central to a client's criminal case, such as a murder weapon or a laptop computer bearing images of child pornography, which has received extensive scholarly attention,[20] the professional implications of a lawyer's

18. *See* N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 997 (2014) (stating that there "is no per se rule against" lawyers' payments for real evidence being contingent on the outcome of the case).

19. *See* Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Op. 93-135 (1993) (concluding that a lawyer could not have the doctor he was using as an expert witness review a fact witness' confidential psychiatric records that were kept at a hospital where the doctor was on staff for purposes of impeaching the witness at trial).

20. *See generally* Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 STAN. L. REV. 813 (2011) (proposing solutions to the problems posed by a criminal defense lawyer's possession of real evidence with criminal implications that protect clients' legal rights and the interests of law enforcement and the public); Peter A. Joy & Rodney J. Uphoff, *"What Do I Do with the Porn on My Computer?": How a Lawyer Should Counsel Clients About Physical Evidence*, 54 AM. CRIM. L. REV. 751 (2017) (explaining the limits of the legal and ethical advice that a lawyer may give a client when the lawyer declines to take possession of physical evidence of a crime); Gregory C. Sisk, *The Legal Ethics of Real Evidence: Of Child Porn on the Choirmaster's Computer and Bloody Knives Under the Stairs*, 89 WASH. L. REV. 819 (2014) (examining evidence law in light of lawyers' professional responsibility, attorney-client confidentiality, and criminal defendants' constitutional rights); Rodney J. Uphoff, *The Physical Evidence Dilemma: Does ABA*

possession of real or documentary evidence belonging to another party that was intentionally sent to the lawyer without the other party's permission has largely eluded adept analysis.[21] As a result, courts and lawyers mired in related disputes too often analyze the lawyers' obligations, and argue or decide the consequences of the lawyers' actions, in light of inapposite or debatable rules of professional conduct, sparse and often qualified ethics opinions, and inconsistent case law. In some cases, neither the court nor the lawyers fully appreciate all the issues in play. In other cases, the lawyers' professional fates (and by extension their clients' causes) may balance on nothing more than the court's subjective sense of fairness.[22]

This Article analyzes lawyers' obligations when someone offers or presents them with another party's potentially privileged or confidential documents or information without that party's authorization. The goal is to provide practical guidance for lawyers who are involved in these tense situations and to help courts properly evaluate those lawyers' conduct when weighing possible sanctions or professional discipline. Part II begins with an analysis of key Model Rules of Professional Conduct. Critically, Part II explains why Model Rule 4.4(b), which governs lawyers' duties regarding inadvertent disclosures of documents or information, does not regulate intentional disclosures of materials despite courts' frequent attempts to analogize the situations. Part III then examines three representative intentional disclosure cases to illustrate how courts resolve such disputes. Finally, Part IV outlines how lawyers may ethically respond to intentional disclosures of another party's potentially privileged or confidential information. In doing so, it focuses on Model Rule 1.15, which provides a simple, effective, and yet overlooked framework for handling the receipt of sensitive documents or information.

Standard 4-4.6 Offer Appropriate Guidance?, 62 HASTINGS L.J. 1177 (2011) (exploring whether criminal defense counsel can return incriminating real evidence to the source and thereby avoid the professional responsibility challenges associated with the possession of such evidence).

21. *But see* DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 376–77 (2d ed. 2016) (proposing an "elegant solution" to the risks posed by lawyers' possession of purloined documents derived from Model Rule 1.15).

22. *See, e.g.*, *In re* Shell Oil Refinery, 143 F.R.D. 105, 108 (E.D. La. 1992) (opining that the plaintiffs' acquisition of Shell's proprietary documents "was inappropriate and contrary to fair play"), *amended by* 144 F.R.D. 73, 74–75 (E.D. La. 1992).

II. UNDERSTANDING APPLICABLE RULES OF PROFESSIONAL CONDUCT

Depending on the facts, a range of ethics rules may apply to lawyers who obtain documents or other information in informal discovery efforts. For instance, lawyers must act honestly in this context just as in other aspects of litigation.[23] This Part therefore focuses on Model Rules of Professional Conduct that are likely to surface in cases in which lawyers obtain a party's allegedly privileged or confidential documents or information as a result of someone's intentional conduct, including (a) Model Rule 3.4(a), titled, "Fairness to Opposing Party and Counsel," which addresses lawyers' unlawful concealment of evidence from another party;[24] (b) Model Rule 4.2, which governs lawyers' ex parte communications with represented persons;[25] (c) Model Rule 4.3, which regulates lawyers' communications with unrepresented persons;[26] (d) Model Rule 4.4, titled "Respect for the Rights of Third Persons";[27] (e) Model Rule 8.4(a), which prohibits lawyers from using others to do that which they ethically cannot do themselves;[28] (f) Model Rule 8.4(b), which makes it professional misconduct for a lawyer to commit certain criminal acts;[29] and (g) Model Rule 8.4(d), which prohibits a lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice."[30]

A. Model Rule 3.4(a): Fairness to Opposing Party and Counsel

To start, Model Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[31] The rule further provides that "[a]

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23. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 4.1(a) (providing that when "representing a client[,] a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person"); *id.* r. 8.4(c) (making it "professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

24. *Id.* r. 3.4(a).

25. *Id.* r. 4.2.

26. *Id.* r. 4.3.

27. *Id.* r. 4.4.

28. *Id.* r. 8.4(a).

29. *Id.* r. 8.4(b).

30. *Id.* r. 8.4(d).

31. *Id.* r. 3.4(a).

lawyer shall not counsel or assist another person to do any such act."[32] Lawyers may violate Rule 3.4(a) outside their representation of clients.[33]

Model Rule 3.4(a) "does not itself create a duty of disclosure."[34] Rather, the rule's prohibition on unlawfully concealing documents or other evidence obligates a lawyer to timely disclose the existence of such materials in accordance with procedural rules, court orders, or other applicable law.[35]

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32. *Id.*

33. *See, e.g.*, People v. Head, 332 P.3d 117, 131 (Colo. 2013) (explaining that Colorado Rule 3.4(a) "does not expressly state . . . that the rule only applies to an attorney's conduct while representing a client" and declining to so narrow the rule's application).

34. Sherman v. State, 905 P.2d 355, 368 (Wash. 1995); *see, e.g.*, Att'y Grievance Comm'n of Md. v. Bellamy, 162 A.3d 848, 862 (Md. 2017) ("While [the lawyer's] behavior in not providing the police report per opposing counsel's request was exceedingly unprofessional . . . this was an informal request, not a discovery request, for . . . a public document. Rule 3.4 makes it a violation to *unlawfully* obstruct access to evidence or alter, destroy, or conceal evidence. Bar Counsel has identified no law that [the lawyer] violated . . . ."); *In re* Grand Jury Investigation, 22 N.E.3d 927, 934 (Mass. 2015) (refusing to produce evidence based on the attorney-client privilege did not violate Rule 3.4(a) because the refusal was not unlawful); *In re* Olson, 222 P.3d 632, 638 (Mont. 2009) (concluding that the lawyer did not violate Rule 3.4(a) by not disclosing that he possessed evidence in a criminal case because he was not at the relevant time obligated to deliver the items to the police or prosecutor pursuant to a statute or court order).

35. *See, e.g.*, *In re* Filosa, 976 F. Supp. 2d 460, 468–69 (S.D.N.Y. 2013) (discussing a violation of the equivalent New York rule by failing to supplement the client's document production as required by Federal Rule of Civil Procedure 26(e)); *In re* Stover, 104 P.3d 394, 398–400 (Kan. 2005) (discussing a violation of Kansas Rule of Professional Conduct 3.4(a) for disobeying a court order requiring the lawyer to allow her former client to have access to the lawyer's computer so that the former client could discontinue and reassign websites that were maintained in the former client's name); Disciplinary Couns. v. Stafford, 946 N.E.2d 193, 195–99 (Ohio 2011) (finding a violation of Rule 3.4(a) for not complying with a court order granting the opposing party's motion to compel discovery and requiring the lawyer to provide discovery responses by a set date); Law. Disciplinary Bd. v. Busch, 754 S.E.2d 729, 739 (W. Va. 2014) (invoking Rule 3.4(a) to discipline a prosecutor who knowingly disobeyed a court order to provide a defense lawyer with copies of computer hard drives and "unlawfully obstructed" opposing counsel's "access to the recording of the alleged victim's statements").

In re Eisenstein[36] is a recent case involving Rule 3.4(a).[37] There, Missouri lawyer Joel Eisenstein represented the husband in a divorce; Stephanie Jones represented the wife.[38] The husband repeatedly logged into his wife's personal e-mail account without her knowledge or permission.[39] During these intrusions, he obtained copies of his wife's most recent payroll records and a list of direct examination questions that Jones had sent to her in preparation for the parties' anticipated trial.[40] In November 2013, the husband gave the purloined payroll records and direct examination script to Eisenstein.[41]

The parties' trial began in February 2014 and, on the second day of trial, Eisenstein "handed Ms. Jones a stack of exhibits that included [her] direct examination questions."[42] Until that moment, neither Jones nor the wife knew that the husband had rummaged through the wife's e-mail account and delivered his bounty to Eisenstein.[43] This was so even though Eisenstein had referred to information contained in the wife's payroll records during pretrial settlement negotiations.[44]

Missouri disciplinary authorities charged Eisenstein with violating several rules of professional conduct, including Missouri's version of Model Rule 3.4(a), which tracks the Model Rule.[45] In his defense, Eisenstein argued that "he immediately disclosed his receipt of the information" at issue.[46] He claimed that he had not realized that the documents were improperly obtained until trial was underway.[47] The Missouri Supreme Court did not believe him and concluded that among other offenses, he violated Rule 3.4(a) by hiding his possession of the wife's payroll records and Jones' list of direct examination questions until the second day of trial.[48]

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36. 485 S.W.3d 759 (Mo. 2016).

37. The offending lawyer, Joel Eisenstein, was found to have violated the Missouri versions of Rules 4.4(a), 8.4(c), and 8.4(d) in addition to Rule 3.4(a). *Id.* at 762–63.

38. *Id.* at 761.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 762.

45. *Id.* at 760, 763.

46. *Id.* at 762.

47. *See id.* at 762–63 (discussing Eisenstein's testimony at a hearing in the trial court's chambers during a trial recess after he handed Jones her list of direct examination questions).

48. *Id.* at 763.

In addition to his misconduct in this case, Eisenstein had a lengthy disciplinary record.[49] Accordingly, the court suspended him from practice indefinitely with no ability to apply for reinstatement for six months.[50]

Oddly, the *Eisenstein* court did not identify a court rule or order that Eisenstein violated by not producing the disputed documents sooner.[51] Presumably, Eisenstein violated Missouri Supreme Court Rule 56.01(e), which obligates a party to timely amend prior responses to interrogatories, document requests, or requests for admission if the party learns that the responses are materially incomplete or incorrect and the corrective information has not otherwise been revealed to the other parties.[52]

B. Model Rule 4.2: Communications with Represented Persons

Lawyers conducting informal discovery may encounter potential witnesses or other people who are sources of information who are represented by counsel, or who are constituents of represented organizations.[53] When witnesses or others are represented by counsel in connection with the matter, lawyers who wish to communicate with them must respect Model Rule 4.2, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[54]

By its terms, Model Rule 4.2 applies only where the lawyer knows that a person with whom she wishes to communicate is represented in the matter by another lawyer.[55] Often a person's represented status is obvious from her lawyer's communications or conduct, but a lawyer's knowledge that a person is represented in a matter can also

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49. *See id.* at 760–61 (reciting Eisenstein's disciplinary record).

50. *Id.* at 764.

51. *See id.* at 760–62 (outlining the case facts).

52. MO. SUP. CT. R. 56.01(e).

53. *See generally* Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (recognizing the importance of lawyers' interviews of corporate employees outside the presence of corporate counsel during informal discovery).

54. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020).

55. *Id.*

be inferred from circumstances.[56] Similarly, lawyers cannot avoid acquiring knowledge of a person's representation by turning a blind eye to relevant facts or circumstances.[57] Even so, the Model Rule 4.2 knowledge requirement is unquestionably one of actual knowledge.[58] The fact that a lawyer *should have known* that a person was represented by another lawyer in a matter will not support a Rule 4.2 violation.[59] For lawyers who are uncertain whether people they wish to speak with are represented in the matter, the easy solution is to ask them if they have counsel.[60]

Lawyers must keep in mind that Model Rule 4.2 does not protect a person's right to counsel; it protects the lawyer's right to participate in any communication between her client and another lawyer concerning the matter at issue.[61] Thus, only the lawyer can invoke Rule 4.2 or instead consent to ex parte contact—the represented witness or other person cannot agree to ex parte communications.[62] Furthermore, Rule 4.2 applies even when the represented person initiates the communication.[63] In that situation, the lawyer must

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56. *Id.* r. 1.0(f).

57. Scanlan v. Eisenberg, 893 F. Supp. 2d 945, 950 (N.D. Ill. 2012); People v. Underhill, 353 P.3d 936, 950 (Colo. 2015).

58. *See, e.g.*, McClellan v. Ready Mixed Concrete Co. of Erie, No. 13-87 Erie, 2014 WL 4060254, at *1–2 (W.D. Pa. Aug. 14, 2014) (noting and applying the actual knowledge requirement); Mori v. Saito, 785 F. Supp. 2d 427, 433 (S.D.N.Y. 2011) (rejecting the argument that a lawyer violated Rule 4.2 because she "must have known" that an unidentified caller was a represented party); State *ex rel.* Okla. Bar Ass'n v. Harper, 995 P.2d 1143, 1147 (Okla. 2000) (requiring actual knowledge for a Rule 4.2 violation and rejecting a proposed "should have known" standard).

59. *Harper*, 995 P.2d at 1147.

60. *See generally* Utah State Bar Ethics Advisory Op. Comm., Op. 96-01 (1996) ("[T]he burden of determining [a] person's represented status is on the contacting lawyer.").

61. State v. Miller, 600 N.W.2d 457, 464 (Minn. 1999).

62. Nieves v. OPA, Inc., 948 F. Supp. 2d 887, 895 (N.D. Ill. 2013); *Scanlan*, 893 F. Supp. 2d at 950; Faison v. Thornton, 863 F. Supp. 1204, 1213 (D. Nev. 1993) (discussing the Nevada version of Rule 4.2); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Stoller, 879 N.W.2d 199, 211 (Iowa 2016); *Miller*, 600 N.W.2d at 464.

63. *Scanlan*, 893 F. Supp. 2d at 950; United States v. Smallwood, 365 F. Supp. 2d 689, 696 (E.D. Va. 2005); *Stoller*, 879 N.W.2d at 211; *In re* Charges of Unprofessional Conduct in Panel File No. 41755, 912 N.W.2d 224, 232 (Minn. 2018); Pleasant Mgmt., LLC v. Carrasco, 870 A.2d 443, 446 (R.I. 2005); Engstrom v. Goodman, 271 P.3d 959, 964 (Wash. Ct. App. 2012); ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995). *But cf.* United States v. Guivas-Soto, 124 F. Supp. 3d 72, 74 (D.P.R. 2015) (concluding that a prosecutor did not violate Rule 4.2 by reading two letters sent to him by a represented defendant because Rule 4.2 "prohibits

terminate the communication as soon as practicable after determining that it is improper.[64]

1. Analyzing Model Rule 4.2's Application to Current Employees of Represented Organizations

In addition to appreciating the essential contours of Model Rule 4.2, lawyers must understand how it applies to represented organizations. This is because organizations speak only through their employees and agents.[65] Crucially, "not every current employee of a represented organizational entity is a 'represented' person for purposes of Rule 4.2."[66] Model Rule 4.2 is not intended to quarantine every employee with knowledge of relevant facts or information concerning a matter and thereby prevent lawyers for other parties from communicating with them outside the presence of the organization's lawyer.[67] An organization's lawyer may not impose a blanket prohibition on ex parte communications with all of the

only communication by the lawyer, and reading a letter does not communicate anything").

64. *See, e.g.*, Golden v. Brethren Mut. Ins. Co., No. 3:18-CV-02425, 2019 WL 3216629, at *3 (M.D. Pa. July 17, 2019) ("Once the lawyer learns that the person is one with whom communication is not permitted, the lawyer must immediately terminate the communication."); Merck v. Swift Transp. Co., No. CV-16-01103-PHX-ROS, 2018 WL 3774007, at *3 (D. Ariz. July 19, 2018) (sanctioning a plaintiff's lawyer who, when called by the defendant's former employee who allegedly caused the accident at issue, did not hang up the telephone but instead stayed on the line and inquired into events relevant to the plaintiff's claim); Zaug v. Va. State Bar, 737 S.E.2d 914, 918–19 (Va. 2013) (concluding that the lawyer did not violate Rule 4.2 when the opposing party called and then launched into an emotional outburst, and the lawyer could not reasonably terminate the conversation immediately; the requirement to disengage from an unrepresented person's communication does not require a lawyer to be discourteous or impolite).

65. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-6(a), at 1015 (2018–2019 ed. 2018).

66 Doe v. Superior Court of San Diego Cnty., 248 Cal. Rptr. 3d 314, 320 (Ct. App. 2019).

67. *Id.* at 321; *see* Iowa Sup. Ct. Att'y Disciplinary Bd. v. Stowers, 823 N.W.2d 1, 11 (Iowa 2012) (noting that Rule 4.2 does not bar ex parte communication "with *all* constituents of [a] represented organization"); ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995) ("[T]he fact that an entity is represented by counsel does not prevent communication with all current employees of the represented corporation." (citation omitted)).

organization's employees.[68] It is accordingly necessary to identify those people affiliated with the organization who hold a position or play a role sufficient to assume its attributes. Employees within this group are sometimes described in shorthand fashion as members of the organization's "control group" or said to be the organization's "alter egos."[69] Regardless of how they are described for ease of reference, such employees are presumptively represented by counsel for the organization.[70] Employees who are not within this constituent group are available for ex parte communications unless they are separately represented.[71]

Courts regularly look to the comments to Rule 4.2 for guidance when deciding which employees should be considered represented by counsel for the organization.[72] Comment 7 to Model Rule 4.2 specifies three such categories of employees:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who [1] supervises, directs or regularly consults with the organization's lawyer concerning the matter or [2] has authority to obligate the organization with respect to the matter or [3] whose act or omission in connection with the matter may be

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68. ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995); Sup. Ct. of Ohio Bd. of Pro. Conduct, Op. 2016-5 (2016).

69. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995) (noting that some courts analyzing the propriety of ex parte communications with current employees of a represented organization have found that only those employees within the organization's "control group" are considered to be represented); ROTUNDA & DZIENKOWSKI, *supra* note 65, § 4.2-6(a), at 1015 (referring to a represented organization's "alter egos").

70. ROTUNDA & DZIENKOWSKI, *supra* note 65, § 4.2-6(a), at 1015.

71. Davis v. Creditors Interchange Receivable Mgmt., LLC, 585 F. Supp. 2d 968, 978 (N.D. Ohio 2008); Klier v. Sordoni Skanska Constr. Co., 766 A.2d 761, 770 (N.J. Super. Ct. App. Div. 2001); Hedges v. E. River Plaza, LLC, 981 N.Y.S.2d 894, 897–98 (Sup. Ct. 2013); MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 7 (AM. BAR ASS'N 2020); ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995).

72. *See, e.g.*, Raub v. US Airways, Inc., No. 16-1975, 2017 WL 5172603, at *5 (E.D. Pa. Nov. 8, 2017) (concluding that flight attendants were represented parties under comment 7 to Rule 4.2); Goswami v. DePaul Univ., 8 F. Supp. 3d 1004, 1007 (N.D. Ill. 2014) (explaining that the text of Rule 4.2 does not answer the question of whether an employee is represented by an organization's lawyers, but comment 7 to the rule does); Mendez v. Hovensa, L.L.C., No. 02-0169, 2008 WL 906768, at *2 (D.V.I. Mar. 31, 2008) (quoting Model Rule 4.2 cmt. 7); *Stowers*, 823 N.W.2d at 11 (quoting comment 7 to Iowa's version of Rule 4.2).

> imputed to the organization for purposes of civil or criminal liability.[73]

A few courts have departed from the Model Rule 4.2 categorical approach in favor of a managing-speaking agent test.[74] Under this test, a lawyer is prohibited from communicating with employees who possess "'speaking authority' for the corporation," meaning those employees "who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.'"[75] Scholars have criticized the managing-speaking agent test as being confusing and for failing to provide lawyers with a clear standard by which to evaluate a planned course of conduct.[76] Regardless, it is distinctly a minority approach.

When Rule 4.2 permits a lawyer to communicate with a represented organization's employees, that grant of permission does not automatically license other methods of informal discovery tied to those communications, as *Glynn v. EDO Corp.*[77] illustrates. In *Glynn*, a defense contractor, IST, fired Dennis Glynn allegedly for reporting perceived problems with IST's technology to the Defense Department.[78] After he was fired, Glynn regularly communicated with an IST employee with whom he was friendly, James Martin.[79]

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73. MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 7 (AM. BAR ASS'N 2020).

74. *See, e.g.*, Goodeagle v. United States, No. CIV-09-490-D, 2010 WL 3081520, at *4 (W.D. Okla. Aug. 6, 2010) (quoting Fulton v. Lane, 829 P.2d 959, 960 (Okla. 1992)); Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 833 (Mass. 2002) ("The employees with whom contact is prohibited are those with 'speaking authority' for the corporation who 'have managing authority sufficient to give them the right to speak for, and bind, the corporation.' . . . Employees who can commit the organization are those with authority to make decisions about the course of the litigation, such as when to initiate suit, and when to settle a pending case." (citation omitted)); Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237, 1247–48 (Nev. 2002) ("We conclude that the managing-speaking agent test . . . best balances the policies at stake when considering what contact with an organization's representatives is appropriate."); Wright v. Grp. Health Hosp., 691 P.2d 564, 569 (Wash. 1984) (adopting the managing-speaking agent test).

75. *Messing*, 764 N.E.2d at 833 (quoting *Wright*, 691 P.2d at 569).

76. *See, e.g.*, Ernest F. Lidge III, *The Ethics of Communicating with an Organization's Employees: An Analysis of the Unworkable "Hybrid" or "Multifactor" Managing-Speaking Agent, ABA, and* Niesig *Tests and a Proposal for a "Supervisor" Standard*, 45 ARK. L. REV. 801, 834–44 (1993) (focusing on the Washington Supreme Court's decision in *Wright*).

77. No. JFM-07-01660, 2010 WL 3294347 (D. Md. Aug. 20, 2010).

78. *Id.* at *1.

79. *Id.*

Martin sent Glynn internal IST documents and e-mail messages, some of which Glynn passed along to his lawyers at The Employment Law Group (TELG).[80] Martin also communicated with TELG directly and sent the firm IST materials.[81]

Glynn sued IST for retaliation under the False Claims Act.[82] It then came to light that Glynn and TELG had obtained IST's internal documents and e-mail messages, which IST claimed were confidential, proprietary, and protected by the attorney-client privilege and work product immunity.[83] IST asked the court to sanction TELG and Glynn by dismissing Glynn's lawsuit or entering a default judgment for the company.[84]

Reasoning its way toward sanctions, the court firmly expressed its belief that it was inappropriate for TELG and Glynn to acquire IST's documents outside the formal discovery process.[85] TELG and Glynn countered that they properly obtained the IST materials because their communications with Martin were permitted by Maryland's version of Rule 4.2.[86] In fact, IST apparently conceded that Rule 4.2 allowed TELG and Glynn to communicate with Martin without IST's knowledge or involvement.[87] But the court rejected TELG's and Glynn's argument anyway because "[p]ermitting communication between Glynn/TELG and Martin [was] materially different . . . from permitting Martin to secrete documents from IST and transmit them to Glynn or TELG, and Rule 4.2 says nothing about authorizing the latter conduct."[88]

Despite its unhappiness with TELG's and Glynn's conduct, the court decided that their actions did not merit a terminating sanction.[89] Instead, the court imposed a $20,000 sanction for which TELG and Glynn were jointly and severally responsible.[90]

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80. *Id.*
81. *Id.*
82. *Id.* at *2.
83. *See id.* at *5 (noting that the parties disputed IST's claims).
84. *Id.* at *1.
85. *Id.* at *5.
86. *See id.* at *6 (rejecting this argument).
87. *Id.*
88. *Id.* (citing *In re* Shell Oil Refinery, 143 F.R.D. 105, 108 (E.D. La. 1992), *amended by* 144 F.R.D. 73, 74–75 (E.D. La. 1992)).
89. *Id.*
90. *Id.* at *1, *9.

2. Applying Model Rule 4.2 to a Represented Organization's Former Employees

Lawyers conducting informal discovery often want to interview *former* employees of a represented organization without alerting the organization's lawyers. Although such communications sometimes concern organizations, Model Rule 4.2 generally permits a lawyer to communicate with former employees.[91] The commentary to Model Rule 4.2 makes this position clear: "Consent of the organization's

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91. Calise v. Brady Sullivan Harris Mills, LLC, No. 18-99WES, 2019 WL 1397245, at *5 (D.R.I. Mar. 28, 2019) (discussing Rhode Island's version of Rule 4.2); Lozama v. Samaritan Daytop Vill., Inc., No. 18 CV 4351 (DLI)(RML), 2019 WL 1002954, at *2 (E.D.N.Y. Mar. 1, 2019) (applying New York law); United States v. Mississippi, No. 3:16-cv-622-CWR-FKB, 2018 WL 4956658, at *4 (S.D. Miss. Oct. 12, 2018) (discussing Mississippi's version of Rule 4.2); Klorczyk v. Sears, Roebuck & Co., No. 3:13-cv-00257 (JAM), 2017 WL 3272237, at *3 (D. Conn. Aug. 1, 2017) (applying Connecticut ethics rules); Thurston v. Okemo LLC, 123 F. Supp. 3d 513, 515 (D. Vt. 2015) (applying Vermont's version of Rule 4.2); EEOC v. SVT, LLC, 297 F.R.D. 336, 344–45 (N.D. Ind. 2014) (applying Indiana rules); EEOC v. Univ. of Chi. Med. Ctr., No. 11C6379, 2012 WL 1329171, at *3 (N.D. Ill. Apr. 16, 2012) (applying Model Rule 4.2); *In re* Digitek Prod. Liab. Litig., 648 F. Supp. 2d 795, 798–99 (S.D. W. Va. 2009) (applying West Virginia rules); Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 949, 952–53 (W.D. Va. 2008) (using Virginia's version of Rule 4.2); Nuckles v. Wal-Mart Stores, Inc., No. 4:06CV00178WRW, 2007 WL 1546092, at *2 (E.D. Ark. May 25, 2007) (applying Model Rule 4.2); United States v. W.R. Grace, 401 F. Supp. 2d 1065, 1068–69 (D. Mont. 2005) (discussing Model Rule 4.2); Smith v. Kalamazoo Ophthalmology, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) (applying Michigan's Rule 4.2); Lang v. Superior Court, 826 P.2d 1228, 1233 (Ariz. Ct. App. 1992); DiOssi v. Edison, 583 A.2d 1343, 1345 (Del. Super. Ct. 1990); H.B.A. Mgmt., Inc. v. Est. of Schwartz, 693 So. 2d 541, 544–46 (Fla. 1997); Sanifill of Ga., Inc. v. Roberts, 502 S.E.2d 343, 345 (Ga. Ct. App. 1998); P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 737 (Ind. Ct. App. 2002); Humco, Inc. v. Noble, 31 S.W.3d 916, 920 (Ky. 2000); Schmidt v. Gregorio, 705 So. 2d 742, 743–44 (La. Ct. App. 1993); Patriarca v. Ctr. for Living & Working, Inc., 778 N.E.2d 877, 881–82 (Mass. 2002); Smith v. Kan. City S. Ry., 87 S.W.3d 266, 272–75 (Mo. Ct. App. 2002); Klier v. Sordoni Skanska Constr. Co., 766 A.2d 761, 770 (N.J. Super. Ct. App. Div. 2001); Muriel Siebert & Co. v. Intuit Inc., 868 N.E.2d 208, 210 (N.Y. 2007); Fulton v. Lane, 829 P.2d 959, 960 (Okla. 1992); State *ex rel.* Charleston Area Med. Ctr. v. Zakaib, 437 S.E.2d 759, 763–64 (W. Va. 1993); Strawser v. Exxon Co., U.S.A., 843 P.2d 613, 622 (Wyo. 1992); ABA Comm. on Ethics & Pro. Resp., Formal Op. 91-359 (1991); Ill. State Bar Ass'n, Advisory Op. 09-01 (2009); State Bar of Mich. Comm. on Pro. & Jud. Ethics, Op. RI-360 (2013); Sup. Ct. of Ohio Bd. of Pro. Conduct, Op. 2016-5 (2016); Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Formal Op. 2005-200 (2005); Va. State Bar Standing Comm. on Legal Ethics, Op. 1890 (2020).

lawyer is not required for communication with a former constituent."[92]

Lawyers' freedom to speak with an organization's former employees has limits, however.[93] Ex parte communication is prohibited if the lawyer knows that the former employee is separately represented in the matter.[94] Courts have also held that lawyers cannot communicate ex parte with former employees who had managerial responsibility in the matter being litigated,[95] who have an ongoing relationship with the organization concerning the litigation,[96] or whose alleged acts or omissions gave rise to the litigation.[97]

Furthermore, courts generally hold that Model Rule 4.2 or Model Rules 4.2 and 4.4(a), read together, prohibit lawyers from asking former employees about documents or information protected by the organization's attorney-client privilege or work product immunity,[98]

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92. MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 7 (AM. BAR ASS'N 2020).

93. *See* Shoreline Computs., Inc. v. Warnaco, Inc., No. CV 990422853S, 2000 WL 371206, at *2 (Conn. Super. Ct. Apr. 3, 2000) ("Although Rule 4.2 does not prohibit ex parte communication with former employees of a corporate party, there are recognized limits to such contact.").

94. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020).

95. *W.R. Grace*, 401 F. Supp. 2d at 1067; *Patriarca,* 778 N.E.2d at 881–82.

96. *Lang*, 826 P.2d at 1233.

97. *See, e.g.*, Merck v. Swift Transp. Co., No. CV-16-01103-PHX-ROS, 2018 WL 3774007, at *3 (D. Ariz. July 19, 2018) (sanctioning a plaintiff's lawyer who communicated ex parte with the defendant's former driver whose alleged negligence gave rise to the litigation); Rodriguez v. Spartan Concrete Prods., LLC, No. 1:12-cv-29, 2017 WL 1508179, at *3 (D.V.I. Apr. 25, 2017) (prohibiting ex parte communications with the defendant's former president who influenced the employment decisions underlying the plaintiffs' Fair Labor Standards Act lawsuit).

98. *See, e.g.*, Kozowski v. Nelson, No.: 6:18-cv-00275-MK, 2020 WL 1066329, at *3 (D. Or. Mar. 5, 2020) (referring to the attorney-client privilege and citing Oregon Rules 4.2 and 4.4); Harris Davis Rebar, LLC v. Structural Iron Workers Loc. Union No. 1, Pension Tr. Fund, No. 17 C 6473, 2019 WL 447622, at *6 (N.D. Ill. Feb. 5, 2019) ("[R]ead together, Rules 4.2 and 4.4 allow an attorney to communicate with a former constituent, but limits those communications to non-confidential and non-privileged information."); Martinez v. County of Antelope, No. 4:15CV3064, 2016 WL 3248241, at *9–10 (D. Neb. June 13, 2016) (disqualifying a lawyer who knowingly obtained privileged information from a former county official); Tomasian v. C.D. Peacock, Inc., No. 09C5665, 2012 WL 2590493, at *7 (N.D. Ill. July 3, 2012) (referring to Rule 4.2 and thereafter stating that "former employees are barred from discussing privileged information to which they are privy."); Gifford v. Target Corp., 723 F. Supp. 2d 1110, 1118–23 (D. Minn. 2010) (disqualifying a law firm that received privileged documents from a former employee after cautioning her not to reveal privileged information and referring to Rule 4.2 cmt. 7 and Rule 4.4(a)); Weber v. Fujifilm Med. Sys., U.S.A., No.

as do legal ethics authorities.[99] In fact, Model Rule 4.4(a) is the correct (and certainly the better) source of authority for this proposition.[100] Comment 7 to Model Rule 4.2 makes this clear by referring lawyers to Model Rule 4.4(a) when they are called upon to analyze their communication obligations regarding former employees who possess their former employers' confidential information.[101]

3:10 CV 401(JBA), 2010 WL 2836720, at *4 (D. Conn. July 19, 2010) (considering whether the defendants' former employees "had 'extensive exposure to privileged communications and sustained access to the [defendants'] litigation strategy and the attorney's work product'" before allowing them to be interviewed ex parte (quoting *Shoreline Computs.*, 2000 WL 371206, at *2)); Smith v. Kalamazoo Ophthalmology, 322 F. Supp. 2d 883, 890–91 (W.D. Mich. 2004) (citations omitted) (explaining that under Rule 4.2, "an attorney may have *ex parte* contact with an unrepresented former employee of an organizational party, subject to the limitation that the attorney may not inquire into areas subject to the attorney-client privilege or work product doctrine."); Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 753–54 (D. Md. 1997) (applying Rule 4.2 to the plaintiff's lawyer's lengthy ex parte interview of the defendants' former general counsel); Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651, 657 (M.D. Fla. 1992) (discussing Rule 4.2 before stating that "[p]rivileged communications present a distinct problem with respect to contact with former employees, thus *ex parte* contact should be barred to prevent disclosure of any inadvertent confidential communications."); *Shoreline Computs.*, 2000 WL 371206, at *2 (describing former employees with whom ex parte communication is prohibited under Rule 4.2).

99. *See, e.g.*, N.C. State Bar, Formal Ethics Op. 1997-2 (1998) ("The exception [to Rule 4.2 allowing ex parte communications with former employees] must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel."); Pa. Bar Ass'n Comm. on Leg. Ethics & Pro. Resp., Op. 2004-80 (2004) (referring to Rule 4.2 and the attorney-client privilege).

100. *See* MODEL RULES OF PRO. CONDUCT r. 4.4(a) (AM. BAR ASS'N 2020) (stating that "[i]n representing a client," a lawyer "cannot use methods of obtaining evidence that violate" a third person's legal rights); *see, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 91-359 (1991) (referring to the attorney-client privilege); State Bar of Mich. Comm. on Pro. & Jud. Ethics, Op. RI-360 (2013) (citation omitted) ("If granted an interview with a former employee who had managerial responsibility, opposing counsel must not seek disclosure of any attorney work-product or privileged communications between the former employee and the organization's counsel that occurred while the individual was employed by the company . . . ."); Neb. Jud. Ethics Comm., Op. 94-5 (1994) (referring to the attorney-client privilege).

101. *See* MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 7 (AM. BAR ASS'N 2020) ("In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.").

C. Model Rule 4.3: Lawyers' Communications with Unrepresented Persons

As the discussion of Model Rule 4.2 suggests, a person with whom a lawyer wishes to speak during informal discovery may not be represented by counsel in the matter. In that situation, Model Rule 4.3 governs the lawyer's conduct.[102] Model Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[103]

In a nutshell, Model Rule 4.3 anticipates the danger that a lawyer may try to exploit an unrepresented person's lack of legal knowledge or lack of sophistication in legal matters, and it thus limits the lawyer's ability to do so.[104]

Model Rule 4.3 "distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which" there is no conflict.[105] In the former instance, the rule assumes that the potential for a lawyer to "compromise the unrepresented person's interests is so great" that the

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102. *See* MODEL RULES OF PRO. CONDUCT r. 4.2 cmt. 9 (AM. BAR ASS'N 2020) ("In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3."); ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 482 (9th ed. 2019) (explaining that Model Rule 4.3 governs lawyers' contacts with a represented organization's employees who are not within one of the protected categories identified in comment 7 to Model Rule 4.2 and to a represented organization's former employees).

103. MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2020).

104. *See, e.g.*, Marino v. Usher, 673 F. App'x 125, 131–32 (3d Cir. 2016) (discussing the lawyer's exploitation of an unrepresented person and concluding that the lawyer's conduct violated Rule 4.3).

105. MODEL RULES OF PRO. CONDUCT r. 4.3 cmt. 2 (AM. BAR ASS'N 2020).

lawyer must be barred from giving any legal advice other than "the advice to obtain counsel."[106] This does not mean, however, that a lawyer has any sort of *Miranda*-type obligation.[107] Provided that the lawyer does not mislead the person into believing that she does not need personal counsel or does not have the ability or right to obtain her own counsel, the lawyer has no obligation to advise the person to retain a lawyer.[108] In short, while Model Rule 4.3 *permits* a lawyer to advise an unrepresented person whose interests may conflict with the interests of the lawyer's client to retain a lawyer, it does not *require* a lawyer to give such advice.[109] Questions as to whether a lawyer's remarks constitute legal advice should be answered by focusing on what the person may reasonably have understood, rather than on the lawyer's intent.[110] This determination may be influenced by the unrepresented person's experience and sophistication, as well as by the context or setting in which the communication occurs.[111]

If an unrepresented person's interests are aligned with those of the lawyer's client, on the other hand, Model Rule 4.3 grants the lawyer discretion to give the person legal advice.[112] This is a situation that demands caution. A lawyer who provides legal advice here risks creating an implied attorney-client relationship with the person that may create conflicts of interest for the lawyer or produce other unintended consequences.[113]

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106. *Id.*

107. Aguiar v. Espirito Santo Bank (*In re* Banco Santos, S.A.), Ch. 15 Case No. 10-47543-BKC-LMI, Adv. No. 13-1934-BKC-LMI, 2014 WL 5655025, at *11 (Bankr. S.D. Fla. Nov. 3, 2014); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 cmt. e (AM. L. INST. 2000).

108. ROTUNDA & DZIENKOWSKI, *supra* note 65, § 4.3-2, at 1028.

109. *See* Suck v. Sullivan, No. 207488, 1999 WL 33437564, at *2 (Mich. Ct. App. Aug. 27, 1999) ("[Rule 4.3] does not impose a duty on an attorney to recommend that a person who is not represented by counsel confer with an attorney under any circumstances." (citation omitted)).

110. *See, e.g.*, Att'y Q v. Miss. State Bar, 587 So. 2d 228, 233 (Miss. 1991) (holding that the lawyer's statement, "don't worry about it," constituted legal advice under the circumstances).

111. MODEL RULES OF PRO. CONDUCT r. 4.3 cmt. 2 (AM. BAR ASS'N 2020).

112. ROTUNDA & DZIENKOWSKI, *supra* note 65, § 4.3-2, at 1028.

113. Courts may imply or infer an attorney-client relationship from the parties' conduct. *In re* Hodge, 407 P.3d 613, 648 (Kan. 2017); Patel v. Martin, 111 N.E.3d 1082, 1093 (Mass. 2018); State *ex rel.* Couns. for Discipline of the Neb. Sup. Ct. v. Chvala, 935 N.W.2d 446, 471 (Neb. 2019). When deciding whether an implied attorney-client relationship exists, courts focus on the would-be client's expectations and especially the reasonableness of the person's belief "that he is consulting a lawyer in that capacity

D. Model Rule 4.4: Respect for Rights of Third Persons

Informal discovery controversies in which lawyers are accused of misconduct frequently involve Model Rule 4.4, which provides:

> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
>
> (b) 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.[114]

With respect to Rule 4.4(a), the question typically is whether the lawyer used methods of obtaining evidence that violated another person's legal rights.[115] As for Rule 4.4(b), there are two issues: (1) whether the rule even applies to documents or information that are delivered to the lawyer intentionally rather than being disclosed inadvertently; and (2) if the rule applies, how the lawyer responded after taking possession of the documents or information in dispute.

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and his manifested intention to seek professional legal advice." Diversified Grp., Inc. v. Daugerdas, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001) (citations omitted) (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978)). Even applying this seemingly lenient standard, however, a putative client's unilateral belief that an attorney-client relationship exists will not establish such a relationship. *In re* Rescue Concepts, Inc., 556 S.W.3d 331, 339 (Tex. App. 2017). Rather, a putative client's subjective expectation that an attorney-client relationship has been formed must be accompanied by facts indicating that the person's belief is objectively reasonable. Hinerman v. Grill on Twenty First, LLC, 112 N.E.3d 1273, 1275–76 (Ohio Ct. App. 2018); O'Kain v. Landress, 450 P.3d 508, 515–16 (Or. Ct. App. 2019). At bottom, then, the existence of an attorney-client relationship is measured against an objective standard. *See, e.g.*, *Hinerman*, 112 N.E.3d at 1275–76; *O'Kain*, 450 P.3d at 515–16.

114. MODEL RULES OF PRO. CONDUCT r. 4.4 (AM. BAR ASS'N 2020).

115. *See, e.g.*, *In re* Eisenstein, 485 S.W.3d 759, 762–63 (Mo. 2016) (suspending a lawyer for violating Rule 4.4(a), among others, where he took possession of documents, including an attorney-client privileged communication, that his divorce client obtained by secretly tapping into his wife's e-mail account).

1. Model Rule 4.4(a): Obtaining Evidence in Violation of a Third Person's Rights

Again, Model Rule 4.4(a) provides that a lawyer representing a client cannot obtain evidence through methods that violate a third person's legal rights.[116] To use a common example, the rule prohibits lawyers from questioning witnesses or opponents' employees about attorney-client privileged information.[117] Similarly, lawyers may not ask adversaries' former employees about privileged matters.[118] A person's or party's attorney-client privilege is a "'legal right'" within the meaning of Model Rule 4.4(a).[119] Information protected by the work product doctrine is also off-limits to an inquiring lawyer.[120]

A harder question is whether a third person's legal rights under Model Rule 4.4(a) extend to contractual confidentiality claims, such as duties imposed by confidentiality provisions in employment contracts, severance agreements, or other non-disclosure agreements. The black letter of Model Rule 4.4(a) indicates that it covers contractual confidentiality obligations, and some ethics authorities support that position.[121] On the other hand, there is authority to the

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116. MODEL RULES OF PRO. CONDUCT r. 4.4(a) (AM. BAR ASS'N 2020).

117. *See id.* r. 4.4 cmt. 1.

118. Calise v. Brady Sullivan Harris Mills, LLC, C.A. No. 18-99WES, 2019 WL 1397245, at *6 (D.R.I. Mar. 28, 2019); Harris Davis Rebar, LLC v. Structural Iron Workers Loc. Union No. 1, Pension Tr. Fund, No. 17 C 6473, 2019 WL 447622, at *6 (N.D. Ill. Feb. 5, 2019); Brown v. St. Joseph Cnty., 148 F.R.D. 246, 255 (N.D. Ind. 1993); Vlassis v. Samelson, 143 F.R.D. 118, 125 (E.D. Mich. 1992). It is important to remember, however, that the attorney-client privilege protects the content of attorney-client communications; it does not prevent the discovery of the facts communicated. Collins v. Braden, 384 S.W.3d 154, 159 (Ky. 2012). Those facts remain discoverable by other means. *Id.* Thus, and by way of example, the fact that a lawyer speaks with an opponent's former employee and asks about facts that may also have been the subject of the opponent's confidential communications with its lawyer does not yield the conclusion that the inquiring lawyer violated Rule 4.4(a). *See, e.g.*, Freeman Equip., Inc. v. Caterpillar, Inc., 262 F. Supp. 3d 631, 634–35 (N.D. Ill. 2017) (citations omitted) (observing that "'topics' are not privileged; *communications* are, and only when all of the requisite conditions are met.").

119. Utah State Bar Ethics Advisory Op. Comm., Op. 96-01 (1996) (citation omitted).

120. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 cmt. b (AM. LAW INST. 2000).

121. *See, e.g.*, Alaska Bar Ass'n Ethics Comm., Op. 2019-1 (2019) ("[D]isclosure of the requested documents may well violate the terms of the confidentiality agreement and therefore violate the rights of the counterparty to that agreement. The lawyer may not use methods of obtaining evidence that violate the legal rights of the counterparty to that agreement." (citation omitted)).

effect that "[c]ontractual confidentiality agreements . . . cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case."[122] Confidentiality agreements are not akin to the attorney-client privilege when it comes to protecting confidential information in litigation.[123] It is therefore arguably wrong to view them as creating a legal right in this context. Indeed, § 102 of the Restatement (Third) of the Law Governing Lawyers excludes from "a duty of confidentiality to another imposed by law" those "confidentiality duties based only on contract."[124]

Given the express language of Model Rule 4.4(a), the safe course for lawyers is to assume that information subject to a confidentiality agreement must be obtained through formal discovery channels.[125] Lawyers who question their duties under Rule 4.4(a) may wish to consider seeking an advisory opinion from a state or local ethics committee where such services are available. Discovering lawyers also need to tread carefully where a confidentiality agreement is in play lest they be accused of tortiously interfering with another party's contract.[126] Whether a lawyer can avoid or defeat tortious interference allegations because the agreement is unenforceable, the alleged interference is justified or otherwise excused, or some element of the

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122. Nestor v. Posner-Gerstenhaber, 857 So. 2d 953, 955 (Fla. Dist. Ct. App. 2003) (citations omitted).

123. For example, confidentiality or non-disclosure agreements are no barrier to discovery between litigants. Diamond Resorts Int'l, Inc. v. Phillips, Case No. 3:17-cv-01124, 2018 WL 3326814, at *2 (M.D. Tenn. Apr. 17, 2018) (quoting Saini v. Int'l Game Tech., 434 F. Supp. 2d 913, 922 (D. Nev. 2006)). Nor may an employer "use confidentiality or non-disclosure agreements 'to chill former employees from voluntarily participating in legitimate investigations into [the employer's] alleged wrongdoing . . . .'" *Id.* (alteration in original) (quoting *In re* JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002)).

124. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 102 cmt. b (AM. LAW INST. 2000).

125. *See, e.g.*, Henry v. IAC/Interactive Grp., No. C05-1510RSM, 2006 WL 354971, at *4–6 (W.D. Wash. Feb. 14, 2006) (ordering the plaintiff to return her laptop and all of the defendant's documents, except those obtained through the discovery process, based on provisions in the plaintiff's employment contract that prohibited her "from disclosing or using for any purpose other than in the course of her employment confidential or proprietary information or trade secrets" and requiring her, upon the termination of her employment, "to return property and equipment belonging to the company, including her computer, e-mail and documents").

126 *See generally* Paisley Park Enters., Inc. v. Boxill, 361 F. Supp. 3d 869, 880 (D. Minn. 2019) ("To state a claim for tortious interference with a contract, a party must allege (1) the existence of a contract, (2) the accused's knowledge of the contract, (3) intentional procurement of its breach, (4) the absence of justification, and (5) damages.").

cause of action fails on the facts obviously will depend on the case and the law of the jurisdiction.[127]

2. Model Rule 4.4(b): Evaluating the Lawyer's Response

Once a lawyer acquires another party's potentially privileged or confidential information outside formal discovery channels—whether through the client, a witness, an ally, or an anonymous source—the issue becomes the lawyer's response.[128] Courts hearing such cases frequently apply or analogize to Model Rule 4.4(b) and state analogs and sanction lawyers who did not comply with the rule's notification requirement.[129] This is true even though the documents or information at issue did not reach the lawyer inadvertently, but rather were intentionally provided.[130]

This approach is unsupportable. By its plain terms, Model Rule 4.4(b) applies only to documents and information that lawyers know

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127. *See generally* United States *ex rel.* Gohil v. Sanofi U.S. Servs. Inc., No. 02-2964, 2016 WL 9185141, at *2 n.3 (E.D. Pa. Sept. 29, 2016) (involving a False Claims Act case where the defendant claimed that the plaintiff took documents in violation of her employment agreement and noting that "[w]hile courts are split on whether . . . public policy overrides an employee's breach of an employment agreement in the context of the FCA, most federal courts have held that documents, which were improperly taken from a company, may be used to support a False Claims Act claim based on a 'public policy exception[,]'" thus suggesting that tortious interference claims arising out of FCA cases may well fail).

128. *See* MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2020).

129. *See, e.g.*, Harris Davis Rebar, LLC v. Structural Iron Workers Loc. Union No. 1, Pension Tr. Fund, No. 17 C 6473, 2019 WL 447622, at *4, *7 (N.D. Ill. Feb. 5, 2019) (applying Model Rule 4.4 and sanctioning the lawyers for "reckless[ly]" waiting three years to notify the plaintiff that a former employee of the plaintiff had given the lawyers numerous internal documents); Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282-JTM-GEB, 2017 WL 2831485, at *14 (D. Kan. June 30, 2017) (analogizing to Kansas Rule 4.4(b), which mirrors Model Rule 4.4(b), in a case where documents were delivered anonymously); Chamberlain Grp., Inc. v. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill. 2010) (citing Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *4–5 (W.D. Pa. Jan. 29, 2010)) ("Many courts, this Court included, fail to see why [the Model Rule 4.4(b)] duty to disclose should cease where confidential documents are sent intentionally and without permission.").

130. *Harris Davis Rebar*, 2019 WL 447622, at *4 (explaining that, despite ambiguity arising from the text of the rule, Model Rule 4.4(b) applies to intentionally obtained documents and outlining sister courts' agreement); *Raymond*, 2017 WL 2831485, at *3–4 (discussing the anonymous delivery of the documents at issue); *Chamberlain*, 270 F.R.D. at 398 (noting that the plaintiff had not solicited the documents at issue).

or reasonably should know were sent to them inadvertently.[131] The rule's language is unequivocal. Furthermore, comment 2 to Model Rule 4.4, which states that the 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 inappropriately obtained by the sending person[,]" reinforces Model Rule 4.4(b)'s limitation to inadvertent disclosures.[132] The ABA's Standing Committee on Ethics and Professional Responsibility has also clarified that Model Rule 4.4(b) applies solely to inadvertent transmissions of documents or information.[133] Finally, state and local ethics bodies have similarly stated that their jurisdictions' versions of Rule 4.4(b) apply only where lawyers receive materials that they know or reasonably should know were inadvertently disclosed.[134]

Courts misapply Rule 4.4(b) to intentional disclosures in various ways. In *In re Eisenstein*,[135] discussed earlier in regard to Model Rule 3.4(a),[136] the Missouri Supreme Court held that Joel Eisenstein

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131. MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2020).

132. *Id.* r. 4.4 cmt. 2.

133. ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011); ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-440 (2006).

134. *See, e.g.*, Alaska Bar Ass'n Ethics Comm., Op. 2019-1 (2019) (reasoning that Rule 4.4(b) relates to inadvertently disclosed information and therefore does not apply where information was intentionally delivered); Fla. State Bar Ass'n Comm. on Pro. Ethics, Ethics Op. 07-1 (2007) (concluding that Rule 4.4(b) did not apply where the lawyer's divorce client wrongfully took documents from her husband and told the lawyer what she had done); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2012-01 (2012) (explaining that Rule 4.4(b) addresses lawyers' obligations only with regard to inadvertently disclosed documents and would not apply if a document were deliberately sent to a lawyer by someone other than its owner); Ass'n of the Bar of the City of N.Y. Comm. on Pro. & Jud. Ethics, Formal Op. 2012-1 (2012) (duplicating N.Y. State Bar Formal Op. 2012-01); Or. State Bar Ass'n, Ethics Op. 2011-186 (2011) ("Oregon RPC 4.4(b) does not require [a] [l]awyer to take or refrain from taking any particular actions with respect to documents that were sent purposely, albeit without authority." (citation omitted)). *But see* Cal. State Bar Standing Comm. on Pro. Resp. & Conduct, Formal Op. 2013-188 (2013) (applying the inadvertent disclosure standard from two California Supreme Court decisions to a lawyer's receipt of an opponent's privileged document from an unknown third party); Iowa State Bar Ass'n Ethics & Prac. Guidelines Comm., Op. 15-02 (2015) ("[W]e depart from the position of the American Bar Association in ABA Formal Op. 11-460 and instead adopt a requirement of stop, notify, return and, in the case of wrongful interception to withdraw regarding the situation where a lawyer has received another lawyer's confidential attorney client communication.").

135. 485 S.W.3d 759 (Mo. 2016).

136. *See supra* Part II.A.

violated Missouri's version of Rule 4.4(a) in connection with his use of documents that his client—the husband in a contested divorce—impermissibly obtained from his wife's e-mail account.[137] But the court silently drifted into Rule 4.4(b) in stating that "Rule 4-4.4 required Mr. Eisenstein to promptly disclose his receipt of the information to [the wife's lawyer] so that appropriate protective measures could be undertaken."[138] The *In re Eisenstein* court was shepherded toward this conclusion by a "comment accompanying Rule 4-4.4(a) [which] recognize[d] that lawyers 'sometimes receive documents that were mistakenly sent or *procured* by opposing parties or lawyers.'"[139] In fact, beyond having nothing to do with intentional disclosures, the comment the court thought it was quoting expressly referred to Rule 4-4.4(b) and never mentioned lawyers' procurement of documents: "Rule 4-4.4(b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or *produced* by opposing parties or their lawyers."[140] The *In re Eisenstein* court strangely butchered its own rule.

Some courts acknowledge Model Rule 4.4(b)'s express limitation to inadvertent disclosures but reason that the same duties should apply to intentional disclosures.[141] For example, in *Chamberlain Group, Inc., v. Lear Corp.*,[142] one of the plaintiffs, JCI, received confidential Lear Corp. (Lear) documents that were sent to it unsolicited by a former Lear contractor.[143] When Lear sought sanctions against JCI, the court evaluated JCI's conduct against Model Rule 4.4(b).[144] The court acknowledged that the disclosure duty imposed by Model Rule 4.4(b) seemed limited to inadvertent productions of documents, but then brushed aside that limitation, stating: "Many courts, this [c]ourt included, fail to see why this same duty to disclose should cease where confidential documents are sent

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137. *In re Eisenstein*, 485 S.W.3d at 762–63.

138. *Id.* at 762.

139. *Id.* (emphasis added) (quoting MO. SUP. CT. R. 4-4.4 cmt. 2 (2019)).

140. MO. SUP. CT. R. 4-4.4 cmt. 2 (2019) (emphasis added).

141. *See, e.g.*, Webb v. CBS Broad., Inc., No. 08 C 6241, 2011 WL 1743338, at *12 (N.D. Ill. May 6, 2011) (stating that the Rule 4.4(b) disclosure requirement "applies *a fortiori*" to documents obtained intentionally); Forward v. Foschi, No. 9002/08, 2010 WL 1980838, at *17 (N.Y. Sup. Ct. May 18, 2010) (rejecting the argument that Rule 4.4(b) is limited to inadvertent disclosures).

142. 270 F.R.D. 392 (N.D. Ill. 2010).

143. *Id.* at 393–94.

144. *Id.* at 398.

intentionally and without permission."[145] "If anything," the *Chamberlain* court reasoned, "the duty to disclose should be stricter when a party obtains the documents outside legitimate discovery procedures."[146] The court determined that sanctions were merited because JCI had not promptly revealed its acquisition of Lear's documents, as Model Rule 4.4(b) would have mandated had JCI instead obtained the documents through Lear's carelessness.[147] The court in *Harris Davis Rebar, LLC v. Structural Iron Workers Local Union No. 1, Pension Trust Fund*[148] recently embraced the *Chamberlain* court's reasoning, saying that it "[m]akes a lot of sense."[149] While acknowledging that Model Rule 4.4(b) facially applies only to documents that were inadvertently produced, the *Harris Davis Rebar* court agreed with other courts that it would be "'nonsensical to apply a separate and lesser standard to intentionally-disclosed documents.'"[150]

To the contrary, the approach taken by the *Chamberlain* and *Harris Davis Rebar* courts and other courts of the same mind makes little sense. Applying a separate standard to intentionally-disclosed documents is a logical course.

First, the superficially appealing argument that the reasoning behind Model Rule 4.4(b) applies with at least equal and likely greater force to intentional disclosures as it does to inadvertent disclosures is difficult to square with the language of the rule.[151] If the reasoning applied equally to intentional disclosures, surely the drafters of the Model Rules would have included such disclosures in Model Rule

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145. *Id.* (citing Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *4–5 (W.D. Pa. Jan. 29, 2010)).

146. *Id.*

147. *Id.*

148. No. 17 C 6473, 2019 WL 447622 (N.D. Ill. Feb. 5, 2019).

149. *Id.* at *4. In adopting the *Chamberlain* court's rationale, the *Harris Davis Rebar* court preliminarily observed that other courts had reached the same conclusion, including Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282-JTM-GEB, 2017 WL 2831485, at *14 (D. Kan. June 30, 2017) and Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *4–5 (W.D. Pa. Jan. 29, 2010).

150. *Harris Davis Rebar*, 2019 WL 447622, at *4 (quoting *Raymond*, 2017 WL 2831485, at *14).

151. *See* Webb v. CBS Broad., Inc., No. 08 C 6241, 2011 WL 1743338, at *12 (N.D. Ill. May 6, 2011) (citing ILL. RULES OF PRO. CONDUCT 4.4 cmt. 2) ("The purpose of notice [under Rule 4.4(b)] is to allow the sender to take protective steps."); *see also* MODEL RULES OF PRO. CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS'N 2020) ("If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.").

4.4(b). That would have been easy to do.[152] But the fact remains that Model Rule 4.4(b) and most state analogs, by their very terms, do not cover intentional disclosures, and courts weighing sanctions or discipline should not expect allegedly errant lawyers to have followed the procedures outlined in a patently inapplicable rule, regardless of the reasoning behind the rule.

Relatedly, no court would ever apply the reasoning behind a statute that expressly did not apply to a lawyer's or party's conduct to penalize the lawyer or party for such conduct. The result should be no different where Model Rule 4.4(b) is concerned, given that courts generally interpret rules of professional conduct according to the same principles that govern statutory interpretation.[153]

Second, under Model Rule 1.6(a), a lawyer cannot "reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)" of Model Rule 1.6.[154] A lawyer's duty of confidentiality "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[155] In the case of inadvertently disclosed documents or information, Model Rule 4.4(b) creates an exception to lawyers' broad Rule 1.6(a) duty of confidentiality.[156] But Model Rule 4.4(b) carves out no similar exception for documents or information that are intentionally provided to a lawyer. Consequently, absent the client's informed consent, or another rule, other law, or court order that requires disclosure,[157] a lawyer cannot ethically notify the owner of documents or information that were intentionally provided to the lawyer as some courts would have the lawyer do under the auspices

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152. *See, e.g.*, TENN. RULES OF PRO. CONDUCT r. 4.4(b) (2011) (governing both inadvertent and intentional, but unauthorized, disclosures).

153. Ferris, Thompson & Zweig, Ltd. v. Esposito, 90 N.E.3d 400, 405 (Ill. 2017); Law Offs. of Jeffrey Sherbow, P.C. v. Fieger & Fieger, P.C., 930 N.W.2d 416, 424 (Mich. Ct. App. 2019) (quoting Morris & Doherty, P.C. v. Lockwood, 672 N.W.2d 884, 888 (Mich. Ct. App. 2003)); Comm'n for Law. Discipline v. Hanna, 513 S.W.3d 175, 178 (Tex. Ct. App. 2016).

154. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020).

155. *Id.* r. 1.6 cmt. 3.

156. *See id.* (noting that "[a] lawyer may not disclose [information relating to the representation] except as authorized or required by the Rules of Professional Conduct or other law.").

157. *See id.* r. 1.6(b)(6) (permitting a lawyer to reveal information relating to a client's representation to the extent necessary "to comply with other law or a court order").

of Model Rule 4.4(b).[158] In other words, a lawyer's duty to disclose cannot be stricter when she obtains documents or information outside formal discovery procedures,[159] and it is sensible to apply a different and lower standard to intentionally-disclosed documents or information. In summary, the *Chamberlain* and *Harris Davis Rebar* courts' reasoning as set forth in their opinions is at best incomplete, as is that of other courts that take the same approach.

To their credit, not all courts attempt to jam the square peg of Model Rule 4.4(b) into the round hole of intentional disclosures.[160] That said, a lawyer may have a duty of disclosure apart from any imposed under Model Rule 4.4(b), as where a rule of civil procedure requires the disclosure of documents sent to the lawyer intentionally.[161] A court could also craft a disclosure obligation in a case management order or impose one pursuant to its inherent authority to regulate the conduct of the parties and lawyers who

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158. ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011); *see also* Fla. State Bar Ass'n Comm. on Pro. Ethics, Ethics Op. 07-1 (2007) (discussing a lawyer's duties where the lawyer's divorce client removed documents from her husband's office, figured out her husband's computer and e-mail passwords and secretly downloaded confidential and privileged documents, and removed potentially privileged documents from her husband's car); Or. State Bar Ass'n, Ethics Op. 2011-186 (2011) (explaining that if a lawyer came into possession of purloined documents that were obtained in a fashion that might involve criminal conduct, the lawyer could not disclose receipt of the documents under Oregon's version of Rule 1.6).

159. *Contra* Chamberlain Grp., Inc. v. Lear Corp., 270 F.R.D. 392, 398 (N.D. Ill. 2010) ("If anything, the duty to disclose should be stricter when a party obtains the documents outside legitimate discovery procedures.").

160. *See, e.g.*, Brado v. Vocera Commc'ns, Inc., 14 F. Supp. 3d 1316, 1320–21 (N.D. Cal. 2014) (deciding that the lawyers acted ethically without even mentioning Rule 4.4(b)); Chesemore v. All. Holdings, Inc., 276 F.R.D. 506, 514–16 (W.D. Wis. 2011) (declining to apply Wisconsin's version of Rule 4.4(b) to documents that were intentionally disclosed); Merits Incentives, LLC v. Eighth Judicial District Court, 262 P.3d 720, 724 (Nev. 2011) (agreeing with the parties that Model Rule 4.4(b) does not apply to intentional disclosures); *see also* Oracle Am., Inc. v. Innovative Tech. Distribs., LLC, No. 11-CV-01043-LHK, 2011 WL 2940313, at *6–7 (N.D. Cal. July 20, 2011) (citing Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1099 (Cal. 2007)) (declining to apply the notification rule described in *Rico*, a case where an opposing party inadvertently produced privileged materials, to a situation where confidential e-mails were sent intentionally to a party prior to the initiation of litigation and later used by the party's lawyers).

161. ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011) (discussing the situation where an employer's lawyer received a copy of an employee's confidential communications with counsel that was located on the employee's workplace computer or in one of the employee's business e-mail files).

appear before it.[162] Should such an obligation exist, whether located in a rule of civil procedure or imposed via court order, a lawyer would be ethically bound to comply.[163]

E. Model Rule 8.4(a): The Proxy Rule

There may be a situation in which a lawyer engaged in informal discovery would like to obtain a party's or potential litigant's documents or information but knows that ethically, she cannot do so. In such a case, Model Rule 8.4(a) prohibits the lawyer from using an agent to do that which she cannot do herself.[164] Lawyers cannot, for example, use their clients as proxies to circumvent rules of professional conduct.[165] Of course, clients may, on their own initiative, collect documents or other information that they then share with their lawyers.[166] As long as the lawyers do not control or direct the clients' activities, however, there should be no basis for a Rule 8.4(a) violation.[167]

F. Model Rule 8.4(b): Criminal Conduct by a Lawyer

Model Rule 8.4(b) makes it "professional misconduct for a lawyer to" . . . "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other

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162. *See id.*; *see, e.g.*, *Merits Incentives*, 262 P.3d at 725 (adopting a notification requirement where a lawyer receives documents or evidence "anonymously or from a third party unrelated to the litigation"); ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011) ("To say that Rule 4.4(b) and other rules are inapplicable is not to say that courts cannot or should not impose a disclosure obligation in this context pursuant to their supervisory or other authority.").

163. *See* MODEL RULES OF PRO. CONDUCT r. 3.4(c) (AM. BAR ASS'N 2020) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]").

164. *Id.* r. 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]").

165. *See, e.g.*, *In re* Pyle, 91 P.3d 1222, 1228–29 (Kan. 2004) (involving a plaintiff's lawyer who drafted an affidavit for the defendant's execution, which he had his client deliver to the defendant; reasoning that Kansas Rule 8.4(a) was incorporated in Kansas Rule 4.2, the court concluded that the lawyer violated the latter rule).

166. *See, e.g.*, United States *ex rel.* Thomas v. Duke Univ., No. 1:17-CV-276, 2018 WL 4211372, at *4–5 (M.D.N.C. Sept. 4, 2018) (involving a *qui tam* relator who, "at his counsel's suggestion[,]" took notes of conversations with co-workers while the case was under seal and shared those notes with his counsel).

167. *See id.* at *5 (declining to sanction the relator's counsel).

respects . . . ."[168] As the language of the rule indicates, not every criminal act by a lawyer violates Rule 8.4(b). Not every criminal act by a lawyer indicates that the lawyer is unfit to practice.[169] Whether a lawyer's criminal act reflects on a lawyer's fitness to practice depends on the facts of the case.[170] To impose discipline, courts generally require a connection between the lawyer's allegedly criminal conduct and the practice of law.[171] Notably, Rule 8.4(b) does not require a criminal charge, complaint, prosecution, guilty plea, *Alford* plea, plea of no contest, or conviction to find a violation,[172]

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168. MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS'N 2020).

169. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Sears, 933 N.W.2d 214, 220 (Iowa 2019) (citing Iowa Sup. Ct. Att'y Disciplinary Bd. v. Templeton, 784 N.W.2d 761, 767 (Iowa 2010)); State *ex rel.* Okla. Bar Ass'n v. McMillen, 393 P.3d 219, 223 (Okla. 2017); *In re* Disciplinary Proc. Against Johns, 847 N.W.2d 179, 185–87 (Wis. 2014).

170. *Templeton*, 784 N.W.2d at 767 (quoting *In re* Conduct of White, 815 P.2d 1257, 1265 (Or. 1991)).

171. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Deremiah, 875 N.W.2d 728, 733 (Iowa 2016); State *ex rel.* Okla. Bar Ass'n v. McArthur, 318 P.3d 1095, 1098 (Okla. 2013).

172. *See, e.g.*, *In re* Ivy, 374 P.3d 374, 379 (Alaska 2016) ("Neither the text of Rule 8.4(b) nor the commentary to it requires an underlying criminal conviction. Rather . . . Rule 8.4(b) contemplates the criminal *nature* of an attorney's misconduct." (citation omitted)); Ligon v. Newman, 231 S.W.3d 662, 670 (Ark. 2006) ("Nothing in [Rule 8.4(b)] requires that there be a formal charge or conviction before the rules can be applied to an attorney's conduct."); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moran, 919 N.W.2d 754, 759 (Iowa 2018) (quoting Iowa Sup. Ct. Att'y Disciplinary Bd. v. Thomas, 844 N.W.2d 111, 116 (Iowa 2014)) ("[A] criminal conviction is not a prerequisite to finding a violation under our rules."); Ky. Bar Ass'n v. Greene, 386 S.W.3d 717, 730 (Ky. 2012) (stating that a lawyer can violate the Kentucky version of Model Rule 8.4(b) absent criminal charges or a conviction); *In re* Williams, 85 So. 3d 583, 591 (La. 2012) (explaining that the lack of a criminal conviction does not bar discipline for violating Rule 8.4(b)); Att'y Grievance Comm'n of Md. v. Bellamy, 162 A.3d 848, 863 (Md. 2017) ("Absence of criminal prosecution does not necessarily mean Rule 8.4(b) has not been violated."); *In re* Treinen, 131 P.3d 1282, 1284 (N.M. 2006) (involving a New Mexico statute governing conditional discharge of felony convictions and asserting that "a criminal conviction is not a prerequisite to discipline[e] . . . for criminal conduct."); *In re* Savage, 91 A.3d 356, 357 (R.I. 2014) (citations omitted) ("[A] criminal conviction is not a necessary prerequisite to a finding of a violation of Rule 8.4(b)."); *In re* Disciplinary Proc. Against Kamb, 305 P.3d 1091, 1099 (Wash. 2013) ("[A]n attorney may be sanctioned for committing a crime for which he was never charged."); *In re* Disciplinary Proc. Against Inglimo, 740 N.W.2d 125, 136 n.12 (Wis. 2007) (noting that a lawyer may violate Wisconsin's version of Rule 8.4(b) even without being charged or convicted of a crime).

although any of the last four events establishes a violation where the underlying conduct renders the lawyer unfit to practice.[173]

It is possible to envision a scenario in which a lawyer who takes possession of documents or information belonging to an opponent that were provided to the lawyer intentionally and without the other party's authorization could be concerned about a Rule 8.4(b) violation. An aggressive or especially aggrieved adversary might assert that the documents or information were stolen from it, such that the receiving lawyer might fear being charged with possession of stolen property.[174] Whether taking possession of documents or information belonging to an adversary that are delivered anonymously or provided by a client or witness constitutes a crime would depend on the facts and circumstances, and the controlling law.[175] In in most cases, it seems unlikely that a receiving lawyer's conduct would be considered criminal.[176] It is also possible that a prosecutor would have no interest

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173. *See, e.g.*, *In re* Najim, 405 P.3d 1223, 1233 (Kan. 2017) (asserting that a criminal judgment conclusively demonstrates the commission of a crime for purposes of a disciplinary proceeding); Att'y Grievance Comm'n of Md. v. Paul, 187 A.3d 625, 634 (Md. 2018) (stating that the lawyer's guilty plea and later conviction conclusively established his commission of a criminal act); *In re* Toman, 206 A.3d 345, 345 (N.J. 2019) (basing discipline on the lawyer's no contest plea to corrupting the morals of a minor); Morrissey v. Va. State Bar *ex rel.* Third Dist. Comm., 829 S.E.2d 738, 745 (Va. 2019) (involving an *Alford* plea to "contributing to the delinquency of a minor").

174. *See, e.g.*, CAL. PENAL CODE § 496(a) (2019) ("Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be [guilty of] a misdemeanor[.]"); KAN. STAT. ANN. § 21-5801(a)(4) (2020) (defining "[t]heft" to include "obtaining control over stolen property" when the property is known to have been stolen); MICH. COMP. LAWS ANN. § 750.535(1) (2020) ("A person shall not buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted."); S.C. CODE ANN. § 16-13-180(A) (2020) ("It is unlawful for a person to buy, receive, or possess stolen goods, chattels, or other property if the person knows or has reason to believe the goods, chattels, or property is stolen.").

175. L.A. Cnty. Bar Ass'n Pro. Resp. & Ethics Comm., Op. 531 (2019).

176. Even if a lawyer is never reported to law enforcement authorities or charged with a crime, it is possible that the party from whom documents or information were taken might allege that the lawyer received stolen property as part of a tortious scheme or as a predicate act for a claim. *See, e.g.*, Sorensen v. Polukoff, 784 F. App'x 572, 578–79 (10th Cir. 2019) (involving a RICO claim against a *qui tam* relator and his lawyers in which the lawyers' receipt of information belonging to the plaintiff saved

in such a case and therefore decline to prosecute the accused lawyer. If a lawyer were considered to have possessed stolen property under applicable criminal law, however, that conduct would surely violate Rule 8.4(b).[177]

G. Model Rule 8.4(d): Conduct Prejudicial to the Administration of Justice

Finally, depending on the facts, a lawyer's possession of documents or information that were delivered intentionally may implicate the Model Rule 8.4(d) prohibition on conduct "prejudicial to the administration of justice."[178] Although such conduct defies precise definition,[179] a lawyer's conduct is generally considered to be prejudicial to the administration of justice if it "taints the judicial process in more than a *de minimis* way."[180] Alternatively, conduct prejudicial to the administration of justice may be described as that which "impedes the efficient operation of the courts and wastes judicial resources,"[181] "harms (or has the potential to harm) either the substantive rights of a party to the proceeding or the procedural functioning of a case or hearing,"[182] or "is likely to impair public confidence in the profession, impact the image of the legal profession and engender disrespect for the court."[183] A lawyer need not intend to impair, impede, or taint the judicial process or harm a party's

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on a computer hard drive was alleged to constitute the receipt of stolen property and thus a RICO predicate act).

177. *See, e.g.*, *In re* Fahrenholtz, 215 So. 3d 204, 207–08 (La. 2017) (disbarring a lawyer who, among other offenses, pled guilty to illegally possessing stolen property); Cincinnati Bar Ass'n v. Evans, 640 N.E.2d 1139, 1140 (Ohio 1994) (disbarring a lawyer who received stolen property under a predecessor rule).

178. MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N 2020).

179. *See* Iowa Sup. Ct. Att'y Disciplinary Bd. v. Goedken, 939 N.W.2d 97, 107 (Iowa 2020) (quoting Iowa Sup. Ct. Att'y Disciplinary Bd. v. Weiland, 885 N.W.2d 198, 212 (Iowa 2016)).

180. *In re* Hallmark, 831 A.2d 366, 374 (D.C. 2003) (citing *In re* Hopkins, 677 A.2d 55, 60–61 (D.C. 1996)).

181. Iowa Sup. Ct. Att'y Disciplinary Bd. v. McGinness, 844 N.W.2d 456, 463 (Iowa 2014) (citing Iowa Sup. Ct. Att'y Disciplinary Bd. v. Kallsen, 814 N.W.2d 233, 238–39 (Iowa 2012)).

182. *In re* Conduct of Maurer, 431 P.3d 410, 416 (Or. 2018) (citing *In re* Lawrence, 256 P.3d 1070, 1073 (Or. 2011)).

183. Att'y Grievance Comm'n of Md. v. Agbaje, 93 A.3d 262, 274 (Md. 2014) (citation omitted).

substantive rights to violate Rule 8.4(d);[184] negligent conduct will suffice.[185]

A court is most likely to find a Rule 8.4(d) violation where the lawyer was actively involved in obtaining privileged or confidential documents or information in a fashion the court considered unethical,[186] lied to the court about how the documents were obtained or tried to cover up the manner in which they were acquired, or attempted to resist or refute allegations of unethical conduct in a manner that was itself unethical.[187] Although speculative, it might also be possible for a lawyer's use of misappropriated documents or information to so disrupt formal discovery or the trial of the matter that the lawyer might be found to have prejudiced the administration of justice.

III. REPRESENTATIVE CASES

Multiple courts have analyzed situations in which a lawyer received documents or other information belonging to another party in pending or threatened litigation that were intentionally sent to the lawyer or her client without the other party's authorization. Courts often struggle to resolve related disputes. This Part examines three representative cases: (a) *Burt Hill, Inc. v. Hassan*,[188] decided by a Pennsylvania federal court in 2010; (b) *Raymond v. Spirit AeroSystems Holdings, Inc.*,[189] a 2017 case from a Kansas federal court; and (c) *Merits Incentives, LLC v. Eighth Judicial District Court*,[190] decided by the Nevada Supreme Court in 2011. The *Burt Hill* and *Raymond* courts sanctioned the lawyers whose conduct was called

184. *In re* Disciplinary Action Against Kennedy, 864 N.W.2d 342, 347 (Minn. 2015).

185. *In re* Alexander, 300 P.3d 536, 546 (Ariz. 2013) (citing *In re* Clark, 87 P.3d 827, 831 (Ariz. 2004)).

186. *See, e.g.*, Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651, 654 (M.D. Fla. 1992) (finding that a law firm's payments to the defendant's former employee made it appear that the law firm had induced the former employee to reveal the defendant's confidential information, thereby violating Rule 8.4(d)).

187. *See, e.g.*, *In re* Eisenstein, 485 S.W.3d 759, 763 (Mo. 2016) (disciplining a lawyer who threatened the opposing lawyer with professional retribution if she persisted in accusing him of using documents that the accused lawyer's client improperly obtained from his wife's e-mail account).

188. No. Civ.A. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010).

189. No. 16-1282-JTM-GEB, 2017 WL 2831485 (D. Kan. June 30, 2017).

190. 262 P.3d 720 (Nev. 2011).

into question.[191] In contrast, the *Merits Incentives* court concluded that the lawyer acted ethically (based on significantly more favorable facts).[192]

A. The Burt Hill *Case*

In *Burt Hill*, the defendants' lawyers claimed that they received two anonymous deliveries of documents belonging to the plaintiff: one in September 2009 and another in October 2009.[193] The first set of documents allegedly arrived in a large, unmarked manila envelope left outside the defense lawyers' office; the second set was supposedly left at the lead defendant's home in an envelope of unknown provenance.[194] Although no one was certain, the documents probably were sent by one of the plaintiff's current or former employees.[195] The packages included documents that the defendants thought helped their case, including privileged and confidential documents belonging to the plaintiff.[196] Unsurprisingly, the plaintiff moved to preclude the defendants' use of the documents in the litigation and to disqualify the defense lawyers.[197] Either anticipating this possibility or more generally concerned about their professional duties, the defense lawyers had consulted a local lawyer, Craig Simpson, who specialized in legal ethics.[198] Simpson analyzed the facts and Rules 4.2, 4.3, and 4.4 and informed the defense lawyers that he could not find anything that would prohibit their use of the disputed documents.[199]

The court seriously doubted that the defense lawyers obtained the documents anonymously and observed that their unsworn claims to that effect were so suspect that they "practically beg[ged] for the

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191. *Raymond*, 2017 WL 2831485, at *18–23; *Burt Hill*, 2010 WL 419433, at *6.

192. *Merits Incentives*, 262 P.3d at 727.

193. *Burt Hill*, 2010 WL 419433, at *1.

194. *Id.*

195. *Id.*

196. *See id.* at *2 (quoting a letter from the lawyer who served as the defense lawyers' legal ethics expert describing certain documents as being perceived by the defendant as helpful to his case); *id.* at *3 (noting that at least some of the documents delivered to the defense lawyers in September 2009 were privileged); *id.* at *4 (discussing defense counsel's review of the plaintiff's "privileged and confidential documents").

197. *Id.* at *1.

198. *Id.* at *2.

199. *Id.* at *2–3 (quoting Simpson's opinion letter).

commencement of evidentiary proceedings."[200] But the plaintiff did not request an evidentiary hearing and neither party seemed to want one, so the court decided the plaintiff's motion based on the parties' submissions.[201]

The *Burt Hill* court began its resolution of the matter by examining Rule 4.4(b) of the Pennsylvania Rule of Professional Conduct, which is identical to Model Rule 4.4(b).[202] The court acknowledged that Rule 4.4(b) expressly applied only to a party's inadvertent production of documents.[203] "Of course, the 'production' in question here was not 'inadvertent,' but rather intentional and unauthorized."[204] The court was unimpressed with Simpson's seeming conclusion that because no ethics rules applied to the situation, the defense lawyers were free to use the mysteriously-delivered documents as they wished.[205] Rule 4.4(b)'s inapplicability "beg[ged] the question" of whether lawyers and judges in situations like this were left to "throw up their hands and conclude that nothing can or should be done to protect or ameliorate the document owner's privilege and confidentiality interests."[206] The answer to that plainly rhetorical question had to be no; "the law [did] not support this conclusion."[207]

With no rules of professional conduct to lean on, the court turned to substantive law, which clearly indicated that by reviewing the plaintiff's privileged and confidential documents, the defense lawyers imperiled themselves and their client.[208] The court observed that "[e]ven within the context of inadvertent productions, Pennsylvania courts ha[d] recognized that 'an attorney receiving confidential documents has ethical obligations that may surpass the limitations implicated by the attorney-client privilege and that apply regardless of whether the documents in question retain their privileged status.'"[209] These "principles . . . underlie the oft-cited protocol directing counsel, upon discovering the confidential nature of

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200. *Id.* at *2 (citing Maldonado v. New Jersey, 225 F.R.D. 120, 125–27 (D.N.J. 2004)).

201. *Id.* at *2.

202. *Id.* at *3–4.

203. *Id.* at *3.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at *4.

209. *Id.* (quoting Herman Goldner Co. v. Cimco Lewis Indus., No. 3501 MARCH.TERM 2001, 2002 WL 1880733, at *1 (Pa. Ct. Com. Pl. July 19, 2002)).

documents, to cease review, notify the owner, and abide by the owner's instructions regarding the documents' disposition."[210]

After reviewing cases from other jurisdictions in which courts sanctioned lawyers for comparable conduct, the court concluded that the "offering of purported 'anonymous source' documents would raise 'red flags' for any reasonable attorney under the circumstances."[211] The court reasoned that the defense lawyers had to agree; after all, they had retained Simpson to advise them about their professional obligations.[212] Unfortunately, Simpson's conclusory opinion did not bring to the defense lawyers' minds as it should have "the adage, 'if something appears too good to be true, it probably is.'"[213]

The *Burt Hill* court determined that based on the totality of the circumstances, it was necessary to invoke its inherent power to sanction the defendants.[214] In formulating an appropriate sanction, the court declined to disqualify the defense lawyers because they had "operated under a cloak of ethical propriety, having retained an expert who opined that the retention and review of [the] [p]laintiff's privileged and confidential documents was permissible."[215] Dubious though Simpson's reasoning may have been, the defense lawyers' reliance on his opinions weighed against their disqualification.[216] Yet, the important issues at stake merited a sanction more serious than simply requiring the defendants to return the disputed documents, as they had apparently urged:

> [T]he [c]ourt cannot understate the importance of its duties to "preserv[e] the public trust," "the scrupulous administration of justice," and "the integrity of the bar." . . .
>
> The [c]ourt also concludes that firm sanctions are necessary to discourage similar conduct in the future. There appears no way of preventing a litigant who has obtained his opponent's privileged and/or confidential materials from claiming that the materials were

210. *Id.* (citing *Herman Goldner Co.*, 2002 WL 1880733, at *1).
211. *Id.* at *5 (citation omitted).
212. *Id.*
213. *Id.*
214. *Id.* at *6.
215. *Id.*
216. *Id.* (citing Nesselrotte v. Allegheny Energy, Inc., No. 06-01390, 2008 WL 2890832, at *6 (W.D. Pa. July 23, 2008)).

> received through an "anonymous" source. Were the [c]ourt merely to require the return of clearly privileged documents, this would be to deny the recipient something he was never entitled to in the first place. Under the circumstances, restricting sanctions to the return of privileged documents would be to impose no meaningful sanction at all.[217]

The court believed that a fitting sanction would be to prohibit the defendants and their lawyers from profiting in any way from their use of the plaintiff's privileged and confidential documents.[218] The court therefore ordered that, among other things, the defendants could not in any way use the anonymous source documents; the defendants would provide the plaintiff with a sworn declaration that they and their lawyers had destroyed or returned all copies of the documents delivered in September 2009; the plaintiff had no duty to produce copies of those documents in discovery; the plaintiff could in the future move to strike any evidence that it determined or had a good faith reason to believe had been secured through the use of the September documents; and if the defendants were to receive documents from an allegedly anonymous source in the future, they were to follow a protocol established by the court.[219]

Burt Hill illustrates for lawyers the wisdom of seeking expert advice when wrestling with hot documents. Simpson's work may not have been top-notch from the court's perspective, but the defense lawyers' instincts in consulting him were correct. Courts considering sanctions against lawyers tend to credit those who check their professional judgment with experts.[220] At the same time, reliance on the advice of counsel is best viewed as a mitigating factor in the

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217. *Id.* at *9 (quoting Arnold v. Cargill, Inc., No. 01-2086, 2004 WL 2203410, at *14 (D. Minn. Sept. 24, 2004)).

218. *Id.* at *7 (reviewing cases where courts imposed sanctions based on similar reasoning).

219. *Id.* at *9–10.

220. *See, e.g.*, *In re* Kagan, 351 F.3d 1157, 1162–65 (D.C. Cir. 2003) (deciding that the lawyer's retention of inadvertently-produced confidential business information did not support a finding of misconduct based largely upon the lawyer's compliance with an outside ethics lawyer's advice); Perna v. Elec. Data Sys., Corp., 916 F. Supp. 388, 394 n.5 (D.N.J. 1995) ("Plaintiffs' counsel acted with the highest degree of professional responsibility and their decision to seek guidance [from the New Jersey Supreme Court Advisory Committee on Professional Ethics] involving this ethical dilemma should be applauded.").

context of professional discipline.[221] Courts generally reject lawyers' reliance on advice of counsel as a disciplinary defense.[222]

B. Another Anonymous Document Delivery: The Raymond *Case*

Like *Burt Hill, Raymond v. Spirit AeroSystems Holdings, Inc.*[223] involved anonymous document deliveries.[224] And again, as in *Burt Hill,* the receiving lawyers in *Raymond* found themselves on the wrong side of a sanctions order.[225]

In the summer of 2013, Spirit AeroSystems (Spirit), a subsidiary of the named defendant, terminated scores of unionized employees who belonged to the Society of Professional Engineering Employees in Aerospace (SPEEA).[226] Spirit asserted that the terminations were part of a performance improvement initiative; the unfortunate union members believed that they were unlawfully terminated based on their ages and the cost of their future medical benefits.[227]

In the spring of 2014, Diane King and Kimberly Jones of the Denver law firm King & Greisen, LLP made multiple trips to Wichita,

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221. *See, e.g.,* Ky. Bar Ass'n v. Guidugli, 967 S.W.2d 587, 589 (Ky. 1998) (suspending the lawyer for thirty days rather than imposing a more severe sanction because the lawyer relied on advice of counsel in deciding not to reveal his *Alford* plea in a matter when he applied to sit for the Kentucky bar examination).

222. *See, e.g.,* People v. Katz, 58 P.3d 1176, 1187 (Colo. 2002) ("It is the individual attorney's duty and obligation to comply with the Rules of Professional Conduct. The attorney may not delegate that duty or responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of those Rules."); Fla. Bar v. St. Louis, 967 So. 2d 108, 118 (Fla. 2007) ("[A] defense based on advice of counsel is not available to respondents in Florida Bar discipline cases unless specifically provided for in a rule or considered as a matter in mitigation." (citation omitted)); Att'y Grievance Comm'n of Md. v. Pennington, 876 A.2d 642, 656 (Md. 2005) ("[A]n attorney may not delegate the responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of the Rules of Professional Conduct."); *In re* Murray, 920 N.E.2d 862, 873 (Mass. 2010) (citing *In re* Lupo, 851 N.E.2d 404, 413 (Mass. 2006)) ("Reliance on the advice of counsel is not a defense to a charge of unethical conduct."); *see also In re* Conduct of Gatti, 333 P.3d 994, 1004 (Or. 2014) ("[W]ith regard to advice from the Bar that leads a lawyer to engage in a particular set of actions, that advice does not estop the Bar from subsequently bringing disciplinary charges if warranted by the resulting conduct. . . . Neither can such advice be invoked as a defense to the charged violations." (citations omitted)).

223. No. 16-1282-JTM-GEB, 2017 WL 2831485 (D. Kan. June 30, 2017).

224. *See Raymond,* 2017 WL 2831485, at *3; *Burt Hill,* 2010 WL 419433, at *1.

225. *See Raymond,* 2017 WL 2831485, at *16–23 (specifying the sanctions); *Burt Hill,* 2010 WL 419433, at *9–10 (specifying the sanctions).

226. *Raymond,* 2017 WL 2831485, at *1.

227. *Id.* at *1–3.

Kansas, to interview potential plaintiffs and witnesses to prepare for litigation with Spirit over its mass reduction in force.[228] Witnesses told King and Jones that Spirit's human resources department was "shredding documents and instructing managers to destroy documents related to the performance improvement initiative."[229] During a late March 2014 trip to Wichita, an SPEEA official, Bob Brewer, gave King a package of documents that he said was anonymously delivered to the SPEEA office.[230] Inside the package was a handwritten note addressed to Brewer that read: "This is information regarding the recent layoffs. This is the project plan for the year. [P]ay attention to the slides they will tell you what the goal was. This information *is* from [a] good source."[231]

King soon began reviewing the documents, but she stopped when she saw that some of them were stamped "privileged."[232] When she returned to her office in Denver, she gave the documents to her paralegal, Dianne Von Behren, and "instructed her to look at the documents only for the purpose of separating any documents marked 'privileged,' and sealing those in a separate envelope."[233] Neither King nor her colleagues read any of the privileged documents.[234] The same day, King asked one of her partners to research Kansas ethics rules and Kansas and Tenth Circuit case law on "the proper procedure for handling privileged documents intentionally produced by a third party prior to litigation," but the partner came up empty.[235] King then decided to keep the documents, thinking that she had handled them safely, that she would ask the court to review them *in camera* once suit was filed, and that preserving the documents would prevent their destruction by Spirit.[236] Although she sent Spirit a litigation hold letter based on the last concern, she did not inform Spirit that she had the documents.[237]

In May 2014, another set of Spirit documents was mailed to King and Jones's law firm by an unidentified source.[238] King opened the envelope, saw that it contained Spirit documents, and immediately

228. *Id.* at *3.
229. *Id.* (citation omitted).
230. *Id.* (noting that Jones was present when King received the documents).
231. *Id.* (replacing underlining with italics).
232. *Id.*
233. *Id.* (citation omitted).
234. *Id.*
235. *Id.* at *4 (citation omitted).
236. *Id.*
237. *Id.*
238. *Id.*

gave the envelope to Von Behren to handle as before.[239] King again said nothing to Spirit about the documents.[240]

Although neither King nor Jones reviewed any Spirit documents that were labeled as privileged, they read the other Spirit documents (which they knew Spirit considered confidential), and King used those documents in her investigation and in drafting a complaint to be filed on behalf of the terminated workers.[241] In July 2016, while preparing to file the *Raymond* lawsuit, King sought advice on how to handle the Spirit documents from Colorado and Kansas lawyers who were known as professional responsibility experts, but neither lawyer offered clear guidance.[242]

On July 11, 2016, King filed the *Raymond* suit—a collective action on behalf of the terminated union employees in a Kansas federal court in which the plaintiffs alleged that Spirit fired them in violation of federal anti-discrimination laws.[243] On July 15, 2016, at her local counsel's recommendation, King called the Kansas Disciplinary Administrator's office for advice on handling the Spirit documents.[244] The official with whom she spoke recommended that she raise the documents at the parties' initial planning meeting and thereafter ask the court to review the documents *in camera* to determine whether they were privileged.[245] According to King, no one ever advised her that she should have immediately told Spirit about the documents or that she should have returned them.[246] Ultimately, she disclosed the documents in a telephone call with Spirit's counsel, and Spirit subsequently sought a protective order and sanctions.[247]

The fundamental issue before the *Raymond* court was whether King and Jones had a duty to notify Spirit that they had received the documents, to refrain from using them, or to do both.[248] This was an issue of first impression for the court.[249] The court reluctantly agreed with the parties that "the black-letter ethical rules fail[ed] to control this factual situation."[250] The court nonetheless examined the Kansas

239. *Id.*
240. *Id.*
241. *Id.* at *4–5.
242. *Id.* at *5.
243. *Id.* at *1, *5.
244. *Id.* at *5.
245. *Id.*
246. *Id.*
247. *Id.* at *6.
248. *Id.* at *7.
249. *Id.*
250. *Id.*

Rules of Professional Conduct and the Model Rules—especially Rule 4.4—as a starting point.[251] After noting that Rule 4.4(b) was limited to inadvertent disclosures and deciding that both sets of rules offered scant guidance, the court observed that lawyers may have additional obligations in cases such as this one that "stem from a court's supervisory authority, or civil procedure rules governing discovery."[252] As a result, the Kansas ethics rules and the Model Rules did not prevent the court from further assessing the lawyers' conduct.[253]

The court first noted that the District of Kansas had adopted the *Pillars of Professionalism* promulgated by the Kansas Bar Association and that the *Pillars* were incorporated by reference in its scheduling order in this case.[254] Among other things, the *Pillars* stated: "Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice."[255] The *Pillars* further stated that "Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration."[256] While recognizing that the *Pillars* were "not law," the court "expect[ed] counsel to reflect these tenets in all aspects of litigation."[257]

The court next examined analogous cases from other jurisdictions.[258] After doing so, however, the court was able to conclude only that those cases were "simply illustrative of the broader perspective."[259] The court thus fell back on its inherent power to sanction lawyers who appear before it to ensure "a level of professionalism and ultimate fairness" in litigation.[260]

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251. *See id.* at *7–9 (analyzing various Kansas rules of professional conduct).
252. *Id.* at *9 (citation omitted) (citing ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-460 (2011)).
253. *Id.* at *10 (citing MODEL RULES OF PRO. CONDUCT, Preamble and Scope, at [16] (AM. BAR ASS'N 2020)).
254. *Id.* (citing Rowan v. Sunflower Elec. Power Corp., No. 15-9227-JWL-TJJ, 2017 WL 680070, at *3 (D. Kan. Feb. 21, 2017)).
255. *Id.* (quoting *Pillars of Professionalism*, U.S. DIST. CT. FOR THE DIST. OF KAN. http://www.ksd.uscourts.gov/pillars-of-professionalism/, at 7–9 (last updated Feb. 15, 2013)).
256. *Id.*
257. *Id.*
258. *See id.* at *10–13.
259. *Id.* at *13.
260. *Id.*

After acknowledging that King and Jones had no role in obtaining the documents at issue, the court returned to Rule 4.4(b) as a basis for faulting their conduct:

> Again, . . . the [c]ourt finds it entirely appropriate to analogize to KRPC 4.4(b). If a lawyer receives information . . . and knows or even reasonably *should* know the information was unintentionally sent by either the opposing party or its lawyer—the rule requires the lawyer to "promptly notify" the sender. The purpose behind this rule is to permit the accidental sender—assumed to be the proper custodian of the documents—to take protective measures. Regardless of the omission in the rule, the [c]ourt frankly finds it nonsensical to apply a separate and lesser standard to intentionally-disclosed documents. In fact, given the documents' dubious origins, protections applied to [the] [d]efendants' proprietary or privileged-marked information should be at least equal, if not heightened, when the disclosure is clearly unauthorized.[261]

The court continued its criticism of the lawyers' conduct:

> Instead of "lying in wait" with the documents . . . obligations of decency, fundamental fairness, and frankly the golden rule, should have prompted counsel to notify [the] [d]efendants in order to avoid problems later. The ethical rules make clear the rules themselves should not end counsel's inquiry, and simply because the rules may not specifically address the situation before counsel does not mean counsel should "throw up their hands and conclude that nothing can or should be done to protect or ameliorate the document owner's privilege and confidentiality interests." In other words, just because you are not *required* by some written regulation to act in a certain manner does not mean you should not.[262]

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261. *Id.* at *14 (footnotes omitted).
262. *Id.* (footnotes omitted).

As for King's effort to segregate the Spirit documents labeled as privileged to remove any taint from their receipt, the court was unimpressed.[263] According to the court, the best practice would have been to promptly notify Spirit's lawyers "and seek outside counsel or an escrow agent, of sorts, to maintain the documents until the [c]ourt was able to examine the issue."[264] Instead, King and Jones circumvented "the orderly discovery process," and arbitrarily established themselves as "the ultimate gatekeeper[s]" of Spirit's confidentiality and privilege claims.[265] As the court viewed matters, it was not King and Jones's call "to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information [they] deemed appropriate."[266] Rather, those decisions were the court's to make in the course of formal discovery.[267]

The *Raymond* court was additionally bothered by the plaintiffs' retention of Spirit's documents for over two years and the use of some of the documents in preparing the plaintiffs' case.[268] Under the circumstances, the lawyers' plan to eventually disclose the documents did not spare them or their clients:

> Counsel did not immediately, upon the filing of the case, alert [the] [d]efendants or the [c]ourt regarding this potential issue. Although they kept the privilege-marked documents sealed, they failed to notify [the] [d]efendants until after reviewing and utilizing the alleged proprietary information in, at a minimum, [the] [p]laintiffs' pleadings and discovery requests. Given the longstanding history between SPEEA and Spirit, even if not through these particular named plaintiffs, [the] [p]laintiffs' counsel was well aware of the identities of Spirit's counsel, and disclosure would not have created a burden to [the] [p]laintiffs or their counsel. Instead—having been alerted to the documents' existence—[the] [p]laintiffs would surely

263. *See id.* at *15.

264. *Id.* (discussing Brado v. Vocera Commc'ns, Inc., 14 F. Supp. 3d 1316, 1318 (N.D. Cal. 2014)).

265. *Id.* (citing Glynn v. EDO Corp., No. JFM-07-01660, 2010 WL 3294347, at *5 (D. Md. Aug. 20, 2010)).

266. *Id.*

267. *Id.* (quoting Xyngular Corp. v. Schenkel, 200 F. Supp. 3d 1273, 1317 (D. Utah 2016), *aff'd*, 890 F.3d 868 (10th Cir. 2018)).

268. *Id.*

> have sought them through appropriate channels of discovery. Although [the] [p]laintiffs' counsel had the noblest of intentions to eventually disclose the documents, the disclosure simply came too late.[269]

In their defense, the plaintiffs' lawyers argued that the court should not fault their conduct because they acted on the advice of legal ethics experts.[270] This argument did not persuade the court, however, for two reasons.[271] First, had the lawyers researched case law around the country rather than confining their research to Kansas and the Tenth Circuit, it "should have given [them] pause" despite the cases they would have discovered being non-binding.[272] Second, they did not seek ethics advice until two years after they received the Spirit documents.[273] On top of those two reasons, the court was "seriously baffled that out of all the legal minds which reviewed these facts, not one appeared to put themselves in the shoes of the opposing counsel or [the] [d]efendants."[274]

Lastly, the court saw "no reason to distinguish between those documents marked privileged and those which are merely marked confidential or proprietary."[275] Rule 4.4(b) does not attempt to parse the materials a lawyer receives inadvertently.[276] King and Jones knew that Spirit did not intend the documents to be used outside its walls.[277] The court therefore found that King and Jones "had a duty to, at minimum, immediately notify [Spirit] of the disclosure, regardless of its intentional nature."[278] That left the court to decide on sanctions for the lawyers' missteps.[279]

Spirit had announced that in pursuing sanctions, it was not seeking to disqualify the plaintiffs' lawyers.[280] The court agreed that disqualification was inappropriate.[281] An evidentiary sanction,

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269. *Id.*
270. *Id.* at *16.
271. *See id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* (quoting KAN. RULES OF PRO. CONDUCT r. 4.4(b) (2020)).
277. *Id.*
278. *Id.*
279. *See id.* at *16–23 (specifying the sanctions).
280. *Id.* at *18.
281. *Id.*

however, was justified.[282] The court therefore ordered the plaintiffs to return the documents to Spirit and prohibited them from using information contained in, or derived from, the documents in future discovery, court filings, or proceedings in the case.[283] The court also awarded Spirit its attorneys' fees and costs directly incurred because of the plaintiffs' retention of the documents.[284] Given the sharpness of the court's criticism of King and Jones, these were fairly restrained sanctions.[285]

In the end, the *Raymond* court acknowledged that "[t]he black-letter ethical rules currently leave a gap in defining the expectations of counsel under the facts of this case," but cautioned readers that "documents intentionally and anonymously produced should create a heightened awareness in both parties and counsel, and the mysterious nature of the production must also generate an amplified duty of notification."[286] The court warned that lawyers cannot view their obligations in isolation, but must consider "how their actions—whether proscribed by some precise rule or not—affect not only the opposing party and its counsel but the orderly administration of justice."[287]

In retrospect, King and Jones unquestionably waited too long to seek professional responsibility advice from independent counsel.[288] They also should have disclosed the documents to Spirit sooner than they did once litigation was underway.[289] But most of the court's other criticisms of them seem strained. For example, the court complained that had King and Jones reviewed case law from other jurisdictions, those non-binding cases would have given them pause.[290] Yet, they apparently had ample pause from the start as evidenced by King's prompt segregation of the documents that Spirit had identified as privileged, and her partner's timely research of controlling ethics rules and case law.[291]

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282. *Id.* at *18–19.

283. *Id.* at *19, *22.

284. *Id.* at *23.

285. *See, e.g.*, *id.* at *18 (displaying the court's distaste for the actions of King and Jones as well as the court's reluctance to impose more severe punishment).

286. *Id.* at *22.

287. *Id.*

288. *See id.* at *16 (emphasizing that the counsel waited two years).

289. *See id.* at *15 (holding that counsel's disclosure of the documents "simply came too late").

290. *Id.* at *16.

291. *Id.* at *3–4.

To use another example, the court criticized King for having Von Behren segregate Spirit's privileged documents on the basis that doing so was tantamount to King dividing up Spirit's documents herself.[292] That's incorrect. Although it would have been preferable for King to entrust the documents to an independent lawyer functioning as an escrow agent, so long as Von Behren did not show the privileged documents to King or tell her what the documents said—she did neither of those things—having Von Behren segregate the documents was a reasonable alternative.[293]

Moving on, the *Raymond* court misapplied the Rule 4.4(b) inadvertent disclosure approach.[294] As explained earlier,[295] the court's assessments that it would be "nonsensical to apply a separate and lesser standard to intentionally-disclosed documents" and that the protections applied to another party's documents "should be at least equal, if not heightened, when the disclosure is clearly unauthorized,"[296] overlooked Model Rule 1.6(a).[297] Nothing in the Colorado or Kansas versions of Rule 1.6 would have allowed King or Jones to disclose the documents to Spirit before suit was filed without their clients' consent.[298]

Certainly, King or Jones could have asked their clients for consent to disclose the documents to Spirit, but there is no guarantee that the clients would have granted it.[299] There would have been good reasons for them to refuse consent. For one thing, had the plaintiffs immediately disclosed the documents, Spirit might have been quickly able to identify the sender. Assuming the sender was a Spirit

292. *Id.* at *15.

293. Von Behren was not involved in any other aspect of the Raymond case. Her duties at the law firm were generally focused on file maintenance. *Id.* at *3.

294. *See* MODEL RULES OF PRO. CONDUCT r. 4.4(b) (AM. BAR ASS'N 2020) (containing the word "inadvertently" before "sent," indicating a purposeful omission of intentionally disclosed documents); *id.* r. 4.4 cmt. 2 ("[T]his 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 inappropriately obtained by the sending person.").

295. *See supra* Part II.D.2.

296. *Raymond*, 2017 WL 2831485, at *14 (citation omitted).

297. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020) (providing that a lawyer must not reveal information relating to a client's representation except under specified circumstances).

298. *See* COLO. RULES OF PRO. CONDUCT r. 1.6 (2020); KAN. RULES OF PRO. CONDUCT r. 1.6 (2020).

299. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020) (providing that a lawyer may reveal information relating to the representation of a client if the client "gives informed consent").

employee, Spirit surely would have fired him or her. From the plaintiffs' perspective, that would have hurt the sender's credibility as a witness at trial. In contrast, delaying notification until suit was filed and a disclosure obligation arose under the Federal Rules of Civil Procedure might well have maintained the sender's anonymity and thus preserved the person's credibility.[300] For another thing, if Spirit was shredding documents as witnesses reported, the anonymous sender's continued delivery of documents might have been the plaintiffs' best hope of proving their claims. For "the discovery process to work," as the court apparently presumed it would when it scolded King and Jones for "taking matters into their own hands,"[301] a party suspected of destroying potential evidence cannot in fact be doing so. Although it was perhaps safe for the court to assume that Spirit's excellent defense lawyers never would have countenanced such behavior, the plaintiffs might be forgiven for thinking otherwise.

Finally, the court's lament that the lawyers' "obligations of decency, fundamental fairness, and frankly the golden rule should have prompted them" to alert Spirit to the situation merits brief attention.[302] If lawyers' discovery conduct was regulated by reference to fundamental fairness, decency, and the golden rule rather than procedural rules and rules of professional conduct, a lawyer who received an adversary's allegedly privileged documents inadvertently could never argue that the adversary had carelessly waived the privilege. After all, fair and decent people who obey the golden rule ought to forgive others' mistakes. But, of course, lawyers are permitted within reasonable limits to capitalize on adversaries' document production blunders.[303] In sum, in framing the lawyers' duties, the *Raymond* court should have stuck to court or ethics rules and case law. Other courts would also do well to avoid hortatory

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300. *See* FED. R. CIV. P. 26(a)(1)(C) (providing that "[a] party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference . . . .").

301. *Raymond*, 2017 WL 2831485, at *15.

302. *Id.* at *14 (citing J. Nick Badgerow, *The Lawyer's Creed of Professionalism: Some Observations from the Field*, 69 J. KAN. BAR ASS'N 24, 30 (2000)).

303. *See* Lund v. Myers, 305 P.3d 374, 376–77 (Ariz. 2013) (explaining that a receiving party may contest the disclosing party's privilege claim by asserting that the subject documents are not privileged or that the inadvertent disclosure waived the privilege); *see, e.g.*, Gloucester Twp. Hous. Auth. v. Franklin Square Assocs., 38 F. Supp. 3d 492, 497–500 (D.N.J. 2014) (agreeing with the plaintiff that the defendant's inadvertent disclosure of three pages of privileged communications in a document production of over 3500 pages of documents waived the defendant's attorney-client privilege).

statements when evaluating lawyers' conduct and tether their opinions to published standards.

C. The Nevada Supreme Court Decision in Merits Incentives

The last representative case, ***Merits Incentives, LLC v. Eighth Judicial District Court***,[304] is one of the few reported state cases on intentional disclosures. In that case, Bumble & Bumble, LLC (Bumble) manufactured and sold salon products that Merits Incentives and two related parties, Ramon DeSage and Cadeau Express, distributed to the Wynn Hotel in Las Vegas under contract with Bumble.[305] When Bumble learned that its products were also being sold to certain retailers, it sued Merits Incentives, DeSage, and Cadeau Express in Nevada state court.[306]

On September 24, 2009, Bumble received an anonymous package.[307] The package contained a computer disk and a note saying that Bumble should forward the disk to its lawyer in the *Merits Incentives* case, John Mowbray.[308] On October 15, Mowbray served the defendants with a supplemental pretrial discovery disclosure under Nevada Rule of Civil Procedure 16.1 that identified the disk and included copies of the disk and the envelope in which it arrived.[309] "On October 19, Bumble served an amended supplemental Rule 16.1 disclosure" and sent the defendants another copy of the disk.[310] The defendants voiced no objections to Bumble's possession or use of the disk.[311] On November 6, Bumble served the defendants with a request for production of documents that listed hundreds of documents contained on the disk, asked the defendants to authenticate the documents, and requested hard copies of some of the listed documents.[312] The defendants objected to the requests but did nothing

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304. 262 P.3d 720 (Nev. 2011).
305. *Id.* at 722.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* Under Nevada Rule of Civil Procedure 16.1, a party generally must, "without awaiting a discovery request," provide to the other parties the name and, if known, directory information for potential witnesses; and copies "of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses . . . ." NEV. R. CIV. P. 16.1(a)(1)(A)(i)-(ii) (effective Jan. 1, 2019).
310. *Merits Incentives*, 262 P.3d at 722.
311. *Id.*
312. *Id.*

more.[313] On January 27, 2010, Bumble used some documents from the disk in deposing one of the defendants' employees.[314] The defendants did not object.[315] Finally, in mid-May 2010, the defendants moved to dismiss Bumble's case with prejudice or, in the alternative, to disqualify Mowbray and his firm and bar Bumble's use of the documents on the disk.[316]

In their motion, the defendants claimed for the first time that Bumble had misappropriated their confidential and privileged documents.[317] They alleged that a former Cadeau Express employee shipped the documents to Bumble in violation of a permanent injunction they had obtained against him prior to this case being filed.[318]

The trial court denied the defendants' motion.[319] The trial court concluded that only one document on the disk was privileged and that Mowbray had acted reasonably in any event.[320] The defendants then petitioned the Nevada Supreme Court for a writ of mandamus.[321]

On appeal, the defendants—now petitioners—contended that Mowbray acted unethically by reviewing the disk.[322] In response, Bumble and Mowbray argued that Mowbray "exceeded any ethical obligations by immediately disclosing the disk received from an anonymous source in a supplemental [Rule] 16.1 disclosure, by propounding discovery . . . seeking authentication regarding the documents contained on the disk, and by listing each document individually in a discovery request."[323] Both sides agreed that Nevada's version of Rule 4.4(b), which states "that '[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender,'" did not apply here.[324] The Nevada Supreme Court echoed the parties' position on

313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.* at 722–23.
317. *Id.* at 723.
318. *Id.* at 722–23.
319. *Id.* at 723.
320. *Id.*
321. *Id.*
322. *Id.* at 724.
323. *Id.*
324. *Id.* (alteration in original) (quoting Nevada's version of Rule 4.4(b)).

the basis that the disk was intentionally sent to Bumble and Mowbray.[325]

The *Merits Incentives* court observed that Nevada had no ethics rule that governed a lawyer's duty when presented with documents or other evidence sent by an anonymous source with no ties to the litigation.[326] The trial court had apparently analogized to Rule 4.4(b) and decided that Mowbray satisfied his ethical duties through his prompt pretrial disclosures.[327] The Nevada Supreme Court agreed with the trial court and then crafted a new standard to govern lawyers' conduct in situations such as the one before it:

> [A]n attorney who receives documents regarding a case from an anonymous source must promptly notify opposing counsel, or risk being in violation of his or her ethical duties and/or being disqualified as counsel. Notification must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the documents or evidence came into counsel's or his or her client's possession.[328]

Mowbray met the court's new standard by timely supplementing Bumble's Rule 16.1 disclosures.[329] The trial court was therefore correct in concluding that Mowbray acted ethically.[330] The *Merits Incentives* court went on to hold that the trial court did not abuse its discretion in declining to disqualify Mowbray and his law firm.[331] Based on those determinations, the court denied the petitioners' request for a writ of mandamus.[332]

In reviewing the decision in *Merits Incentives*, it is interesting to consider how the case might have taken a different path in the trial court. The defendants slept on their claimed rights by waiting months to move for sanctions.[333] What if they had been more attentive? Although there was no applicable "cease, notify, and return" rule in

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325. *Id.*
326. *Id.* at 725.
327. *Id.*
328. *Id.* (citation omitted).
329. *Id.* at 725–26.
330. *Id.* at 726.
331. *Id.* at 727.
332. *Id.*
333. *Id.* at 722–23.

place, nothing would have prevented them from seeking the return of the disk and its contents when they received Bumble's first set of supplemental disclosures.[334] If they thought based on those disclosures that Mowbray was wrongfully holding their privileged documents, they could have promptly informed him of their position and demanded that he return the disk and any documents that he had downloaded or printed from it.[335] If he had refused their request, they could have moved for a protective order or sanctions.[336]

D. Summary

A lawyer's simple receipt of another party's privileged or confidential documents or information is not professional misconduct.[337] Rather, as *Burt Hill*, *Raymond*, and *Merits Incentives* illustrate, it is how a lawyer responds to the receipt of privileged or confidential materials that determines whether sanctions or discipline are appropriate.[338] Where a lawyer has a duty to disclose her possession of privileged or confidential documents or information belonging to another party—as may exist under a rule of civil procedure or case management order—the sooner she does so, the more likely a court is to conclude that she acted ethically.[339] Even where a duty to disclose is not obvious, as may be the case before suit is filed, lawyers who do not disclose their possession of an opponent's privileged or confidential documents reasonably soon after getting them—or, at the latest, when suit is filed and rules of civil procedure kick in—risk sanctions.

IV. ETHICALLY SOLVING THE PROBLEM OF INTENTIONAL DISCLOSURES

As the *Raymond* and *Merits Incentives* courts observed, Model Rule 4.4(b) applies to the inadvertent disclosure of privileged or confidential documents or information and does not by its terms govern lawyers' duties when such materials are intentionally

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334. *Id.* at 725 n.7.

335. *Id.*

336. *Id.*

337. GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 4-9.6(e)(3), at 520–21 (2018).

338. *See supra* Part III.

339. *See, e.g.*, *Merits Incentives*, 262 P.3d at 727 (finding that a lawyer who promptly disclosed documents in accordance with a rule of civil procedure acted ethically and affirming the trial court's decision not to sanction or disqualify him).

delivered to them without the owner's authorization.[340] As explained earlier, the Model Rule 4.4(b) standard for handling inadvertent disclosures cannot be logically extended to intentional disclosures despite some courts' mistaken embrace of that approach.[341] So the question remains: how should lawyers respond when they receive potentially privileged or confidential materials belonging to another party that are intentionally delivered to them without the party's authorization?

A. Refusing the Evidence

To start, lawyers may refuse to accept documents, information, or other materials belonging to another party that are delivered or offered to them either anonymously or by a known source. For example, a lawyer who receives a USB flash drive in the mail from an anonymous sender with a note stating that the flash drive contains information helpful to a case the lawyer is handling could discard the flash drive without reviewing its contents. To use another example, a lawyer who is offered a package of documents belonging to an opposing party by a witness outside the formal discovery process could decline to accept the documents. So long as the lawyer does not accept delivery of the USB flash drive or the package so that she cannot be said to have taken possession of them or to have received them, she owes no duty to the owner of the materials on the flash drive or in the package. In fact, unless and until the lawyer reviews at least some of the documents on the thumb drive or the materials in the package and is therefore able to identify them, the lawyer does not even know whether the documents or materials are what the offeror or sender purports them to be. That being the case, there is no basis for imposing any sort of duty of disclosure on the lawyer. Once the lawyer knows what the documents or materials are, however, her obligations are different.[342]

A logical concern is whether the lawyer must consult the client before the lawyer refuses delivery of documents, information, or other materials, or before the lawyer discards them without reviewing them. Consultation arguably may be required by Model Rule 1.2(a), which provides that a lawyer must "abide by a client's decisions concerning the objectives of [the] representation" and mandates that

340. Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282-JTM-GEB, 2017 WL 2831485, at *7–10 (D. Kan. June 30, 2017); *Merits Incentives*, 262 P.3d at 724.

341. *See supra* Part II.D.2.

342. *See infra* Part IV.B.

the lawyer "consult with the client as to the means by which they are to be pursued."[343] Alternatively, a lawyer's Model Rule 1.4(a)(2) duty of communication might be thought to require a conversation between the lawyer and the client over the delivery's treatment.[344] At the same time, it is reasonable to believe that the decision whether to accept or reject the delivery or offer of an adversary's potentially privileged or confidential documents or information is a matter of professional judgment reserved to the lawyer. Generally, "[a] lawyer has authority to take any lawful measure within the scope of representation . . . that is reasonably calculated to advance [the] client's objectives,"[345] and this would seem to be precisely such a situation.

Even if the decision whether to accept or reject the delivery or offer of another party's potentially privileged or confidential documents or information is reserved to the lawyer, as it should be, a lawyer may wish to consult with the client before deciding how to handle the situation. Allowing the client a voice in the decision effectively eliminates the prospect of the client blaming the lawyer if things turn out badly. If the lawyer decides to consult the client, the lawyer must explain the related issues to the client "to the extent reasonably necessary to permit the client to make" an informed judgment.[346]

If the lawyer concludes that it would be unethical or simply too risky to accept the documents or information and the client instructs the lawyer to do so anyway, the lawyer must explain the ethical limitations on her conduct to the client.[347] The lawyer should also explain to the client the possible adverse consequences of accepting the materials.[348] Presumably the fully-informed client will defer to the lawyer's judgment.[349] If the client still insists that the lawyer accept the documents or information, the lawyer must be prepared to

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343. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

344. *See id.* r. 1.4(a)(2) (requiring a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

345. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (AM. LAW INST. 2000).

346. MODEL RULES OF PRO. CONDUCT r. 1.4(b) (AM. BAR ASS'N 2020).

347. *Id.* r. 1.2 cmt. 13.

348. *See id.* r. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations . . . that may be relevant to the client's situation.").

349. *See id.* r. 1.2 cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").

withdraw from the representation.[350] Before withdrawing (if the issue arises pre-suit) or moving to withdraw (if litigation is underway), the lawyer generally should explain her plan to withdraw and the reasoning behind it to the client. This will give the client a chance to reconsider its position. Of course, at that point the lawyer might consider the attorney-client relationship so fractured or unmanageable that she could opt to withdraw even if the client relented and agreed with the lawyer that they should refuse acceptance of the documents or information.

B. The Model Rule 1.15 Solution

If a lawyer takes possession of an opponent's potentially privileged or confidential documents or information, what then? Despite courts and lawyers' complaints that the Model Rules offer no guidance in this situation, "[i]n fact, the Model Rules do offer an elegant solution for lawyers who question their professional responsibilities when they receive documents that may have been purloined or otherwise improperly obtained" from another party.[351] That solution, first identified by the Legal Ethics Committee of the District of Columbia Bar,[352] is found in Model Rule 1.15.[353] Model Rule 1.15 charges a lawyer with responsibility for the safekeeping of property belonging to clients or third persons that the lawyer possesses.[354]

Applying Model Rule 1.15 in this context requires consideration of three of its subparts. First, Model Rule 1.15(a) states that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the

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350. *See id.* r. 1.16(a)(1) (mandating withdrawal if continuing "the representation will result in violation of the Rules of Professional Conduct or other law"); *id.* r. 1.16(b)(4) (permitting a lawyer to withdraw from representing a client when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement"); *see also* Fla. State Bar Ass'n Comm. on Pro. Ethics, Ethics Op. 07-1 (2007) (emphasizing mandatory withdrawal from representation if the client does not consent to the lawyer's disclosure in a case in which the client obtained the subject documents unlawfully).

351. RICHMOND ET AL., *supra* note 21, at 376.

352. *See* D.C. Bar Legal Ethics Comm., Op. 318 (2002) (stating that Rule 1.15(b) applies to the situation in which "counsel in an adversary proceeding receives a privileged document from a client or other person that may have been stolen or taken without authorization from an opposing party").

353. RICHMOND ET AL., *supra* note 21, at 376.

354. MODEL RULES OF PRO. CONDUCT r. 1.15 (AM. BAR ASS'N 2020).

lawyer's own property."[355] Second, Model Rule 1.15(d) states that "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person."[356] Third, Model Rule 1.15(e) provides that "[w]hen in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved."[357] Putting these provisions together, when a lawyer receives another party's potentially privileged or confidential documents or information that were sent to the lawyer intentionally and without the other party's authorization, the lawyer must (1) segregate the documents or information from the rest of the lawyer's files or records; (2) "promptly notify the party from whom the documents [or information] were taken" that the lawyer has them; and (3) if the lawyer intends to keep the documents or information—holding them until the parties negotiate a resolution or a court determines whether the lawyer and her client have the right to use the documents or information in the related litigation—"continue to keep the documents [or information] segregated until the dispute over [them] is resolved."[358]

A lawyer who receives documents or other information that she suspects may be privileged or confidential is best advised not to review the materials. If the lawyer does read the materials, she should stop as soon as she recognizes that some of them may be confidential or privileged.

In segregating the documents or information, the best practice is to ask a respected lawyer from another firm to hold them as a type of escrow agent until the dispute over them is resolved.[359] This approach

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355. *Id.* r. 1.15(a).

356. *Id.* r. 1.15(d).

357. *Id.* r. 1.15(e).

358. RICHMOND ET AL., *supra* note 21, at 376–77.

359. *See* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282-JTM-GEB, 2017 WL 2831485, at *15 (D. Kan. June 30, 2017) (endorsing this approach). "Best practices" are aspirational ideals; they do not constitute standards of care. *See* Somerville v. United States, No. 6:08-cv–787-Orl-22KRS, 2010 WL 2643533, at *5 n.9 (M.D. Fla. June 30, 2010) ("The standard of care is not equivalent to 'best practices.'"); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 697 (Del. Ch. 2005) ("Delaware law does not—indeed, the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices, any more than a common-law court deciding a medical malpractice dispute can impose a standard of liability based on ideal—rather than competent or standard—medical treatment practices, lest the

preempts any argument that the receiving lawyer is improperly reviewing the documents despite her assurances to the contrary or at least could do so.[360] In other words, it eliminates any appearance of impropriety. If this is not practicable, the lawyer preferably should ensure that, for example, the documents are sealed in a box or envelope in the presence of a witness, the date the documents were segregated is recorded in some fashion, and that the documents are then kept untouched by someone in the lawyer's firm who is not working on the case to which the documents relate.

With respect to notifying the other party, the sooner the lawyer is reasonably able to do so, the more likely that a court will favorably view her conduct. If the lawyer receives the documents or information once litigation is underway, she should be sure to seasonably disclose the documents or information in accordance with any applicable rules of civil procedure in addition to any additional notice she provides the other party.

The *Brado v. Vocera Communications, Inc.*[361] court effectively endorsed this line of action without mentioning Model Rule 1.15. *Brado* was a consolidation of two securities class actions against Vocera in which Labaton Sucharow LLP (Labaton) represented the plaintiffs.[362] While working up the cases before discovery commenced, Labaton's investigator interviewed a former high-ranking Vocera employee who provided the investigator with "internal Vocera documents and other information relevant to Vocera's alleged wrongdoing."[363] The investigator reviewed the documents and thought that some of them might be covered by Vocera's attorney-client privilege.[364] "The documents and the investigator's notes from the interview were sequestered and no attorney at Labaton reviewed them or communicated with the investigator about their contents."[365] Labaton retained separate counsel to hold the documents.[366]

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average medical practitioner be found inevitably derelict."); Green v. House of Wright Mortuary, Inc., No. 02C-11-242MMJ, 2005 WL 3194484, at *6 (Del. Super. Ct. Nov. 17, 2005) (criticizing an expert witness's opinion because it could "be read as evaluating the funeral director's conduct under a 'best practices' test, rather than the legal standard of care").

360. *See Raymond*, 2017 WL 2831485, at *15 (stating that using another lawyer as an escrow agent of sorts "eliminates any appearance of wrongdoing").

361. 14 F. Supp. 3d 1316 (N.D. Cal. 2014).

362. *Id.* at 1317–18.

363. *Id.* at 1318.

364. *Id.*

365. *Id.*

366. *Id.*

Vocera contended that some of the documents were confidential and proprietary and that others contained privileged communications.[367] Vocera alleged that the former employee pilfered the documents and breached contractual confidentiality obligations by giving them to Labaton's investigator.[368] Vocera did not accuse Labaton or its investigator of wrongdoing.[369] Vocera even agreed that if discovery were to go forward, it would produce any of the documents that were not privileged.[370] Nonetheless, Vocera argued that the plaintiffs should be ordered to return the documents and prohibited from using them prior to the launch of formal discovery.[371] Vocera's apparent goal was to prevent the plaintiffs from using the documents in opposing a possible "motion to dismiss under the PSLRA."[372]

The *Brado* court rejected Vocera's arguments.[373] Unlike other cases in which courts barred the use of purloined documents, here the former employee took the documents from Vocera before Labaton was involved in the litigation, and he later volunteered them to Labaton's investigator.[374] Labaton sequestered the documents without reviewing them.[375] Because Labaton did nothing wrong, there was no reason to punish the firm either for an ethical violation or for flouting discovery rules.[376]

Again, the document-handling process that the *Brado* court approved and that other courts have endorsed is basically the process that Model Rule 1.15 commands of lawyers.[377] Yet, courts and lawyers seem strangely reluctant to apply Model Rule 1.15 to intentional disclosures of parties' potentially privileged or confidential documents or information. To be sure, this is not a usual application of the rule—which is more often concerned with lawyers holding money, securities, or other valuables that belong to clients or others—but that does not make it incorrect. The language of the rule fits the intentional disclosure of potentially privileged or confidential documents, information, or materials regardless of whether the rule is commonly

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367. *Id.*
368. *Id.*
369. *Id.* at 1319.
370. *Id.*
371. *Id.* at 1318.
372. *Id.*
373. *Id.* at 1320.
374. *Id.* at 1321.
375. *Id.* at 1318.
376. *Id.* at 1321.
377. *See id.* at 1316–21; *see also* MODEL RULES OF PRO. CONDUCT r. 1.15 (AM. BAR ASS'N 2020).

applied in other contexts. For that matter, the Model Rules are rules of reason, and they may therefore be applied in a range of circumstances to which they reasonably relate.[378] This is one such circumstance.

Beyond that, Model Rule 1.15 offers lawyers concrete guidance on how to handle intentional disclosures of potentially privileged or confidential documents or information where other ethics rules do not. Furthermore, courts can apply Model Rule 1.15 to achieve the segregation and notification requirements that they obviously want lawyers to adopt in intentional disclosure cases without having to create a related professional responsibility regime from whole cloth by misapplying Model Rule 4.4(b).

Applying Model Rule 1.15 also clears the Model Rule 1.6(a) confidentiality hurdle that Model Rule 4.4(b) runs into.[379] That is, Rule 1.15 creates an exception to lawyers' broad Rule 1.6(a) duty of confidentiality,[380] such that they can reveal their possession of documents or other information sent to them intentionally when no other ethics rule or rule of civil procedure does so, as is typically the case during pretrial maneuvering.

The only articulated basis for opposing Model Rule 1.15's application seems to be that Model Rule 1.15(d) governs property rights and that "when the property being held by the lawyer plainly belongs as a matter of property rights to a third person, the lawyer of course must transfer that property to the rightful owner regardless of the client's contrary preferences."[381] But if this truly is an argument against applying Rule 1.15 to intentional disclosures, it misses the mark. Model Rule 1.15(d) applies where a lawyer receives "funds or

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378. *See* MODEL RULES OF PRO. CONDUCT Scope [14] (AM. BAR ASS'N 2020) ("The Rules of Professional Conduct are rules of reason.").

379. *See supra* notes 154–59 and accompanying text.

380. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2020) (permitting disclosure "as authorized or required by the Rules of Professional Conduct").

381. SISK ET AL., *supra* note 337, § 4-9.6(e)(3), at 524. Even this questioning of Model Rule 1.15's utility in this context is at best equivocal. The full sentence in which the quoted language appears reads: "While Rule 1.15 *allows a lawyer to retain property pending resolution of a genuine dispute between the client and a third person* who makes a claim to that specific property, when the property being held by the lawyer plainly belongs as a matter of property rights to a third person, the lawyer of course must transfer that property to the rightful owner regardless of the client's contrary preferences." *Id.* (emphasis added) (citation omitted).

other property in which a client or third person has *an interest*."[382] So, while the party from whom the documents were taken (or, more commonly, whose documents were copied and the copies delivered to the lawyer) may have a property interest in them, so too may the lawyer's client claim an interest in their use in litigation. Model Rule 1.15 thus allows the lawyer to retain the documents until the dispute over their use may be resolved.[383]

V. CONCLUSION

Lawyers preparing their clients' claims and defenses frequently engage in informal discovery both before litigation commences and once it is underway. For example, they may interview current and former employees of organizational litigants or potential parties who they believe know relevant facts, and they may also find themselves across from disgruntled employees and former employees who approach them. Some of these people consider themselves to be whistleblowers while others are sympathetic to the lawyer's cause or are friends of the lawyer's client. Lawyers also may be the beneficiaries of anonymous sources of evidence. In any event, lawyers conducting informal discovery sometimes receive another party's potentially privileged or confidential documents or information that are sent intentionally and without the other party's authorization.

Lawyers are often unsure about how to handle intentional disclosures. Although several Model Rules of Professional Conduct may be invoked to discipline lawyers who wrongfully exploit another party's confidential or privileged documents or information, guidance for conscientious lawyers who want to appropriately handle such materials has historically been harder to come by. Lawyers who have consulted supposed legal ethics experts for advice have received little or no assistance. Courts have also struggled to govern lawyers' conduct in this context. Courts have all too often applied Model Rule 4.4(b) to sanction lawyers who, in their view, have mismanaged intentional disclosures of sensitive documents or information. As we have seen, however, Model Rule 4.4(b) is expressly limited to *inadvertent* disclosures and does not apply to *intentional* disclosures. Furthermore, courts' application of the rationale underlying Model Rule 4.4(b) to intentional disclosures has overlooked lawyers' broad duty of confidentiality under Model Rule 1.6(a).

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382. MODEL RULES OF PRO. CONDUCT r. 1.15(d) (AM. BAR ASS'N 2020) (emphasis added).

383. RICHMOND ET AL., *supra* note 21, at 376–77.

A lawyer does not engage in professional misconduct simply by receiving another party's privileged or confidential documents or information. It is how a lawyer responds to the receipt of privileged or confidential materials that determines whether the lawyer has acted appropriately or whether sanctions or discipline are appropriate. In such a case, Model Rule 1.15 clearly outlines a lawyer's ethical obligations. The lawyer must (1) segregate the documents or information from the rest of the lawyer's files or records; (2) promptly notify the party from whom the documents or information were taken that the lawyer has them; and (3) if the lawyer intends to hold onto the documents or information rather than returning them to the party from whom they were taken, continue to keep the documents or information segregated until the dispute over them is resolved.

Courts and lawyers have so far declined to apply Model Rule 1.15 to intentional disclosures of parties' potentially privileged or confidential documents or information. They need to overcome their reluctance for the good of all concerned.