INADVERTENT DISCLOSURE OF PRIVILEGED INFORMATION AND THE LAW OF MISTAKE: USING SUBSTANTIVE LEGAL PRINCIPLES TO GUIDE ETHICAL DECISION MAKING

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INTRODUCTION: THE PERCEIVED DEMISE OF PROFESSIONAL ETHICS

The decline of Professionalism, especially in the law, has taken on epidemic proportions.\(^1\)

The lay public is at least superficially more educated about the mores of the legal profession today than at any point in this country’s history. Images of the profession bombard the public daily through a variety of mediums. Fictitious television dramas like Law and Order, The Practice, JAG and Ally McBeal, and nonfictitious but nonetheless titillating productions such as Judge Judy, The People’s Court and the offerings of Court TV are so abundant that the public is rarely without its law-vision fix.\(^3\) Portrayals of lawyers also abound in film\(^4\) and in popular novels.\(^5\) Yet, notwithstanding (and perhaps because of)

\(^1\) Philosophers often distinguish between ethics and morality, the former concerned with the theoretical examination of the principles underlying morality and the latter concerned with the practical question of helping people become better individuals. See OLIVER A. JOHNSON, ETHICS 2-4 (1958). Thus, philosophers would say that someone is a "morally good person" because her actions are praiseworthy. However, philosophers would not say that someone is an "ethically good person"; rather, they would say that she is a good ethicist, meaning that her views in ethics are theoretically cogent. Id.

In this Article, I do not maintain the philosophical distinction because as a practical matter the line separating ethics and morality is not clear-cut. Indeed, in everyday language people use the words interchangeably. I use the adjectives "ethical" and "moral" synonymously to refer to principles of right and wrong, good and bad. I use the nouns "ethics" and "morality" interchangeably to refer to the systematic investigation of conduct with the purpose of discovering rules and principles that ought to govern human activity. I employ the phrases "professional ethics" and "legal ethics" merely to emphasize that this inquiry focuses on the norms and standards of the legal profession. Although I will speak of the profession and professional ethics, I do not mean to suggest that the legal profession is monolithic or that there is only one normative view of the law and principles governing law. I limit the present inquiry to the private bar and the civil context in acknowledgment of the fact that government lawyers and the criminal defense bar may possess different understandings of the normative standards to which they are subject. Other communities or segments of the legal profession may also object to the normative vision represented herein. I welcome those alternative views, for continued dialogue may lead to a strengthening and reformulation of our shared understanding of the profession’s norms.


\(^3\) Indeed, an entire industry of televised legal programs emerged in the aftermath of the O.J. Simpson trial, including Burden of Proof, Cochran & Company, etc.

\(^4\) See, e.g., A CIVIL ACTION (Touchstone Pictures & Paramount Pictures 1993); CLASS ACTION (Twentieth Century Fox 1991); THE CLIENT (Warner Brothers 1994); DEAD MAN WALKING (Polygram Filmed Ent. 1995); A FEW GOOD MEN (Columbia Pictures & Castle Rock Ent. 1992); THE FIRM (Paramount Pictures 1993); JUST CAUSE (Warner Brothers 1995); LEGAL EAGLES (Universal City Studios 1986); MY COUSIN VINNY (Twentieth Century Fox 1992); THE PELICAN BRIEF (Warner Brothers 1993); PHILADELPHIA (TriStar Pictures 1993); PRESUMED INNOCENT (Warner Brothers & Mirage 1990); PRIMAL FEAR (Paramount Pictures 1996); THE RADISSON THE (1997); REGARDING HENRY (Paramount Pictures 1991).

\(^5\) For example, in the past 12 years, John Grisham has written at least nine bestsellers whose plots center upon the conduct of lawyers. See JOHN GRISHAM, THE CHAMBER (1994); JOHN GRISHAM, THE CLIENT (1993); JOHN GRISHAM, THE FIRM (1989); JOHN GRISHAM, THE PARTNER (1997); JOHN GRISHAM, THE
the public's greater access to and familiarity with the workings of the legal profession, public regard for lawyers appears to be in decline. Although dissatisfaction with the legal profession and with the administration of justice is "as old as the law itself," few would argue with Professor Geoffrey Hazard's apt observation that "the contemporary problems of the American legal profession seem to run deeper than in the past..."[T]he public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society."7

6 Rose, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Rep. 395, 395 (1906). Regardless of when a particular observation is made, the glorious days of the profession always appear to be in the past and longings for the wondrous days of old are constantly present. See, e.g., Louis D. Brandeis, The Opportunity in the Law, Address Before the Harvard Ethical Society (May 4, 1905), in BUSINESS--A PROFESSION 329, 337 (1933) (observing over nine decades ago that "it is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago"). We must, of course, be careful of such musings because for many people of color and women the bright days of the past were dark periods of exclusion. See, e.g., Charles W. Wolfram, Modern Legal Ethics 9-14 (1986) (noting the history of discrimination against both blacks and women in the legal profession). Indeed, as late as 1970, women constituted approximately 5% of the legal profession and African-Americans approximately 1%. See Terence C. Halliday, Six Score Years and Ten: Demographic Transitions in the American Legal Profession, 1850-1980, 20 L. & Soc'y Rev. 1, 62-63 (1986); Edward J. Littlejohn & Leonard S. Rubinowicz, Black Enrollment in Law Schools: Forward to the Past?, 12 T. Marshall L. Rev. 415, 418 (1987).

7 Geoffrey Hazard, Jr., The Future of Legal Ethics, 100 Yale L.J. 1239, 1240 (1991); see also Burger, supra note 2, at 950 (concluding that the "standing of the legal profession is perhaps at its lowest ebb in this century—and perhaps at its lowest in history"); Commission on Professionalism, American Bar Ass'n, Report to the House of Delegates, 112 F.R.D. 243 (1986) (recommending ways of improving both the reality and the perception of lawyer professionalism). Results of surveys and public opinion polls evidence a decline in public regard for the legal profession. For example, a 1985 survey of corporate executives and judges conducted by the ABA Commission on Professionalism found that only 6% of corporate users of legal services rated "all or most" lawyers as deserving to be called "professionals"; only 7% saw professionalism increasing among lawyers; and 68% said that it had decreased over time. In addition, 55% of state and federal judges questioned in a separate poll stated that lawyer professionalism was declining. Id. at 254 (citing G. Shubert, Survey of Perceptions of the Professionalism of the Bar (1985) (unpublished)); see also Pharmacists Rate Highest in Public Trust, Gallup Survey Shows, U.S. Newsp. Jan. 15, 1997 (1996 Gallup poll finds 41% of the public believe lawyers have low honesty and ethical standards); Gary A. Hensler, The Public Perception of Lawyers: ABA Poll, A.B.A. J., Sept. 1993, at 60 (only 40% of those polled on comprehensive survey of public views of the legal profession expressed favorable feelings towards lawyers); Nancy E. Roman, ABA Meeting Ponders Reasons Lawyers Are Held in Low Esteem, Wash. Times, Aug. 12, 1993, at A4 (Gallup poll reveals only 16% of Americans trust lawyers); Lara Wozniak, In the Court of Public Opinion, Lawyers Lose, St. Petersburg Times, Aug. 6, 1996, at IE (number of people who have little or no respect for lawyers rose from 25% in 1988 to 44% in 1996).

To be sure, some of the negative sentiment directed at the profession may be overblown. In a 1991 survey of disciplinary procedures, the ABA Commission on Evaluation of Disciplinary Enforcement observed that although much of the criticism it heard was justified and accurate,
Numerous authors have speculated about the underlying causes of the current cynicism. Significant lawyer involvement in major public scandals over the last 25 years (including quite a few recent ones) undoubtedly is a contributing factor. Added to the calculus are, among other things, low rates of disciplinary enforcement by state bars, the competitive nature of

\[\text{[m]any negative perceptions about the profession are out of proportion to reality. Most lawyers are honest and skillful, and their clients respect them. ... Unlike other professionals, lawyers are more likely to be criticized because of the nature of their work. In litigation, fifty per cent of the clients lose their cases. In domestic relations, almost everyone leaves the proceedings with some sense of dissatisfaction. Some clients who are unhappy with the results of litigation will continue to complain about their lawyers, and no amount of reform will eliminate that criticism.}\]

\[\text{AMERICAN BAR ASS'N COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT OF THE ABA xxiii (1991). In addition, some of the negative sentiment directed at the legal profession may be part of an overall decline in faith in public institutions. See WOLFRAM, supra note 6, at 3-4 ("[P]olls of the public mood about other institutions show a striking decline in the positive feelings that Americans once had toward many institutions such as government, business, labor unions, and most other important segments of American life.").}\]

\[\text{See Burger, supra note 2, at 952-57 (criticizing some lawyers for trying their cases on courthouse steps, for behaving like hired guns in the courtroom, and for engaging in "huckster-slyster" styles of advertising); Deborah L. Rhode, The Professionalism Problem, 59 WM. & MARY L. REV. 263, 283-96 (1988) (reviewing common complaints held by the public about the legal profession); see also ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (lamenting the decline of the once-dominant professional ideal of the lawyer-statesman); Edward D. Re, The Causes of Popular Dissatisfaction with the Legal Profession, 68 ST. JOHN'S L. REV. 85 (1994) (identifying persistent abuses of the adversary system through Rambo tactics premised on a sporting theory of justice, materialistic attitudes manifested in unjustified billing practices, the commercialization of the profession, ethical lapses, scandals, and attitudes of self-interest as culprit).}\]

\[\text{Lawyers figured prominently in the Watergate investigation of the 1970s, the Iran-Contra and savings and loan debacles of the 1980s, the no-holds-barred judicial confirmation battles over Robert Bork and Clarence Thomas, and the series of containing scandals that have marred the Clinton administration. See, e.g., United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (en banc) (former Attorney General John Mitchell and other top Nixon advisors convicted of conspiracy, obstruction of justice, and perjury); George H. Brown, Financial Institutions; Lawyers as Quasi Public Enforcers, 7 GEO. J. LEGAL ETHICS 637 (1994) (discussing role of lawyers in collapse of savings and loans); Deborah L. Rhode, Ethics by the Pervasive Method, 42 J. LEGAL EDUC. 31, 39 (1992) (tracing the profession's present emphasis on legal ethics to the Watergate scandal); Jill Abramson, Culture of Scandal Turns Inquiry Into an Industry, N.Y. TIMES, April 26, 1998, § 1, at 22 (referencing numerous scandals involving the Clinton White House); Stuart Taylor, Jr., A Close Look at the Fraud that Ruined O.P.M., N.Y. TIMES, May 1, 1983, § 3, at 4 (describing lawyer involvement in O.P.M.'s fraudulent use of forged and altered computer leases to obtain loans).}\]

\[\text{In 1970, the ABA found that disciplinary action was "practically nonexistent." AMERICAN BAR ASS'N SPECIAL COMT. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT I (1970). In 1986, an ABA Commission on Professionalism determined that problems continued to plague state disciplinary systems. COMMISSION ON PROFESSIONALISM, supra note 7, at 265, 294 (noting that state disciplinary agencies were insufficiently funded and staffed and were capable of pursuing only those ethical violations that were easy to prove (such as the theft or misappropriation of client funds or the commission of a felony)). Similar results were reported in 1991. See COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, supra note 7, at 49-50 (observing that}\]
contemporary legal practice, and the failure of law schools to teach students what they need to know in order to be ethical practitioners.

Although these factors cannot be ignored, I believe the public’s disdain for the legal profession, and perhaps dissatisfaction within the profession itself, is attributable in large part to the limited sense of lawyering now dominant in many professional circles. The public is disturbed by lawyers because it is becoming clear to them that legal ethics in practice means that a lawyer must do everything for a client that the law permits a lawyer to do. Given the extremely adversarial nature of contemporary legal practice, too often lawyers appear not as deliberative decision makers, carefully balancing the consequences of their actions, but rather as knee-jerk reactionaries willing to do whatever it takes to advance their client’s cause regardless of the costs involved. This apparent abandonment of judgment leads the public to conclude that many lawyers have little or no concern about legal merit or justice.

This Article examines the ways in which lawyers make ethical decisions and the factors that inform those decisions in order better to understand, and perhaps to decrease, the growing division between the public’s concept of acceptable moral behavior and what individual lawyers believe their roles as representatives of clients require. In short, I argue that the current process of

notwithstanding significant increases in funding and staffing, lack of adequate funding remained a serious problem resulting in processing delays).

11 See Rhode, supra note 8, at 298-99.


13 The problem is not limited to negative external perceptions of the legal profession. Even within the ranks of lawyers, a certain degree of dissatisfaction and “moral anxiety” exists. See Rhode, supra note 8, at 296-303 (summarizing some of the reasons for dissatisfaction within the legal profession). Indeed, lawyers are often disappointed by the disconnect between their moral aspirations upon entering the profession and the subsequent realities of practice. See William H. Simon, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 1-4 (1998). Instead of doing good, lawyers sometimes find themselves behaving in ways that produce the opposite result. See id. at 2. For many lawyers, this outcome is perplexing and disturbing. See id.

14 A number of scholars have attributed public dissatisfaction with lawyer conduct to the moral demands of the lawyer’s specialized role, which sometimes conflict with common moral intuition. See, e.g., David Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY at xxii, 104-47 (1988); Murray Schwartz, The Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669 (1978); Richard Wasserstrom, Roles and Morality, in THE GOOD LAWYER 25-37 (David Luban ed. 1984).
ethical decision making is overly formalistic and acontextual.\textsuperscript{15} In resolving
difficult questions of professional ethics, lawyers appear to be guided primarily by:
(1) an over-reliance upon ethical rules promulgated by courts and bar associ-
ations;\textsuperscript{16} and (2) a belief that loyalty to one's client is the preeminent, if not
the sole, consideration.\textsuperscript{17} An approach to ethical decision making that relies
heavily upon these factors is problematic because rules can never capture the
universe of ethical conflicts that will arise. In addition, rules are often incon-
clusive and contradictory and, as a result, give rise to competing interpretations
and variable outcomes.\textsuperscript{18} Because of these limitations, a vast territory for deci-
sion making lies both within and beyond rules. Unfortunately, when faced
with ambiguity, the dominant approach to legal ethics teaches that lawyers
should merely adopt interpretations and solutions that are most supportive of
their client's interests.\textsuperscript{19} Sadly, this approach discourages lawyers from con-
sidering the full panoply of options that are often available to them when pre-
presented with ethical problems. In effect, it absolves lawyers of responsibility
for engaging in ethical deliberation and consequently reinforces the perception
that lawyers are overly opportunistic hired guns who have little or no concern
for the underlying legal merits of a cause or for justice.

In this Article, I propose that instead of being wedded to a formalistic
approach to ethical decision making that relies heavily upon the two factors
noted above, lawyers should consider ethical questions within a broader context.
Thus, like several contemporary legal ethicists, I contend that lawyers
should move away from rigid styles of decision making to more expansive
modes of analysis that will take a variety of factors into consideration.\textsuperscript{20} I seek

\textsuperscript{15} In recent years, other commentators have also noted this phenomenon. See, e.g., SIMON, supra note

\textsuperscript{16} See COMMISSION ON PROFESSIONALISM, supra note 1, at 259; Deborah L. Rhode, Symposium Intro-

\textsuperscript{17} See, e.g., LUBAN, supra note 14, at 393-405; SIMON, supra note 13, at 7-11.

\textsuperscript{18} For a critique of the lack of clarity inherent in the Model Rules, see Richard L. Abel, Why Does the
ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 642 (1981) (observing that the "Model Rules are
drafted with an amorphousness and ambiguity that render them virtually meaningless").

\textsuperscript{19} See sources cited supra note 17.

\textsuperscript{20} See, e.g., SIMON, supra note 13, at 138-69 (suggesting that lawyers consider three recurring tensions
when examining ethical problems: substance versus procedure, purpose versus form, and broad versus
narrow framing); Feldman, supra note 15 (arguing against analytical styles that discourage sentimental respons-
iveness); see also GEOFFREY C. HAZARD JR. ET AL., THE LAW AND ETHICS OF LAWYERING (3d ed. 1999)
(using general legal frameworks for ethical guidance); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY:
ETHICS BY THE PERSUASIVE METHOD (2d ed. 1998) (drawing upon a variety of sources, including ethical
rules, case law, scholarly commentary, and other interdisciplinary materials, in examining ethical problems).
to add to the discussion by arguing that legal principles developed in analogous areas of the law may offer helpful guidance to lawyers in this expanded context. In short, I suggest that lawyers do in the legal ethics realm that which they do quite naturally in other areas of the law when confronting difficult or novel legal questions. Although my focus will be on the individual lawyer, the arguments set forth herein may also be useful to regulatory bodies responsible for drafting ethical rules, commentary, and opinions.

Although a more expansive mode of decision making is less static and more fluid than the prevailing contemporary approach, it need not be unstructured. Indeed, lawyers might find helpful the three-step analytical method I employ throughout this Article. When faced with ethical conflicts or questions, I suggest that lawyers should first look to ethics rules and any applicable substantive laws (statutory as well as common) for guidance. It is important that the inquiry not end at that point if the rules provide inadequate instruction. Rather, lawyers should as a second step consider the purposes served by the rules and their underlying principles. If analysis of those principles gives rise to an irreconcilable conflict or provides insufficient guidance, lawyers should then consider other factors when resolving the problem. Again, I maintain, and seek to demonstrate in this Article, that consideration of analogous areas of the substantive law in which courts have explored issues similar to those raised by the ethical conflict in question may be helpful. The above methodology is useful because it exhausts conventional methods of ethics analysis and eliminates issues on which there is likely to be considerable agreement. It does not, however, limit the examination in ways that preclude ethical deliberation or a fuller understanding of the complex dimensions of ethical problems.

To illustrate some of the drawbacks with the profession’s current approach to ethical decision making and how legal principles in other areas of the law

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21 Some may argue that instead of encouraging lawyers to behave better as lawyers, we should encourage lawyers to be better human beings. I have no quarrel with the latter objective. However, it seems to me that many lawyers are reluctant to make or to justify professional choices on the basis of their own individual or personal moral beliefs. Nor should they be forced to do so. Although the practice of law necessarily involves the exercise of discretion and judgment, in other aspects of practice lawyers are provided with mechanisms to guide that discretion when faced with difficult legal questions. Lawyers should be afforded the same or similar techniques in the ethics realm. By equipping lawyers qua lawyers with a means of addressing ethical questions that is consistent with their legal training and that relies upon legal principles, we may circumvent lawyers’ hesitancy to engage ethical challenges and render legitimate the decisions that are ultimately reached.
may be useful in resolving practical problems, I explore the ethical obligations of recipients of inadvertently disclosed privileged information.\textsuperscript{22} I have chosen this example for three reasons. First, it presents a practical problem whose ethical dimensions have not been adequately explored and with which both the courts and practitioners are struggling. Thus, the analysis set forth herein is of contemporary significance. Second, it concerns conduct that does not fall squarely within a rule of ethics and is an area where the law is unclear. Neither legal doctrine nor ethical rules give lawyers clear guidance as to their professional obligations. Third, the example involves two values that are central to the law of lawyering: confidentiality and zealous representation of client interests. In the inadvertent disclosure context, these values conflict and produce a case of true ethical dilemma, a situation in which neither choice made by the receiving lawyer can easily be justified in face of the alternative presented to her. Thus, the decisions made by recipients of inadvertently disclosed information go to the heart of professionalism and raise fascinating questions concerning fairness, confidentiality, and the limits of advocacy. More importantly, the example provides an excellent opportunity to explore the complex ways in which lawyers make ethical decisions in the face of competing professional values and to examine the factors that inform those judgments.\textsuperscript{25}

The analysis proceeds as follows. Part I introduces the ethical conflict raised by the inadvertent disclosure of privileged information and critiques current approaches to this problem in order to illustrate some of the flaws with contemporary methods of ethical decision making. Part II explains why I believe legal principles developed in other areas of the law may be useful to lawyers when making ethical judgments. Part III tests this theory by applying

\textsuperscript{22} This Article discusses the ethics of inadvertent disclosures as opposed to disclosures resulting from a conscious or deliberate decision, which later is determined to be erroneous, to release information. For example, lawyers customarily review documents before disclosing them to an adversary. During this review, any privileged or confidential documents or information is removed or redacted. Occasionally, a lawyer may conclude that a document is not privileged and permit its disclosure. Subsequently, she may learn that her conclusion was mistaken and that the document should not have been released. In this scenario, the decision to disclose was deliberately made after reflection as opposed to having occurred through mere inadvertence. I will refer to disclosures falling within this category as erroneous deliberate disclosures. Admittedly, as the Mysterious Memo scenario will demonstrate, the distinction between erroneous deliberate disclosures and inadvertent disclosures is not always clear. See infra notes 219-22 and accompanying text.

\textsuperscript{23} Many scholars have used more sensational cases to support various arguments about legal ethics (e.g., the Lake Pleasant murder case, the Watergate scandal, or the O.P.M. fraud scheme, among others). I have chosen a relatively simple example that occurs increasingly in practice because I believe that the character of a profession is determined more by how it addresses conflicts and dilemmas that arise in its daily course of business rather than how it responds to more fantastic, but less frequently occurring, scenarios.
the doctrine of unilateral mistake in contract law to various scenarios involving inadvertent disclosures. Part IV briefly discusses the role of the client in the decision making process.

It is important to note at the outset that my intention is not to bash lawyers. Like many commentators, I believe that most lawyers are conscientious, well-meaning professionals who desire to render excellent legal service to their clients while simultaneously upholding the integrity of the law and of the legal profession. My purpose here is to appeal for more expanded, more flexible forms of decision making and to suggest that substantive law principles may be useful to lawyers when making ethical decisions. My hope is that the arguments set forth herein will enable lawyers to become more thoughtful ethical deliberators and consequently to produce more considered ethical outcomes. Accomplishing the latter may coincidentally minimize the public’s perception that lawyers simply do not care about ethics.

I. THE ETHICS OF “GOTCHA JUSTICE”: EXPLORING THE ETHICAL OBLIGATIONS OF LAWYERS WHO RECEIVE INADVERTENTLY DISCLOSED PRIVILEGED INFORMATION FROM OPPOSING COUNSEL

In the hectic world of far-reaching discovery and high-tech communications, inadvertent disclosure of privileged information is increasingly common. Disclosure may occur in a number of ways. Documents may be released accidentally in the course of a routine document production. A secretary may mistakenly address a letter or send a fax. The slip of a finger may cause a lawyer to send a confidential e-mail soaring through cyberspace to the desk of opposing counsel. The most careful screening mechanisms

\[24\] Indeed, this Article is for those lawyers. The careful reader will observe that the arguments set forth herein contain no enforcement mechanisms. Rather, the goal is simply to equip well-meaning professionals with practical tools for conducting more expansive investigations of ethical problems. If, however, regulatory agencies and scholars were to adopt the methodology employed herein, their efforts would undoubtedly provide additional and necessary support for individual lawyers who desire to engage in broadened ethical analysis.


\[26\] See James P. Ulwick, Producing By Mistake, LITIG., Spring 1992, at 20 (recounting incident in which secretary inadvertently faxed defense attorneys’ jury selection analysis to plaintiff’s lawyer).

cannot prevent these inadvertent disclosures from occurring. Thus, the question inevitably arises as to what happens next. After privileged information has been disclosed, has the information lost its privileged or confidential character? May the lawyer receiving the material use it in any fashion she desires? What, if any, ethical obligations limit the receiving lawyer’s options?

To explore the ethical problem raised by inadvertent disclosures, consider the following scenarios:

*The Mysterious Memo*—Upon receipt of a request for documents, Alan Attorney and his associates review their client’s files. Subsequently, Alan produces forty boxes of materials to opposing counsel, Susan. Unbeknownst to Alan, one of the documents is a memorandum from his client’s in-house counsel to the client discussing the subject of the lawsuit. The first page of the memorandum, which identifies the parties, is not attached to the version that is produced. The contents of the memorandum are privileged.

*The Overheard Conversation*—While in their law firm, Alan and his colleague Carol take an elevator to the firm’s cafeteria. En route, Alan and Carol discuss damaging information they have just received from their client and their proposed response to it. Unbeknownst to Alan and Carol, a lawyer from Susan’s law firm is present in the building on another case and overhears the conversation. That lawyer is about to brief Susan on the contents of Alan and Carol’s discussion.

*The Forgotten File*—After a long day of meetings with Susan to discuss settlement options, Alan inadvertently leaves two files containing confidential information in a conference room in Susan’s law firm. Susan has just noticed the files.

*The Errant Fax*—Susan has sued Corporation on Bill’s behalf. While representing Bill, Susan receives a fax. The fax is not addressed to Susan and does not otherwise appear to be intended for her. In fact, the fax is addressed to the CEO of Corporation and is from Alan, counsel for Corporation. The first page of the fax contains typical language stating that the fax includes confidential information and should be returned immediately if sent in error. The fax appears on its face to contain information subject to the attorney-client privilege. Alan and Corporation do not know the materials have been missed.
In these examples, Susan did not ask for the disclosed information. She did not pay someone to sneak into the other side’s offices to steal it, nor did she hire a mole in the opposing law firm. The information came unsolicited. In other words, it was a “gift”—or possibly a curse.

In each case, Susan faces a difficult ethical choice. In the eavesdropper situation, should she refuse to hear what her colleague has to say? In the other scenarios, should she refrain from reading the seemingly privileged materials? Should she notify opposing counsel? Should she return the documents to opposing counsel? Should she keep the documents, say nothing, and use them to seek every advantage for her client? And what of the other side’s concerns? If you represented the client whose confidential information has been disclosed inadvertently, how might you think Susan ought to proceed?  

A. Current Approaches to the Problem

The Model Rules of Professional Conduct (“Model Rules”), the most recent ABA codification of lawyer ethics, do not directly address the ethical

28 Ron Smith, General Counsel for the Kansas Bar Association, posed the question quite colorfully in a recent article entitled Think Ethics. He writes:

In September, 1862, a set of marching orders issued by Confederate General Robert E. Lee intended for Lee’s corps commanders were [sic] lost. A Union corporal found them and within an hour, Union General George McClellan had a blueprint of where Lee was deploying his troops in the Maryland countryside. McClellan already outnumbered Lee and now he could marshal his forces and get between the two wings of Lee’s army, destroying the Army of Northern Virginia in one classic napoleonic battle.

Lee’s communication was privileged because it was obviously meant only for Lee’s corps commanders. Did McClellan have an obligation to return them, and not act upon the information?

If Lee and McClellan were lawyers subject to the Model Rules of Professional Conduct, the answer is probably yes. Since they were mere generals, McClellan acted on these papers, and ordered his Union army to intercept the confederates. Lee survived his messenger’s faux pas but at a terrible cost; Antietam became America’s bloodiest day ever.

Ron Smith, Think Ethics, J. KAN. BAR ASS’N, Oct. 1994, at 9. Smith’s recount raises an interesting and intriguing question: Is litigation war? Undoubtedly, in many cases it is precisely that for the parties involved. But, what of the lawyers? In an adversary system, are lawyers merely generals like McClellan and Lee, obliged to fight to death for their respective sides at all costs? Or is the lawyer’s role somehow different? To some extent, this Article explores these fundamental questions.

29 The ABA has promulgated three major ethics codes: (1) the Canons of Professional Ethics (adopted in 1908); (2) the Model Code of Professional Responsibility (adopted in 1969); and (3) the Model Rules of Professional Conduct (adopted in 1983). See MODEL RULES OF PROFESSIONAL CONDUCT vii (1998). The Canons provided the primary source of ethical guidance for lawyers from their adoption in 1908 until they were superseded by the Model Code in 1970. The ABA adopted canons 1-32 in 1908. The ABA adopted
conflict faced by the recipient of inadvertently disclosed material. Nor does the case law of waiver, which determines whether the attorney-client privilege is waived through inadvertent disclosure, provide consistent guidance. It is therefore not surprising that strong and conflicting views have emerged among the few scholars and commentators who have examined the issue. In general, the arguments fall into one of two camps. On the one hand rests the viewpoint expressed by the ABA in a 1992 formal ethics opinion. On the other hand lies the opinion of Professor Monroe Freedman, whose comments typify the views of those who disagree with the ABA. Review of these two divergent approaches to inadvertent disclosures illustrates both the complexity of the problem and weaknesses with the profession’s current approach to ethical decision making. For ease of application, I shall focus primarily on the Errant Fax scenario in describing these views. I shall subsequently return to the other examples.

1. The ABA Approach

On November 10, 1992, the ABA issued Formal Ethics Opinion 92-368, which addresses the errant fax situation. In that opinion, the ABA

canons 33-45 in 1928. By 1975, 49 states had adopted the Model Code in some form. See WOLFRAM, supra note 6, at 56-57. By mid-1993, more than two-thirds of the states and the District of Columbia had adopted some version of the Model Rules. HAZARD ET AL., supra note 20, at 13-16. Federal courts often cite the Model Code and Model Rules as authority in decisions concerning professional conduct. Id. When I discuss ethical rules, unless otherwise indicated, I will cite to the Model Rules. It is important to note, however, that the Model Rules have no legal force in and of themselves. They take effect only after having been adopted by a state’s highest court, and many states have altered one or more of the provisions contained in the Model Rules. Id.

30 See infra Part I.A.3.

31 In a fourteen-page opinion, the ABA conducted the most comprehensive analysis of this problem to date. See ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992) reprinted in AMERICAN BAR ASS’N, COMPENDIUM OF PROF. RESP. RULES AND STANDARDS 405 (1997).

32 In a brief newspaper article, Professor Monroe Freedman succinctly summarized arguments against the ABA’s views. Monroe Freedman, The Errant Fax, LEGAL TIMES, Jan. 23, 1995, at 26.

33 The Committee was specifically asked to give an opinion on

the obligations . . . of a lawyer who comes into possession of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer[,] including situations in which the sending lawyer has notified the receiving lawyer of the erroneous transmission and has requested return of the materials sent as well as those situations in which the inadvertent sending lawyer and his client remain ignorant that the materials were missent [and] situations in which the receiving lawyer has already reviewed the materials as well as those in which the sending lawyer intercedes before the receiving lawyer has had such an opportunity.

acknowledged that the Model Rules of Professional Conduct do not directly answer the question posed, but nonetheless concluded that recipients of inadvertently disclosed information should refrain from examining the materials once the inadverntene is discovered, notify the sending lawyer, and abide by his or her instructions. In reaching this result, the ABA relied heavily on the importance of confidentiality to the lawyer-client relationship, finding that “[t]he concept of confidentiality is a fundamental aspect of the right to the effective assistance of counsel. As reflected in each iteration of the rules of professional responsibility, the obligation of the lawyer to maintain and to refuse to divulge client confidences is virtually absolute.”

In determining that it could not identify a more important principle justifying conduct that would undermine the strong policy in favor of confidentiality, the ABA briefly addressed several arguments. First, it rejected the blanket assertion that the legal profession has an interest in punishing or seeking to deter carelessness on the part of the sending lawyer by allowing the receiving lawyer to keep the confidential materials without notifying opposing counsel. The ABA observed that lawyers are already strongly motivated to protect confidential materials, that loss of confidentiality is a high penalty to pay for a mere slip, and that punishment will not prevent future accidents from occurring. Second, the ABA countered the suggestion that there is no confidence to protect after disclosure, noting that “there is still value in maintaining what confidentiality remains” and that disclosure to counsel need not result in disclosure to counsel’s client or other parties. The ABA also recognized a difference between knowing the contents of documents and being

34 Id. ("A satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules.").
35 Id. at 406.
36 Id. at 406-07. Model Rule 1.6 provides one source for this motivation. That rule states, in part: “[A] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).
37 Formal Op. 92-368, supra note 31, at 407. The ABA notes:

The argument also ignores the persistence of human frailty. The possibility of “punishment,” no matter how severe, will never prevent, in this modern age of electronic transmission, unlimited photocopies and cases with hundreds of parties, accidents from occurring. The wrong number on the facsimile machine will still be “mis-speed-dialed”; the contents of two envelopes will get switched; “send copies to all defense counsel” will be misunderstood as “send copies to all counsel.”

38 Id. at 408.
able to use them at trial. Thus, the mere fact that information is out of the bag does not mean that it can be used indiscriminately for all purposes. Third, in response to the argument that the receiving lawyer has an obligation to maximize the advantage his client will gain at trial, the ABA stated that there are many ethical constraints on “uncontrolled advocacy,” noting among other things that “the Model Rules carefully circumscribe factual and legal representations a lawyer may make, people counsel may contact, and clients counsel can represent.” Finally, the ABA invoked good sense and reciprocity as bases for its decision, cautioning that “what goes around comes around” and admonishing lawyers to avoid risking dire consequences like mistrials and forced withdrawals that may result from proceeding in an overly aggressive fashion.

Although Opinion 92-368 addresses the above concerns, the opinion rests primarily on the important values served by the principle of confidentiality. The ABA relies heavily on the belief that preservation of client confidences encourages persons to seek legal advice and to communicate freely and openly with their lawyers. This enables lawyers to represent their clients honestly and effectively and promotes the broader public interest in the observance of law and the administration of justice. These goals arguably would be compromised if the privilege could be cast aside or waived through inadvertence. As a result, followers of the ABA approach argue that the standard for waiver should be quite high and that waiver must be knowing and intentional. In the inadvertent disclosure context, the disclosing party arguably has not knowingly and intentionally relinquished its rights to the confidential material. Because waiver has not occurred, the receiving lawyer is ethically obliged to refrain from viewing the inadvertently disclosed materials and to notify opposing counsel of their receipt. To buttress its conclusions, the ABA points to cases in which courts have been unwilling to permit mere inadvertence to constitute waiver.

39 Id.
40 Id.
41 Id. at 412-13.
43 Although there are situations in which a party's handling of privileged information is so sloppy or negligent as to suggest an implied waiver, lawyers arguably are not positioned to make that determination at first glance without an assessment of the circumstances of disclosure by an impartial arbiter (i.e., the court).
44 See Formal Op. 92-368, supra note 31, at 413.
45 Id. For a critique of reliance upon the law of waiver for ethical guidance in inadvertent disclosure cases, see infra Part I.A.3.
Technically, ABA opinions have no binding force. Because the ethics rules of most states are derived from either the Model Rules or the Model Code, ABA opinions are nonetheless quite influential and are often cited by courts, state and local ethics committees, and legal scholars. Indeed, several state bars have elected to follow the recommendations contained in Opinion 92-368. On the other hand, some state bars and commentators have found the reasoning of Opinion 92-368 unpersuasive.

46 See, e.g., Alabama State Bar, Office of General Counsel, Informal Op. of April 12, 1996 (following Opinion 92-368 in earnest fax situation); Connecticut Bar Informal Ops. 95-4, 96-4 (1996) (citing Opinion 92-368 in cases involving unauthorized release of psychiatric records and duty to forward tax documents to former partner of law practice); District of Columbia Bar Op. No. 256 (1995) (following Opinion 92-368 if recipient of inadvertently disclosed information has not reviewed the information); Florida Bar Op. 93-3 (1994) (recipient of inadvertently misdelivered documents must promptly notify sender); Kentucky Bar Ass’n Op. E-374 (revised) (1995) (lawyer who receives materials under circumstances in which it is clear that they were not intended for the receiving lawyer should refrain from examining the materials, notify sender, and abide by the sender’s instructions regarding disposition of materials, but the lawyer who does not follow the materials is not subject to discipline); Board of Responsibility of the Supreme Court of Tenn. Advisory Ethics Op. 92-A-478 (1992) (same).

In response to written requests for information, the following states indicated that they had no opinions concerning inadvertent disclosure of privileged materials: Arkansas, California, Georgia, Hawaii, Idaho, Iowa, Indiana, Kansas, Minnesota, Nevada, New York, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Vermont, Virginia, West Virginia, Wisconsin. Several bars have issued opinions dealing with unauthorized disclosures that were not directly on point. See, e.g., Arizona Op. No. 83-16 (1983) (dealing with unauthorized receipt of privileged materials from third party); New Jersey Advisory Comm. on Professional Ethics Op. 680 (1995) (reporting that use of materials stolen from briefcase of opposing counsel). Several bars have not addressed the inadvertent production question directly, but have commented on it in reaching results on slightly different facts. Arizona Opinion No. 93-14 (1993) raises an interesting scenario. There, in a divorce action, the client provided the attorney with a tape containing privileged communications between the client’s spouse and the spouse’s attorney. The spouse apparently had left the tape in the couple’s residence in the course of removing her possessions. According to the bar, it was unclear whether the tape had been left inadvertently or whether it had been abandoned. In deciding that the attorney could listen to the tape, the bar distinguished this case from the situation addressed by ABA Opinion 92-368 on the grounds that the client had obtained the information through the inadvertence of the spouse and not opposing counsel.

47 See, e.g., Maine Professional Ethics Comm. Op. No. 146 (Dec. 9, 1994) (rejecting professional courtesy arguments and refusing to read unexpressed limitations into the Maine Bar Rules); Maryland Bar Ass’n Op. No. 89-33 (June 23, 1989) (lawyer may use document obtained from unidentified source and is not required to notify court or opposing counsel, but lawyer should keep copies to avoid destruction of evidence); see also State Bar of Alabama, Office of General Counsel, Informal Op. of April 8, 1996 (distinguishing inadvertent production in the course of a routine document production from an errant fax transmission and refusing to apply 92-368 in the former context). Some state bars have concluded that the receiving lawyer may use the materials, but that she should notify opposing counsel. See Ohio Board of Commissioners on Grievances and Discipline Op. 93-11 (Dec. 3, 1993) (lawyer who obtains inadvertently disclosed privileged memorandum during the course of a public records search has no ethical duty to protect an opposing party’s confidence and secrets by refraining from reading the memorandum, but the recipient does have an ethical duty to notify the source and to provide opposing counsel with a copy of the document upon request); Virginia Legal Ethics Op. 1076 (May 17, 1988) (concluding that “nothing in the Code of Pro-
2. Opponents of the ABA Approach

Professor Monroe Freedman⁴⁸ has been an outspoken critic of the ABA’s conclusions.⁴⁹ Although Professor Freedman is not alone in his views,⁵⁰ his comments typify the opinions of those persons and entities who disagree with the ABA. Thus, for ease of reference I shall refer to those identifying with his arguments as the Freedman camp. Briefly, Professor Freedman contends not only that the recipient of inadvertently disclosed privileged documents may review the documents and use them, but that receiving counsel need not inform opposing counsel that she possesses the information. He points out that no Model Rule supports the ABA’s result,⁵¹ that the receiving lawyer is not obliged to protect the confidentiality between opposing counsel and her client,⁵² that the receiving lawyer has a duty to represent zealously her client’s interests,⁵³ and that she should not be forced to give more weight to her adversary’s obligation of confidentiality than to her own obligation of zealous representation. Professor Freedman buttresses his arguments with practical considerations. Regarding review of the document, Professor Freedman asks, “How do you know that a document is privileged unless you read it[?],” observing that “[e]ven a faxed invitation to lunch is likely to have a cover sheet with the standard language about lawyer-client privilege and threats of cruel and unusual punishment for any unauthorized use.”⁵⁴

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⁴⁸ Professor Freedman is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School.
⁴⁹ See Freedman, supra note 32.
⁵⁰ See sources cited supra note 47.
⁵¹ Freedman, supra note 32 (“[T]he ABA’s analysis begins with the admission that a ‘satisfactory answer cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules.’ A translation from the doublespeak is that there is no rule that supports the ‘satisfactory answer’ the [ABA] wanted to reach.”).
⁵² Id. Professor Freedman states:

Your adversary has been careless in protecting her client’s confidences. Therefore, says the [ABA], you should protect her client’s confidences. . . . I understand everything but the “therefore” . . . . [T]here are values, including the lawyer-client privilege, that take precedence over truth seeking. But you—the adversary of the party who holds the privilege—are not bound by that privilege.

Id.

⁵³ Id. (“[T]eal has always been subject to express limitations. But that is hardly an excuse for adding unexpressed limitations . . . .”).
⁵⁴ Id.
Those in the Freedman camp rest their conclusions on another fundamental value underlying the law of lawyering: the lawyer’s duty to represent her client’s interests zealously. Having identified partisanship as the preeminent value at issue, this camp appears to find confidentiality of marginal significance and is more inclined to agree with Professor Wigmore’s restrictive view of the attorney-client privilege.²⁵ Because the privilege obstructs the search for truth, this camp maintains that it should be treated like a “crown jewel.”²⁶ If an attorney is “careless” with it, then that attorney must pay the price and sacrifice the privilege’s protections. Pursuant to this reasoning, the privilege would be lost through inadvertent disclosure, or any disclosure. There being no confidential information to protect as a matter of law, an attorney would be free to use the inadvertently disclosed material in any way she deems fit.²⁷

3. **The Law of Waiver**

Both the ABA and the Freedman camp rely upon the case law of waiver (albeit differing case law) to support their respective conclusions.²⁸ That reliance is somewhat misguided because courts rarely discuss the ethical obligations of recipients of inadvertently disclosed materials in their opinions. Instead, they focus almost exclusively on the legal question of whether inadvertent disclosure waives the attorney-client privilege. That is to say, rather than addressing the appropriateness of the receiving side’s behavior in reviewing and utilizing the material before judicial resolution of the matter, courts tend to focus on the ultimate question of waiver and on prospective use

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²⁵ In an often-quoted passage, Wigmore argues that the privilege is an exception to the general duty of disclosure. He notes:

> [I]t is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

²⁶ See supra note 31; Freedman, supra note 32.

²⁷ Professors Freedman’s views have raised the ire of some lawyers and commentators. For an interesting response to Professor Freedman, see Bertram Packer, Letters, “Errant Fax” Argument Proves Too Simplistic, LEGAL TIMES, Feb. 6, 1995, at 33 (“[T]he poverty of the Distinguished Professor of Legal Ethics’ position is reasonably clear to some of us ‘old-timers’ who, despite the fact that we zealously represent our clients and give no quarter, still expect appropriate professional behavior from both our colleagues and adversaries . . . .”).

²⁸ See supra note 31; Freedman, supra note 32.
of the information.\textsuperscript{59} To understand fully the limited utility of the law of waiver in determining a receiving attorney's ethical obligations, a brief overview of that law is in order.

In general, courts have developed three tests for determining if waiver has occurred: (1) the balancing of factors test; (2) the strict responsibility test; and (3) the intent test.\textsuperscript{60} Although it is of recent vintage, the balancing of factors test has become the favorite in federal courts.\textsuperscript{61} Yet, this test yields the least predictable results. Under it, courts consider five factors, or the "totality of the circumstances," in determining whether inadvertent disclosure waives the attorney-client privilege. These factors are: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; \textsuperscript{62} (2) the time taken to

\textsuperscript{59} This results from the posture of these cases by the time they get to court. For the most part, by that time, courts are not asked to consider the appropriateness of the recipient's behavior upon receipt of the information, but rather are called upon to determine whether the information can be used at trial.

\textsuperscript{60} Numerous authors have analyzed and commented upon the relative merits of these tests. See, e.g., Anne G. Bruckner-Harvey, Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?, 46 BAYLOR L. REV. 385 (1994) (analyzing issues raised by disclosure of mistaken faxes and urging courts to hold that such disclosures do not waive the attorney-client privilege); Robert J. Franco & Michael E. Prangle, The Inadvertent Waiver of Privilege, 26 TORT & INS. L.J. 637 (1991) (extensively reviewing various legal approaches to waiver and recommending adoption of a balancing of factors approach); James M. Grippando, Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents, 59 U. MIAMI L. REV. 511 (1985) (advocating for adoption of the balancing of factors test over the strict responsibility test for waiver); Roberta M. Harding, Waiver: A Comprehensive Analysis of a Consequence of InadvertentlyProducing Documents Protected by the Attorney-Client Privilege, 42 CATH. U. L. REV. 465 (1993) (critiquing three approaches to waiver and proposing an alternative test establishing a rebuttable presumption that inadvertent production does not waive the attorney-client privilege); Stevenson, supra note 27 (applying waiver doctrine to the unique problems raised by inadvertent disclosure of e-mail communications). Although it is helpful briefly to summarize the various court approaches to waiver, my intent here is not to revisit the issues explored by those authors, as their purpose is to examine the legal question of whether waiver has occurred. In contrast, my goal is to apply the methodology outlined earlier in this Article to examination of the ethical obligations of recipients of inadvertently disclosed materials when the law is unclear.


\textsuperscript{62} This factor receives the most attention in judicial opinions. In nearly every case where the court determines that reasonable precautions were in place, the privilege is maintained. In every case where the court determines that reasonable precautions were not taken, the privilege is waived.

In determining what constitute "reasonable precautions," courts assess whether documents were screened by the disclosing party before review by opposing counsel, whether potentially privileged documents were carefully segregated from other documents, who screened the documents (attorneys, paralegals, or secretaries), how many people were involved in the screening, how much time was spent on the screening process, and whether requested documents were screened a second time before being produced, among other things. See, e.g., United States v. Derr, No. C-91-2782-BAC, 1993 U.S. Dist. LEXIS 11414, at *2-3 (N.D. Cal. Aug. 2, 1993) (no waiver where discovery review lasted more than a year and where attorneys reviewed all documents before disclosure).
rectify the error;\(^{63}\) (3) the scope of discovery;\(^{64}\) (4) the extent of the disclosure;\(^{65}\) and (5) the overriding issue of fairness.\(^{66}\) Although widely used, the balancing of factors approach is sorely lacking in theoretical justification. Courts using the approach rarely make any attempt to justify it, or say (in essence) "everyone’s doing it" or "it just makes sense."\(^{67}\) The few justifications that are offered usually focus on the weaknesses of the other two approaches rather than on the strengths of the balancing of factors approach.\(^{68}\) When courts offer a positive justification it is usually shaped as follows: a waiver is typically an intentional act, and a person should not lose the privilege through an accident. Privileged communications, however, may be disclosed in a manner sufficiently negligent as to be deemed "intentional." Thus, the balancing of factors approach tests whether an inadvertent disclosure was negligent enough to result in waiver of the privilege. This approach protects the privilege while

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\(^{63}\) The faster a party attempts to rectify the error, the more likely the privilege will be maintained. Courts are divided over when the clock begins. For most courts, the clock starts when the disclosing party realizes its error. See, e.g., Edward Lowe Indus. v. Oil-Dri Corp., No. 94-C-7568, 1995 U.S. Dist. LEXIS 9380, *12 (N.D. Ill. July 10, 1995); Georgia-Pacific Corp. v. GAF Roofing Mfg., No. 93 Civ. 5125 (RPP), 1995 U.S. Dist. LEXIS 3338, at *4-5 (S.D.N.Y. March 16, 1995). Other courts hold that the clock begins as soon as the error is committed. See, e.g., Central Die Casting & Mfg. Co. v. Tekheim Corp., No. 93-C-7692, 1994 U.S. Dist. LEXIS 11411, at *14 (N.D. Ill. Aug. 15, 1994).

\(^{64}\) The broader the discovery request, the more likely the privilege will be maintained. Courts usually compare the number of documents (or pages) produced with the number of inadvertent disclosures. See, e.g., In re Atlantic Fed. Fed. Secs. Litig., No. 89-645, 1992 U.S. Dist. LEXIS 2619, at *21 (E.D. Penn. March 3, 1992). In essence, consideration of this factor is another way of getting at the reasonableness of the precautions taken to prevent disclosure—the smaller the ratio of inadvertent disclosures to production, the better the precautions are deemed to be.

\(^{65}\) The more limited the disclosure, the more likely the privilege will be maintained. In some cases, a protected document has only been briefly reviewed (but not physically possessed) by the opposing party. In most cases, a copy of the document is actually in the opposing party’s hands, meaning that the extent of disclosure is complete. See, e.g., Rotelli v. 7-Up Bottling, No. 93-6957, 1995 U.S. Dist. LEXIS 5277, at *7 (E.D. Pa. April 19, 1995).

\(^{66}\) This final factor is a "miscellaneous" or "catch all" category. Some courts use it as a potential escape hatch to justify a ruling contrary to that suggested by analysis of the other four factors. See, e.g., Rotelli, 1995 U.S. Dist. LEXIS 5277, at *7. Other courts use this category to discuss policy issues, such as the unfairness of rewarding a party for its carelessness by protecting the privilege, see, e.g., Edwards v. Whittaker, 868 F. Supp. 225, 229 (M.D. Tenn. 1994), or the unfairness to a client of having its privilege waived by the negligence of the attorney, see, e.g., Monarch Cement v. Lone Star Indus., 132 F.R.D. 558, 560 (D. Kan. 1990).


simultaneously retaining incentives for parties to guard privileged information.\(^6\)

The strict responsibility test is much less flexible. Pursuant to it, any inadvertent disclosure waives the privilege.\(^7\) Three justifications are commonly offered for this approach. First, because the privilege is an obstacle to the fact-finding process, it ought to be construed narrowly; this narrow construction includes broad rules of waiver.\(^7\) Second, because the privilege is designed to protect secrecy, once disclosure has occurred there is no point to continuing the privilege.\(^2\) As one court put it, "One cannot ‘unring a bell’."\(^3\) Third, because the party claiming the privilege is best positioned to prevent disclosure, it is her duty to implement necessary precautions, and a strict responsibility rule "internalizes the costs" of disclosure.\(^4\) A related argument is that if a communication is treated so carelessly as to be inadvertently disclosed, the party is undeserving of the protection of the privilege.\(^5\) Although the strict responsibility test is the more traditional approach to inadvertent disclosures,\(^6\) few federal courts actually use this approach.\(^7\)


\(^{7}\) See, e.g., In re Sealed Case, 877 F.2d 916, 980 (D.C. Cir. 1989); In re United Mine Workers, 156 F.R.D. 507, 511 (D.D.C. 1994); FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992). Although exception is made for "extraordinary circumstances," no court applying the strict responsibility rule has ever found such circumstances. The example of "extraordinary circumstances" often given is that of TransAmerica Computer v. IBM, 573 F.2d 646 (9th Cir. 1978), in which the court demanded that IBM produce 17 million pages of documents in three months. Without formulating a rule for inadvertent disclosure, the court said that this was so close to "court-compelled disclosure" that the inadvertent disclosure of privileged documents did not constitute a waiver.

\(^{7}\) See, e.g., In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979).


\(^{3}\) Singh, 140 F.R.D. at 253.

\(^{6}\) See, e.g., In re Sealed Case, 877 F.2d at 981.

\(^{7}\) See, e.g., id. at 980 ("[T]he amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege. . . . If a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels."). In addition to the reasons commonly offered by the courts, the strict responsibility approach has two other advantages. It serves the goal of judicial efficacy because it is the easiest test to administer and produces the most reliable results. Also, it avoids the problem of "systematic embarrassment," whereby (through inadvertent disclosure) certain facts are known to both parties and to the court which would decide the case one way, but whose inadmissibility requires a contrary holding. Such systematic embarrassment eventually undermines confidence in the judicial system. See Richard L. Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605, 1636 (1986) (discussing the problem of systematic embarrassment).

\(^{8}\) See Note, Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege, 82 Mich. L. Rev. 598, 607 (1983). The strict responsibility approach is most in line with the views of Wigmore, who stated, "All involuntary disclosures . . . are not protected by the privilege. . . . The risk of insufficient precautions is on the client." Wigmore, supra note 55, § 2225.

\(^{7}\) See In re Sealed Case, 877 F.2d at 976; Bell South Adver. & Publ'g Corp. v. American Bus. Lists,
Under the third approach, the intent test, waiver only occurs if the holder of the privilege intends to waive it. Thus, a truly “inadvertent” disclosure never constitutes waiver of the privilege; for this reason, this approach is known as the “no waiver” approach. Courts using the intent test also give three justifications for it. First, because waiver is “the intentional relinquishment or abandonment of a known right,” an inadvertent disclosure is, by definition, not an intentional relinquishment. Second, the attorney-client privilege is a valuable asset, held by the client and existing for the sake of the client, and should not be waivable by mere negligence of counsel. Third, this approach more effectively furthers the goal of promoting attorney-client communications because it rests control of the privilege squarely in the client’s hands.

In determining which of the above tests to adopt, courts typically weigh the benefits afforded by the attorney-client privilege against the costs it inflicts on the truth-seeking process. As regard for the privilege increases, so too does the difficulty of establishing waiver by inadvertence. However, as concern for the impact of the privilege on the truth-seeking process increases, waiver becomes easier to establish.

Certainly, clear resolution of the legal issue of whether disclosure waives the attorney-client privilege is relevant to determining the ethical obligations of recipients of inadvertently disclosed information. If inadvertent disclosure waives the privilege, then no ethical issue arises because there is nothing to protect. On the other hand, if inadvertent disclosure does not waive the privilege, then an attorney has a heightened obligation to respect the law.
concerning confidentiality and to refrain from using the disclosed material. If the jurisdiction in which a lawyer is practicing has not taken a position on the matter, however, it may be difficult to know in advance which test will govern in a particular context.

In addition, the tendency of an increasing number of courts is to employ the balancing of factors test, a totality of the circumstances approach that sometimes results in a conclusion of waiver and sometimes does not. Because of the fact-specific nature of this test, no rule of general applicability or presumption regarding waiver has evolved. Consequently, even if an attorney knows that courts are likely to apply the balancing of factors test in her jurisdiction, it is still unclear how those courts will assess the facts in any given case. Moreover, when the attorney receives the disclosure and must decide what to do, she may lack sufficient information upon which to rest a conclusion because the balancing test turns on the precautions taken by the other side. At the critical point of receipt, the receiving party usually does not have access to information about the extent to which opposing counsel has instituted precautionary measures to protect privileged information. This lack of uniformity and clarity on the question of whether waiver has occurred

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83 If the relevant jurisdiction employs either the strict responsibility test or the intent test, then the lawyer may proceed on the basis of that knowledge. In a strict responsibility regime, the lawyer would use the material. In a jurisdiction employing the intent test, she would refrain from using the material. Of course, real life practice is never quite this simple. In some circuits, there will be no binding precedent concerning waiver by inadvertent disclosure. In these circuits, it may be difficult to know in advance which test will apply and how courts will rule on an attorney's ethical obligation. Compare Transport Equipment Sales Corp. v. BMY Wheeled Vehicles, 903 F. Supp. 1187 (N.D. Ohio 1996) (noting the absence of binding precedent in the Sixth Circuit, rejecting the strict responsibility test, and ruling that attorneys should follow the dictates of ABA Formal Opinion 92-368, with In re Polypropylene Carpet Antitrust Lit., 181 F.R.D. 680 (N.D. Ga. 1998) (finding no waiver by inadvertence, but refusing to apply Opinion 92-368 in case involving law enforcement investigatory privilege because of lack of clear guidance from the Eleventh Circuit and because of conflicting opinions among the district courts concerning which waiver test to apply). In addition, the decisions of courts within a particular jurisdiction are not always consistent. See In re Polypropylene (noting division among district courts in the Eleventh Circuit over whether to apply the strict responsibility or the balancing of factors test). Moreover, lawyers are bound by case law as well as by ethics rules promulgated by relevant bar authorities, and these authorities also conflict at times. For example, the D.C. Circuit is one of the few circuits employing the strict responsibility test. See supra note 77. Yet, the D.C. Bar has issued an opinion in which it states that the recipient of inadvertently disclosed information should refrain from viewing the materials and return it to opposing counsel. District of Columbia Bar. Op. No. 256 (1995). For lawyers licensed in D.C. and practicing in the courts there, these contradictory directives likely will lead to some confusion. Beyond the fact that bar rules and the case law may conflict lies an additional risk: courts may distinguish between legal rules and an attorney's ethical responsibilities. Thus, relying upon case law for ethical guidance may be a risky proposition. See infra notes 86-87 and accompanying text.
means that the receiving attorney has little if any real guidance as to her legal, and consequently her ethical, obligations. 84

Some observers may argue that in jurisdictions where the law is unsettled, the simple solution is for lawyers to raise the issue directly with the court. This solution, however, ignores the fact that many judges dislike being heavily involved in discovery disputes and lawyers are consequently hesitant to raise these issues with the court early in the process. 85 When the question of waiver finally does come before the court, the issue to be decided is whether the recipient can use the materials in the case. At that point, the ethical question is for all intents moot because the receiving attorney already will have decided how she intends to proceed with the material. An ex post ruling on the legal question of waiver does little to assist with determining how the receiving attorney should have behaved before such judicial resolution. Because waiver analysis typically focuses on whether the privilege has been waived and usually does not include examination of how attorneys should behave in circumstances where it is unclear if waiver has occurred, court opinions will likely provide little guidance for attorneys in future cases.

Finally, even if a lawyer relies upon the law of waiver, courts may nonetheless determine that the lawyer’s ethical obligations are different and distinct from her legal obligations. A federal court in Michigan adopted precisely this stance in Resolution Trust Corp. v. First of America Bank. 86 In that case, the defendant’s lawyers inadvertently sent a privileged communication to plaintiff’s counsel. In defending their decision not to return the document, plaintiff’s lawyers relied upon legal precedent concerning the law of waiver to support their claim that inadvertent disclosure terminates the attorney-client privilege. The court, however, rejected plaintiff’s argument, noting that “most of the cases [relied upon by plaintiff] discuss waiver of privilege as an evidentiary, as distinguished from an ethical, matter or they are factually inapposite. . . . In any event, there does not appear to be any black letter rule regarding inadvertent disclosures.” 87

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84 See infra notes 86-87 and accompanying text regarding the assumption that ethical obligations flow inexorably from legal rules.
85 This solution also forces the recipient to notify the opposing side of receipt of the information. Because the receiving lawyer may not desire this result, she may decline to seek judicial review. Unless and until the disclosing lawyer learns of the disclosure through some other means, the disclosing side will be unable to raise the issue with the court.
87 Id. at 220. But see In re United Mine Workers, 156 F.R.D. 507 (D.D.C. 1994).
For all of these reasons, resort to the law of waiver will not as a general matter advance the analysis significantly. This leaves open the question of how lawyers should resolve ethical conflicts when the law is unclear. Closer analysis of the ABA and Freedman views reveals shortcomings with the profession's current approach to this problem.

B. Limits of Current Methods of Ethical Decision Making

I began this Article with the observation that contemporary ethical decision making is dominated by a tendency to rely heavily on rules for guidance and by a strong belief that pursuit of client interests is the most important consideration for a lawyer. The latter sentiment is sometimes expressed as the dominant view; that is, the belief that a lawyer must take all actions not expressly proscribed by the law when representing her client.88 The arguments set forth by the ABA and Professor Freedman illustrate the ways in which these ideals operate in practice. Closer inspection of these arguments, however, reveals the shortcomings with this approach to ethical decision making and how it fails to answer the question of how lawyers ought to make ethical judgments when the rules are silent and the case law is unclear.

1. Rule-Oriented Decision Making

In their attempts to resolve the dilemma facing the recipient of inadvertently disclosed information, both the ABA and the Freedman camp begin by seeking instruction from the Model Rules and the law of waiver. Thus, their reactions reflect the common tendency of lawyers to resort automatically to written rules when faced with ethical conflict. This practice is of somewhat recent vintage. Indeed, for much of its history, the organized bar in the United States relied upon generalized norms rather than written rules to direct the professional conduct of lawyers.89 As the bar began to promulgate ethics codes,

88 See Simon, supra note 13, at 7.
89 At least until the 20th century, the bar in the United States could be characterized as a "legal fraternity" consisting of men of similar educational, social, and economic backgrounds. See Hazard, supra note 7, at 1249-50. Prevailing ethical norms were consistent with the notion of a cohesive fraternal order. Writing in 1884, George Sharswood, a leading commentator on legal ethics, observed:

A very great part of a man's comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren . . . . He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them . . . . He should never unnecessarily have a personal difficulty with a professional brother. He should neither give nor provoke insult . . . . Let him shun most carefully the reputation of a sharp practitioner.

however, lawyers increasingly came to rely upon written rules as the primary, if not the exclusive, source for ethical guidance. 90

In the spirit of brotherhood, rather than having extensive written rules, professional norms and values were passed down informally from one generation of lawyers to the next as a matter of collective tradition. See Hazard, supra note 7, at 1249-50. Moreover, it was assumed that all members of the fraternity knew the proper boundaries of behavior befitting a lawyer. See id. Thus, early ethical standards consisted primarily of admonitions to civil behavior rather than legally enforceable standards. See N. Lee Cooper & Stephen F. Humphrey, Beyond the Rules: Lawyer Image and the Scope of Professionalism, 26 CUMB. L. REV. 923, 925-29 (1993-96) (noting that early standards consisted basically of “exhortations to rectitude with no specific consequences for violations”).

90 In 1908, the ABA adopted the ABA Canons of Professional Ethics. Interestingly, one reason for adoption of the Canons, at least according to the ABA committee recommending them, was to protect the profession from the overt commercial and competitive energies of its newest entrants. The committee feared that if unchecked, these practitioners, including many from immigrant backgrounds, would debase the profession’s public status; their “eager quest for lucre” threatened to “reduce the bar’s calling to the level of trade, to a mere means of livelihood or of personal aggrandizement.” AMERICAN BAR ASS’N, REPORT OF THE COMMITTEE ON [THE] CODE OF PROFESSIONAL ETHICS, 1906 ABA REPORTS 600, 600-04, reprinted in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 96 (Geoffrey Hazard, Jr. & Deborah Rhode eds., 1988). Notwithstanding the bar’s dubious concerns about its new entrants, the Canons were aspirational in character and merely reflected previously existing sentiments concerning legal professionalism. As one commentator has observed:

[The Canons presupposed that right-thinking lawyers knew the proper thing to do and that most lawyers were right-thinking. They expressed the viewpoint of an economically advantaged social stratum distinguished by its intellectual accomplishment, attachment to the business community, and preoccupation with civic-political affairs. . . . As admonitions emanating from a merely private organization, the Canons had no direct legal effect, either in grievance proceedings against lawyer misconduct or in civil actions for legal malpractice. In such proceedings, the Canons functioned not as enforceable legal standards but only as evidence of such standards.

Hazard, supra note 7, at 1250.

Between 1950 and 1980, the bar’s composition underwent a fundamental change. The number of lawyers more than doubled. See BARBARA A. CURRAN, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s, at 4 tbl. 1.1.1 (1985) (showing that the lawyer population increased by almost 300% between 1951 and 1984). What was once an almost exclusively white enclave began to admit significant numbers of women and people of color. See id. at 10 (showing an increase in the number of women lawyers from less than 3% from 1951 to 1970, to 8.1% in 1980, and almost 13% in 1984); see also COMMISSION ON PROFESSIONALISM, supra note 7, at 252 (noting that in 1971, there were less than 5,600 students classified as minorities in law schools, but in 1985 there were over 12,300). In addition, the median age of lawyers decreased dramatically. See CURRAN, supra, at 8 (showing that from 1960 to 1980, the median age dropped from 46 to 39 years). In short, the old fraternity had been replaced by a less cohesive, more diverse group of individuals connected primarily by its members having been licensed to practice law. A new era had begun. In an attempt to establish more extensive control over the profession, in 1970 the ABA adopted the Model Code of Professional Responsibility and with it the process of legalizing and codifying professional norms began with a vengeance. Whereas the Canons had merely expressed “fraternal understandings that memorialized a shared group discourse,” Hazard, supra note 7, at 1251, the Code included Disciplinary Rules, or black-letter principles the violation of which resulted not merely in fraternal disapproval, but in disciplinary adjudication with court-imposed penalties. This legalization process continued in 1983 when the Model Rules of Professional Conduct replaced the Code.
Although it is a fairly new phenomenon, an approach to ethical decision making that relies upon written rules is not without merit. In fact, there may be good reasons to proceed upon this basis. When they are clear, rules provide valuable guidance and direction. They are also easily administered, fairly simple to follow, and likely to produce relatively uniform outcomes (again, when they are clear). Perhaps more importantly, in a heterogeneous profession in which the lawyer's function is complex and multifaceted, ethical rules represent a collective and shared understanding among members of the profession as to how lawyers should balance the many competing obligations they face.\footnote{Hazard, supra note 7, at 1254-55 (quoting 1 M. Weber, ECONOMY AND SOCIETY 217, 226 (G. Roth & C. Wittich eds., 1963)).}

Although ethical rules may provide a useful mechanism for resolving ethical conflicts, overreliance upon written rules is potentially problematic. In most cases, if a lawyer can identify a rule specifying conduct appropriate to a given situation, the lawyer will generally follow the rule. If, however, no rule speaks directly to the issue at hand, if the rules are unclear, or if they suggest multiple courses of conduct, the lawyer may be tempted to conclude that she is free to pursue any action she desires (and usually this means engaging in partisan advocacy).\footnote{But see Rhode, supra note 8, at 317-20 (noting that increased diversity within the profession in terms of personal background, substantive specialty, and practice setting may require more diverse regulatory structures and practice-specific rules).} This rule-oriented approach creates an inclination to view the commands of the rules as exhaustive; lawyers come to regard written rules as

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Adoption of the Model Code and, subsequently, the Model Rules gave testimony to the belief that professional norms could be expressed primarily through binding legal rules. Because these norms were not merely professional obligations, but legal ones, it was felt that principles not reflected in the rules could not give rise to a violation of professional standards. As Professor Hazard has observed:

[The Rules represented a transformation of the profession from a "traditional" institution—one in which authority derives from "the sanctity of age-old rules"—to a "bureaucratic" institution—one regulated by a "system of abstract rules which have . . . been intentionally established" for "expediency, value-rationality, or both." As a member of a traditional institution, a lawyer would first think: "Doing X is unprofessional," and perhaps on second thought wonder whether X was barred by the Canons. As a member of an institution whose character is defined by law, the lawyer's first thought is more likely to be: "Does Rule Y prohibit/require doing X?"

Hazard, supra note 7, at 1254-55 (quoting 1 M. Weber, ECONOMY AND SOCIETY 217, 226 (G. Roth & C. Wittich eds., 1963)).

\footnote{Hazard, supra note 7, at 1254-55 (quoting 1 M. Weber, ECONOMY AND SOCIETY 217, 226 (G. Roth & C. Wittich eds., 1963)).}

\footnote{But see Rhode, supra note 8, at 317-20 (noting that increased diversity within the profession in terms of personal background, substantive specialty, and practice setting may require more diverse regulatory structures and practice-specific rules).}

\footnote{See COMMISSION ON PROFESSIONALISM, supra note 7, at 259 ("if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level"); Feldman, supra note 15, at 901-02 ("Even if it does not take itself to exhaust the subject of lawyers' ethics, a statutory code equates lawyers' ethical and legal obligations, discouraging lawyers from considering going beyond what is legally required to what would be ethically admirable."); William Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083 (1988) (critiquing lawyers' categorical approach to ethical decision making).}
encapsulating the universe of their ethical obligations and to view compliance with those rules as satisfying the entirety of those obligations.\textsuperscript{93}

Unfortunately, as illustrated by the inadvertent disclosure problem, a set of rules cannot capture the myriad circumstances in which ethical conflicts might arise.\textsuperscript{94} Moreover, it is implausible to believe the drafters of the Model Rules thought they could anticipate and address in written rules the entire universe of ethical conflicts that may unfold in the life of the practicing lawyer. The Preamble to the Model Rules explicitly negates this possibility by stating:

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.\ldots

The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.\textsuperscript{95}

Because ethical rules are inherently limited, an approach to ethical decision making that relies primarily, if not exclusively, on imperatives and proscrip-

\textsuperscript{93} See sources cited supra note 92.

\textsuperscript{94} Contemporary virtue ethicists recognize the limited utility of codified rules as a guide for ethical judgment because of their inability to account for the significant role of “detail, nuance and particularity” in varying ethical situations. As one virtue ethicist observes:

If one attempted to reduce one’s conception of what virtue requires to a set of rules, then, however subtle and thoughtful one was in drawing up the code, cases would inevitably turn up in which a mechanical application of the rules would strike one as wrong—and not necessarily because one had changed one’s mind; rather, one’s mind on the matter was not susceptible of capture in any universal formula.


\textsuperscript{95} MODEL RULES OF PROFESSIONAL CONDUCT Preamble cmts. 6, 14 (1998) (emphasis added). The Canons contained a similar limitation, stating

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

Canons of Professional Ethics Preamble (1908), \textit{reprinted in ABA Comm’n on Prof’l Ethics and Grievances, Opinions of the Committee on Professional Ethics and Grievances} 75 (1931).
tions contained in those rules is flawed, for such an approach will always leave a vast territory for discretionary judgment. This fact alone would not be problematic if lawyers were properly equipped to make sound judgments within this terrain. Unfortunately, because a rule-oriented approach implicitly teaches that rules are both the starting and the ending point for ethical analysis, it does not even invite lawyers to ponder seriously what they should do and how they ought to behave in situations where the rules do not apply. In short, it does not invite ethical deliberation.

Problems resulting from the inherently limited scope of rules are compounded by another fact that bodes ill for a rule-oriented approach: ethical rules are often inconclusive and conflicting.96 Because even a marginally skilled lawyer can interpret these rules to support many different behavioral outcomes, they invite what Professor Heidi Feldman calls "technocratic" decision making.97 Basically, the mission of a technocrat is to utilize any available weapon to secure her client's ends or to justify a path she has already decided to take.98 Thus, when faced with ambiguous or conflicting rules, a technocrat will adopt interpretations or positions that are most supportive of her client's interests.99 Again, this behavior does not stimulate ethical deliberation about what may be the right outcome or the proper role for a professional in the particular situation at hand. Unfortunately, resisting this temptation without an available alternative method of decision making may be impossible given the high costs of legal services and the competitive nature of contemporary legal practice.

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96 See Abel, supra note 18, at 642.
97 A technocratic lawyer "aims essentially for instrumental efficacy in accomplishing goals set by her client." Feldman, supra note 15, at 886.
98 Id. at 898. Professor Feldman notes:

A skilled technocratic lawyer can create defensible legal arguments for almost any position, not in spite of black letter ethics codes, but with their aid. This owes in large measure to the inevitable inconclusiveness inherent in any statutory code, including a code of ethics. . . . The more frequently a black letter code is inconclusive, the more opportunities there are for technocratic lawyering: for interpreting the rules simply to permit pursuit of the client's ends, without regard to independent ethical concerns.

Many of the above problems are illustrated by the approaches taken by both the ABA and the Freedman camp to inadvertent disclosures. Each side begins with analysis of the Model Rules of Professional Conduct, and each concludes that the Rules do not resolve the dilemma at hand. From that point, approaches to the problem diverge. The Freedman camp’s starting premise is that the absence of a rule directly on point means a receiving lawyer is free to use the material at will. To the extent the Freedman camp offers a justification for its conclusions, the camp invokes the principle of partisanship and points to case law in which courts have concluded that inadvertent disclosure waives the attorney-client privilege.

The Freedman position illustrates both the dangers of an over-reliance upon written rules to discern ethical obligation and the strong impulse towards technocratic decision making. Indeed, Professor Freedman explicitly asserts that absent a rule directly on point, lawyer conduct should not be curtailed by unwritten ethical constraints. This approach produces troublesome consequences because it encourages lawyers to become dismissive of or to oversimplify those ethical matters that are not resolved by written rules. It also eliminates any perceived need for and desire to engage in ethical deliberation (after all, either the rules resolve the matter or they do not—if they do not, then the lawyer is free to travel any path she desires). Having disposed of any written constraints on lawyer conduct, Professor Freedman argues that lawyers should resolve ethical issues falling beyond the parameters of the rules by simply doing what is best for their clients. The question thus becomes not what one thinks is the right or correct outcome considering all the relevant circumstances, but what position will best support one’s client. Moreover, the goal is not to use the rules as an aid to reaching the correct ethical outcome, but rather to interpret them as narrowly as possible to support the conclusion that most promotes the client’s interests. This approach avoids anything beyond mere passing consideration of professional norms and systemic values. In short, it is nothing more than technocratic decision making by default.

The point of departure for the ABA is quite different and so therefore is its conclusion. Absent a rule directly on point, the ABA does not automatically fall back on notions of partisanship to resolve the matter. Rather, the ABA

\[100\] See supra notes 51-53 and accompanying text; see also MONROE FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 71 (1990) (criticizing suggestions that the “advocate’s zeal on behalf of a client should be constricted by moral standards that have not been enacted into law by the legislature or recognized by the courts”).

\[101\] FREEDMAN, supra note 100.
concludes that additional analysis is required and proceeds to expand the scope of the analysis by considering the principle of confidentiality. Because of the importance of that principle, the ABA concludes that the recipient of inadvertently disclosed material should not use the disclosed information.

Although the ABA does not fall into the trap of regarding written rules as exhausting a lawyer’s ethical obligations and does not automatically default to the principle of partisanship, its approach is nonetheless problematic because it is unclear how the ABA determined that a recipient of inadvertently disclosed material is ethically obliged to refrain from using the material. Three possibilities come to mind: (1) the ABA viewed the factual scenario, decided what it thought should be the intuitively correct outcome, and reasoned backwards; (2) the ABA already possessed an opinion as to the relative importance of the two values at stake (i.e., confidentiality and partisanship) and applied that pre-existing hierarchy to the problem at hand; or (3) the ABA conscientiously weighed confidentiality against partisanship and concluded that the former was much more important than the latter in the instant scenario.

Review of the ABA’s cursory treatment of partisanship in Opinion 92-368 strongly suggests the ABA did not pursue the third option. Indeed, the ABA devotes only two paragraphs out of fourteen pages to partisanship. To the extent the ABA followed one of the remaining alternatives noted above, its methodology is flawed because both options create a tendency to dismiss the Freedman claims concerning partisanship. Regardless of whether the ABA is merely seeking to justify what it believes to be an intuitively correct outcome or is proceeding from a preset hierarchy of values, the fact that it is already committed to a particular position diminishes significantly its ability to consider alternative viewpoints openly. Indeed, the predetermined nature of the inquiry obscures the fact that a kernel of legitimacy may lie in both the ABA and the Freedman positions and avoids the necessity of confronting what may in fact be a substantial and irreconcilable collision of professional values. Lost in the process is not only an opportunity to scrutinize these values more closely in order to understand their functions and limits within the legal profession, but also a chance to develop ethical decision making techniques that will adequately account for changing and competing professional norms. In sum, although the ABA does not regard written rules as exhausting a lawyer’s ethical obligations, its approach to decision making may not go much farther than a rule-oriented approach in elucidating the complexity of professional values and in encouraging ethical deliberation. In the final analysis, this approach may not be much better than technocratic decision making.
2. Partisan Advocacy and the Dominant View

Undoubtedly, many lawyers will assert that it is their job to do everything within their power to represent the interests of clients vigorously, especially when the rules are ambiguous or inapplicable. They will contend that there is nothing wrong with displaying loyalty to one’s client or following the dominant view (i.e., the belief that a lawyer must “pursue any goal of the client through any arguably lawful course of action”\textsuperscript{102}). These arguments are not without support. The prevailing image of the lawyer in the United States historically has been that of the partisan advocate fearlessly championing her client’s cause in the name of justice.\textsuperscript{103} Lord Brougham’s defense of Britain’s Queen Caroline provides a classic description of the lawyer’s partisan role:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.\textsuperscript{104}

\textsuperscript{102} Simon, supra note 13, at 8. Professor David Luban has referred to this principle as the “standard conception.” Luban, supra note 14, at 393-403.

\textsuperscript{103} Of course, lawyers are not only partisan advocates. The complexity of the lawyer’s role is captured nicely in the Preamble to the Model Rules, which states that “[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1998). Although it is helpful and important to keep in mind the multifaceted nature of a lawyer’s responsibilities and duties, such general and amorphous descriptions are of limited assistance in specific cases where professional obligations conflict. In those cases, determining how a lawyer ought to proceed necessarily involves a more particularized analysis of the specific principles giving rise to the conflict.

\textsuperscript{104} 2 Trial of Queen Caroline 8 (J. Nightingale ed., 1821). The consequences of Lord Brougham’s partisanship might very well have brought chaos to his country. As he explained:

When I said that it might be my painful duty to bring forward what would involve the country in confusion . . . [t]he real ground was neither more nor less than impeaching the king’s own title, by proving that he had forfeited the crown. He had married a Roman Catholic (Mrs. Fitzherbert) while heir-apparent, and this is declared by the Act of Settlement to be a forfeiture of the crown, “as if he were naturally dead.”

Henry P. Brougham, Life and Times of Lord Brougham 405-07 (n.d.). Although Lord Brougham’s statement in defense of partisan advocacy was made in reference to a criminal case, it has been used to support extreme acts of partisanship in the civil context as well. See Hazard, supra note 7, at 1244-45.
Inherited from the British system, this image of the partisan advocate is reflected in early writings on legal ethics and in the first major ethics codes in the United States. For example, Canon 15 of the 1908 Canons of Professional Ethics states, in part:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

The Model Code of Professional Responsibility and the Model Rules of Professional Conduct also contain provisions that strongly embrace partisan advocacy. Thus, for well over a century, the highest authorities on legal ethics have recognized that a fundamental duty of the attorney is to represent clients vigorously. Contemporary scholars and commentators also have observed that zeal is the fundamental principle of the law of lawyering, "the first, the foremost, and, on occasion, the only duty of the lawyer."

Merely to demonstrate that the principle of partisan advocacy has existed historically does little to assist in assessing its proper scope. Accomplishing the latter requires examination of the underlying justifications for partisanship. Because arguments both for and against excessive partisanship and the

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106 ABA CANONS OF PROFESSIONAL ETHICS Canon 15 (1908) (quoting SHARWOOD, supra note 89, at 78-79).
107 Rule 1.3 of the Model Rules states that "A lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1998). Comment One to Rule 1.3 adds that "[a] lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Id. cmt. 1.

Similarly, Disciplinary Rule 7-101 of the Model Code states that "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1980). The Ethical Considerations that accompany DR 7-101 state further that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." Id. EC 7-1.
108 L. Ray Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 EMORY L.J. 909, 918 (1980); see also id. at 947; WOLFRAM, supra note 6, § 10.3.1, at 580 (1986).
dominant view have been extensively analyzed and effectively critiqued elsewhere in the ethics literature, it is unnecessary, and in fact would be redundant, to engage in detailed examination of them here.\[109\] Rather, a brief sampling of these arguments is sufficient to illustrate the weaknesses of the dominant view and to explain why the legal profession should not proceed blithely upon the assumption that the dominant view is the only or even the preferred way to proceed with ethics analysis.

\hspace{1em}a. The Adversary System Excuse

A commonly offered rationale for excessive partisanship is that the adversary system requires it. In that system, lawyers for both sides vigorously present their clients' most persuasive arguments before a neutral or impartial arbiter.\[110\] In theory, this adversarial presentation of evidence and arguments gives the judge and jury the strongest possible view of each side's case and allows the fact finder to make accurate and fair judgments. Supporters of this system maintain that it is the best means of obtaining justice—whether that is protecting the legal rights of individuals, uncovering the truth, or otherwise producing fair outcomes.\[111\]

The principle of partisanship flows naturally from an adversarial ideal. The mere fact that lawyers must be partisan advocates, however, does not require that they push the boundaries of professional ethics in pursuing client interests. To justify the latter, proponents of the adversary system excuse invoke what Professor Murray Schwartz has termed the "Principle of Non-accountability." That principle relieves advocates of legal, professional, and moral accountability for the means used or the ends achieved on behalf of their clients.\[112\] This principle ostensibly ensures that moral and ethical reservations do not encumber adversarial zeal.\[113\]

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\[109\] For in depth examination of these issues, see generally Luban, supra note 14, at 50-104; Simon, supra note 13; David Luban, The Adversary System Excuse, in The GOOD LAWYER, supra note 14, at 83-122.

\[110\] Professor Murray Schwartz refers to this concept as the "Principle of Professionalism," which requires that an advocate maximize her client's interests. Schwartz, supra note 14, at 671.

\[111\] See, e.g., Marvin E. Frankel, PARTISAN JUSTICE 12 (1980) (discussing the traditional view that partisan advocacy "will best assure the discovery of truth in the end"); Monro H. Freedman, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 1-8 (1975) (arguing that a primary benefit of the adversary system is the protection of human dignity).

\[112\] Schwartz, supra note 14, at 671.

\[113\] Thus, the syllogism used to justify excessive or ethically questionable partisanship goes something like this: the adversarial system achieves justice; for that system to work, lawyers must fulfill certain essential role obligations, of which partisan advocacy is one; to be effective advocates, lawyers must represent
Although the adversary system may require partisan advocacy, it does not demand slavish adherence to the concept in all cases. In fact, as designed, the system contains limitations on partisanship. Every ethical code adopted by the ABA has explicitly circumscribed or limited partisanship. For example, Comment 1 to Model Rule 1.5 specifically states that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." Similarly, DR 7-101 of the Model Code says that a lawyer is obligated to act within the bounds established by law, including the Disciplinary Rules. It further states:

A lawyer does not violate this Disciplinary Rule . . . by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client . . . , by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process . . . .

In his representation of a client, a lawyer may:

1. Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
2. Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

In addition, the drafters of Canon 15 of the Ethical Canons incorporated an explicit limitation on zealous advocacy, stating:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up

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their clients' interests vigorously, unencumbered by moral reservations. Because the system is justified and legitimate, too are morally questionable acts undertaken in the course of legal representation. Professor Liban terms this reasoning process the "Fourfold Root of Sufficient Reasoning." Liban, supra note 14, at xxii ("One justifies a morally disquieting action by appealing to a role-related obligation: one justifies this role-related obligation by showing that it is necessary to the role; one justifies the role by pointing to the institutional context (such as the adversary system) that gives rise to it; and finally, one demonstrates that the institution is a morally worthy one."); see also id. at 128-33.

Applying the above reasoning to the inadvertent disclosure situation, the analysis would proceed as follows: the adversary system promotes justice; the duty of partisan advocacy is necessary for this system to work; use of inadvertently disclosed material to benefit one's client is merely an aspect of partisanship; if using the disclosed material is morally suspect, it is nonetheless ethically justified because the ultimate aims served by the adversary system are legitimate.

by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause. . . .

But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.\textsuperscript{116}

Thus, while widely recognizing and accepting that a principal function of lawyers is to advise and to represent the interests of clients fully and completely, the legal profession's most influential ethics codes have simultaneously acknowledged limitations on a lawyer's ability to go all out for her client. These codes explicitly counter the suggestion that lawyers must through their partisan efforts give clients not only everything the law provides, but everything the law does not expressly disallow as well.\textsuperscript{117} Significantly, the drafters did not find limitations on partisanship to be incompatible with effective and committed advocacy.

In addition to being curtailed in general terms by the very rules that codify the principle of partisanship, other ethical and procedural rules also circumscribe zeal in a more specific fashion to promote fair and honest dealings among and between adversaries and the courts. For example, Rule 11 of the Federal Rules of Civil Procedure sets forth basic factual and legal investigations a lawyer must complete before filing a complaint or advocating certain claims on behalf of her client.\textsuperscript{118} Rules 26(g) and 37 of the civil discovery rules allow courts to sanction lawyers for engaging in certain abuses of the discovery process that might inure to their client's benefit (e.g., hiding or destroying documents, improperly delaying depositions, filing repetitive motions for purposes of delay or harassment).\textsuperscript{119} Model Rule 3.3 prohibits a lawyer

\textsuperscript{116} ABA Canons of Professional Ethics Canon 15 (1908).

\textsuperscript{117} See also Luban, supra note 14, at 159 (arguing that clients are not always entitled to everything that the law allows them and that the proper approach is for zealous representation to be rationed in the lawyer's discretion).

\textsuperscript{118} FED. R. CIV. P. 11. It is generally accepted that the "central purpose of Rule 11 is to deter baseless filings in district courts and thus . . . streamline the administration and procedure of the federal courts." Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 393 (1990). Attorneys are thus required to "certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and "not interposed for any improper purpose."" Id.

\textsuperscript{119} FED. R. CIV. P. 26(g) & 37. The Supreme Court has stated that Rule 37 promotes deterrence of unethical conduct and must be applied diligently "not merely to penalize those whose conduct may be deemed
from making misrepresentations to the court. And Model Rule 4.2 restricts the persons a lawyer may contact in the course of her representation.

120 National Hockey League v. Metropolitan Hockey League, 427 U.S. 639, 643 (1976). Rule 37 sanctions serve at least three additional policy goals: (1) to compensate parties injured by ethical violations; (2) to affirm the authority of the court through punishment; and (3) to protect the public interest in access to prompt justice. See John W. Heiderscheidt, Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal, 68 Or. L. REV. 57, 62 (1989).


122 Model Rules of Professional Conduct Rule 4.2 (1998). Some critics will assert that the above examples are of conduct that is clearly proscribed by procedural law or ethical rules. Therefore, these limitations on zeal are acceptable because they reflect widespread consensus among the drafters of the rules and among lawyers in relevant jurisdictions regarding the appropriate behavior of lawyers in an adversary system. Applying these restrictions is easy and fair because attorneys are given clear notice of impermissible conduct. However, to go farther and argue that attorneys should refrain from engaging in conduct that the law and the ethical rules do not explicitly prescribe is another matter. If the profession proceeds along this route it will end up in a confused abyss, in which attorneys are unsure of their ethical or professional obligations and in which uniformity and fairness in application of ethical standards will be compromised.

These claims merely reiterate arguments made by proponents of a rule-oriented approach to ethical questions. See infra notes 153-56 and accompanying text. Although it is true that the profession must cautiously view any attempts to limit zeal, it is not the case that conduct can be restricted only when a law or ethical rule proscribes it. The drafters of the ethics codes understood this to be the case. Moreover, as I pointed out earlier, relying solely upon restrictions contained in rules is dangerous because it conveys the sense that legal ethics is merely about the avoidance of enumerated acts of misconduct. See supra notes 92-93 and accompanying text. This in turn discourages lawyers from undertaking the complex deliberative process required of persons engaged in a profession whose mandate is not only to protect individual rights, but also to uphold public trust in the administration of the system of justice.

The above claims also prove too much. For example, were lawyer conduct limited only by specific proscriptions contained in rules, lawyers, in the name of zeal, might be tempted not only to use information contained in an errant fax, but also surreptitiously read papers left on a table in a conference room during a break in negotiations, to examine papers left accidentally in an unlocked briefcase in the opposing attorney’s office at the end of a meeting, and so forth. Imagine the headlines if lawyers were allowed to engage in this sort of behavior simply because no ethical or legal rule specifically proscribed it. Envision the consequences in terms of the public’s regard for the law if the persons charged with upholding that law were perceived regularly to carry on in this fashion. More importantly, consider the state of a profession that never required its members to ponder not only whether their conduct was lawful, but also whether it was right.

Recognizing the vital connection between lawyers, the legal system, and the basic functioning of a society controlled by the rule of law, the drafters of the ethics codes set up a system in which lawyers would not be merely pawns in the hands of clients, or paid hired guns willing to do anything, by any means, at any cost, to secure client ends. Rather, they established a framework in which lawyers could serve client interests effectively while simultaneously protecting larger systemic values.
The existence of these general and specific limits within an adversarial context demonstrates that partisanship is not absolute.\textsuperscript{122} Rather, it must be balanced against other values important to the judicial system. This is especially true in cases of ethical conflict in which one value is likely to collide with another. In those instances, instead of resorting immediately to the dominant view, a better approach is to measure partisanship against the other value at issue. Such analysis will either reveal the primacy of one principle over the other or will confirm the existence of a true ethical dilemma. If the latter occurs, then the lawyer need not make an arbitrary choice. Rather, the lawyer should broaden the scope and the focus of her analysis. One way of doing so is by considering similar principles in analogous areas of the law.

\textit{b. The Libertarian Premise}

In addition to the adversary system excuse, lawyers sometimes contend that extreme partisanship, as exemplified by the dominant view, is necessary to safeguard the liberty and autonomy of individual citizens.\textsuperscript{123} This argument

\begin{footnotesize}

\textsuperscript{122} A more philosophical critique may be leveled at the notion that the adversary system excuses excessive partisanship that leads to morally questionable behavior. Taken to an extreme, the notion that the adversary system justifies morally questionable acts begins to approximate Machiavelli's contention that "the end justifies the means." NICCOLO MACCHIAVELLI, THE PRINCE 88, 103 (George A. Bull ed., 1971) ("[T]he actions of man, and especially princes, from which there is no appeal, the end justifies the means. Let a prince therefore aim at conquering and maintaining the state and the means will always be judged honorable and praised by everyone."). Yet, if the ends are not just, then the means cannot be legitimate. In addition, even if the ends are just, if the system designed to achieve them is ineffective at accomplishing those ends, then acts undertaken pursuant to that system cannot be valid. Few would seriously doubt that the goals sought by the adversary system are in fact just. However, one could quite legitimately question whether the adversarial system actually achieves these goals. Indeed, our inability to answer this question definitively provides the basis for Professor David Luban's contention that the adversary system cannot provide an excuse for lawyers who engage in excessive, indeed immoral, partisan acts. Luban, \textit{The Adversary System Excuse, supra} note 109. In short, Professor Luban argues that if the adversary system is not morally justified, then it cannot provide an institutional excuse for immoral acts conducted under its auspices. Rather, if the adversary system has a weak moral foundation, then the Principle of Nonaccountability cannot hold (i.e., the lawyer's role carries no moral privileges and immunities) and anything that is morally wrong for a non-lawyer to do on behalf of another person is morally wrong for a lawyer to do as well. \textit{Id.; see also} Wassertrom, \textit{supra} note 14, at 35-37. That is not to say that Professor Luban concludes that zealous advocacy is immoral. Rather, his point is that because the adversary system's justification rests on weak grounds, "when professional and moral obligation conflict, moral obligation takes precedence. When they don't conflict, professional obligations rule the day. . . . [T]hat is to say, the Principle of Professionalism can tell a lawyer not to cut corners; . . . it cannot mandate him or her to cut throats." Luban, \textit{The Adversary System Excuse, supra} note 109, at 118.

\textsuperscript{123} See Simon, \textit{supra} note 13, at 26-27. Some lawyers will assert that they follow the course that is most likely to further their client's interests because that is, in fact, what they are paid to do. To the extent that this assertion focuses on the monetary as opposed to the fiduciary aspect of the lawyer-client relationship, it is troublesome because it explicitly reduces the lawyer's role to nothing more than that of a hired
rests upon the belief that the primary role of the lawyer is to protect clients from unwarranted encroachments on their liberty and autonomy by the state and by others. By taking any and all actions not expressly disallowed by the law, lawyers guarantee the widest sphere of freedom for their clients. A necessary corollary to this argument is the notion that it is not up to individual lawyers to determine in particular cases what the limits of representation are or what they should be. Lawyers who acknowledge constraints on advocacy short of those explicit limitations imposed by the law are guilty of either: (1) "playing God" by sacrificing their clients' rights to their own personal desires; or (2) usurping power by acting as self-appointed legislatures imposing new limits on client autonomy.

In The Practice of Justice, one of the most important books on legal ethics in the past decade, Professor William Simon persuasively challenges the premises underlying the above arguments. He observes that because a primary purpose of the law is conflict resolution, adjudication necessarily involves limiting someone’s autonomy. The libertarian premise, however, does not explain why lawyers should prefer their client’s autonomy to the autonomy of people with whom their client comes into contact or how favoring one’s client serves autonomy in general. One common response to this argument is that dominant view lawyering enhances autonomy by: (1) strengthening the rule of law and thereby shielding individuals from sub-ordination to the will of lawyers; (2) treating people the same and thereby ensuring that everyone has an equal opportunity to pursue her interests; and (3)
increasing the predictability of legal outcomes and thereby enabling people better to plan their lives.

In critiquing these concerns, Professor Simon notes that the first point confuses an exercise of judgment with an exercise of will.\textsuperscript{129} He argues that the exercise of judgment is essential to vindicating the rule of law because a "legal outcome can only be true to a governing norm if some role players make plausible judgments about how the norm applies in the particular circumstances of the case."\textsuperscript{129} Turning to the equality argument, Professor Simon notes that to the extent it rests on the notion that dominant view lawyering treats everyone equally, the argument is nihilistic and dishonest.\textsuperscript{131} It is nihilistic because in effect it states that clients should have an equal opportunity to win without regard to the substantive merits of their cause, and dishonest because people's access to counsel and other litigation resources is often dependent upon their wealth.\textsuperscript{132} Thus, the system does not provide the sort of equality contemplated by defenders of the dominant view. More importantly, however, equality may be served by any system, not just one governed by the dominant view, that requires that lawyers treat clients consistently.\textsuperscript{133} Finally, Professor Simon debunks the contention that dominant view lawyering contributes to greater certainty in the application of legal rules and thereby enables people to plan their lives better. He notes the primary problem with this argument is that it erroneously assumes that "greater predictability of lawyer decision making tends to produce greater predictability in the social world in which people plan their affairs."\textsuperscript{134}

Professor Simon concludes his critique of the libertarian premise by observing that

even if we accept liberty as the preeminent underlying value of law and legal ethics, there is no reason to think that the Dominant View is more compatible with that value than other approaches to legal ethics. . . . [In addition,] there is no reason we should accept liberty as the preeminent underlying value. Both the legal system and popular morality treat liberty as one among many important values

\textsuperscript{129} Id. at 32 ("A lawyer who insists on disclosing information or refusing to cross-examine a witness because of a commitment to legal merit does not impose his personal will any more than does a judge or police officer who acts on the basis of a decision about the relevant legal norms.").

\textsuperscript{130} Id.

\textsuperscript{131} Id. at 34.

\textsuperscript{132} See id.

\textsuperscript{133} See id. at 35.

\textsuperscript{134} Id. at 35-36.
...to be traded off against and compromised with competing values.\textsuperscript{135}

Again, it is unnecessary for purposes of this Article to delve into detailed examination of these sophisticated and deeply complex matters of legal theory and philosophy. Rather, it is sufficient to note that the above debate raises serious questions about the dominant view and about whether it is the preferred way to proceed with ethics analysis. Even if one is not wholly convinced by challenges to the libertarian premise and the adversary system excuse, the existence of vigorous debates over these matters and the seriousness with which these debates are taken by legal ethicists\textsuperscript{136} demonstrates that there is room to doubt the widespread acceptance of the dominant view and cause to explore viable alternatives.

II. THE USE OF SUBSTANTIVE LEGAL PRINCIPLES TO GUIDE ETHICAL DECISION MAKING

Because rules are inherently limited, when they fail to afford adequate direction, lawyers should not automatically do what appears to be in the immediate best interests of their clients. Rather, it is precisely in the moment of convergence created by unclear or inapplicable rules and potentially conflicting legal values and obligations that an attorney has a heightened duty to exercise professional judgment and discretion. This discretion need not be arbitrary and ungrounded. To guide it, lawyers should bring to ethical decision making the same processes and modes of analysis they apply to other legal puzzles. Thus, when addressing ethical questions, the text of the rules is the obvious starting point.\textsuperscript{137} However, if that text does not provide clear guidance, then lawyers ought next to consult the purposes behind the rules and

\textsuperscript{135} Id. For Professor Simon's equally thoughtful critique of the positivist premises underlying the dominant view, see id. at 37-43.

\textsuperscript{136} For detailed exploration and critique of Professor Simon's arguments, see various essays in Symposium, THE PRACTICE OF JUSTICE by William H. Simon, 51 STAN. L. REV. 867 (1999).

\textsuperscript{137} I have already pointed out the benefits of beginning ethics analysis with examination of ethics rules and pertinent case law (in this context, the law of waiver). See supra note 91 and accompanying text. Of course, some lawyers may aspire to ethical standards higher than those set forth in written rules even when those rules are crystal clear. See, e.g., Burger, supra note 2, at 954 ("If the idea of a profession means anything, it means that a profession must adhere to standards that are above the minimum commands of the law. For centuries, that is what has marked the difference between a profession and a trade."). For discussion of problems arising from the gap between what the law allows or requires and what is morally just, see Stephen L. Pepper, Lawyers' Ethics in the Gap Between Law and Justice, 40 S. TEX. L. REV. 181 (1999).
the principles upon which they rest.\textsuperscript{138} That is not to say that lawyers should merely invoke any arguments that will justify paths they have already chosen. Rather, lawyers ought to consider whether principles supporting the outcome they most desire conflict with other professional values that might suggest a different result. At best, this analysis will reveal the primacy of one principle over the other. At worst, it will confirm the existence of a true ethical dilemma. In either scenario, ethical deliberation will have occurred (as opposed to rationalization masquerading as deliberation). If there is still insufficient information upon which to make a decision or if the principles underlying the rules are irreconcilable, as a third step lawyers might seek guidance from analogous areas of the substantive law in which courts have explored issues similar to those raised by the ethical conflict in question.\textsuperscript{139}

The approach outlined above closely parallels tactics lawyers commonly employ when examining legal (as opposed to ethical) questions that are unresolved by legal rules. For example, a decade ago a lawyer confronting the novel question of whether sexual orientation was covered by Title VII of the Civil Rights Act of 1964\textsuperscript{140} would first have looked for a solution on the face of the statute or in interpretive cases. If the statute and case law failed to provide clear answers, the analysis would not have ended at that point. Rather, the lawyer would have assessed the underlying goals of the statute to determine whether extending coverage to gay and lesbian persons fell within legislative aims. If the answer was still uncertain, the lawyer would likely have looked to other anti-discrimination laws to determine how those laws approached the question of extending coverage to additional classes of people. This line of inquiry might have revealed that courts consider, among other things, the history of discrimination suffered by the class, the magnitude of that discrimination, whether the discrimination is directed at an immutable

\textsuperscript{138} Indeed, the Preamble to the Model Rules suggests such an approach:

\begin{quote}
In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.
\end{quote}

\textsuperscript{139} The substantive law is one factor lawyers might consider in an expanded analysis. Other commentators have suggested other variables that might be weighed in appropriate cases. See supra note 20.

characteristic shared by the class, and whether the discrimination involves a fundamental right. All of these factors, although applied in a different context, would have assisted the lawyer investigating the orientation question.

This approach to decision making is largely unchallenged outside of the ethics context because it is based upon logical reasoning. Lawyers typically begin with a question and through deductive and comparative analysis attempt to reach conclusions that are fair and reasonable in light of surrounding circumstances. The fact that the inquiry is grounded in the law and legal principles expounded by courts and legislatures increases its legitimacy.

There is no apparent reason to depart from this format in the ethics context. In fact, there are many positive justifications for pursuing it. Consider first the benefits of probing beyond the specific dictates of the rules to their underlying principles and purposes. This single step counters many of the ills identified earlier that flow from a rule-oriented approach. It discourages lawyers from hastily concluding that when the rules do not apply directly, the lawyers' actions are unrestrained by any ethical norms. Instead of assuming, "Because no rule directly applies, I can do anything," the attorney is urged to ask, "Although no specific rule applies directly, is my desired course nonetheless contrary to the overall purposes served by the rules in question?"

In addition, this step encourages a more thorough examination of the ethical issue at hand. It prods attorneys to consider not only the immediate aims of their clients, but whether their means of accomplishing these aims are desirable when juxtaposed against other values important to our system of justice and which may be implicated in the situation at hand. Answering the question, "Should I do X?" requires that the attorney consider her role in a broader context. Indeed, it promotes true professional and ethical deliberation. Finally, in situations where the rules conflict or on their face give rise to competing obligations, looking to underlying principles is often helpful in discerning whether the conflict is more apparent than real and whether a true dilemma in fact exists. By examining the principles that give rise to specific rules and concepts, attorneys gain a more comprehensive understanding of the

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141 Case law that directly addresses the question at hand will be helpful in isolating the underlying principles at issue. For example, in the inadvertent disclosure setting, court opinions on the question of waiver will help the attorney identify confidentiality and partisanship as the primary principles involved.

142 See supra notes 92-99 and accompanying text for analysis of the dangers of overreliance upon written rules.
circumstances certain rules are designed to address and are thereby better able to determine when one rule or principle might trump another.

If the values underlying the rules do not satisfactorily resolve the ethical conflict, I recommend that lawyers expand the scope of their analysis and consider, among other things, the treatment of analogous problems in other areas of the substantive law. That is, lawyers should explore the ways in which courts have handled comparable questions in other circumstances in order to gain greater insight into the problem and a better understanding of factors that ought to be weighted. Again, this step is based upon sound logic. To the extent courts have grappled with similar issues and reached rational conclusions, lawyers should not ignore what may in fact be very helpful guidance. In addition, this step is commendable because it does not require lawyers to venture beyond a legal setting for guidance. As a result, lawyers are likely to feel more comfortable with the process and are more likely to use it. This approach also gives lawyers an additional basis upon which to explain a particular conclusion or recommendation to their clients. Instead of simply saying, "I think it would be wrong to do X," a lawyer can explain the legal principles underlying her recommended course and why a court might consider it inappropriate for the lawyer to take a particular action.

In one notable respect, this third step departs from the path normally followed by lawyers. When confronting novel or difficult legal questions outside of the ethics context, lawyers usually face a choice between a number of viable arguments and will look to various areas of the substantive law in determining which course to pursue. This selection process involves an assessment of legal merit intertwined with public and social policy considerations. Generally, lawyers will quite legitimately invoke only those arguments and analogies that buttress their client's claims. If the system functions properly, the opposing side will respond with competing arguments, and ultimately an impartial fact finder will render a just verdict after weighing both sides' contentions. At least, that is the theory.

In the ethics context, dilemmas usually involve a collision between two or more fundamental principles or values. In those circumstances, however, the lawyer (not an impartial fact finder) will be called upon to make the preferable ethical choice from among conflicting alternatives. Reliance solely upon those arguments that best support the client's position is not the preferred option because that approach merely circumvents the ethical question of what the lawyer should do in the face of two competing professional duties. To break
the deadlock created by conflicting principles, lawyers should step back and examine the problem through a wider lens in an attempt to discover the core issue being raised.\textsuperscript{143} For example, in the inadvertent disclosure situation, instead of concentrating on the narrow question of whether the recipient may use the material without notifying opposing counsel, the lawyer might focus on the larger question of whether it is fair to proceed on the basis of information that has been mistakenly and unknowingly disclosed by a third party and to which one is not necessarily entitled. Stated even more broadly, the essential question becomes when is it fair to capitalize on another's mistake. To further the examination, lawyers should search for legal contexts in which courts have examined this question.\textsuperscript{144}

The question inevitably arises as to how one determines the core issue and decides which area of the substantive law to invoke. Based upon her own self-interests, the receiving lawyer may merely engage in technocratic decision making in assessing these matters. To remedy this very real problem, I suggest that when faced with an ethical dilemma, lawyers should put aside their own self-interests or those of their clients and view the situation through the lens of an impartial spectator.\textsuperscript{145} To the extent possible, lawyers should examine the conflict through the eyes of objective outsiders and ponder what those individuals might consider to be the preeminent question and factors at issue. In effect, lawyers assume the role typically occupied by a judge or a jury.\textsuperscript{146}

Several critics may argue that broadening the scope of the inquiry necessarily involves

\textsuperscript{143} Professor Simon suggests a similar tactic in arguing for more contextualized ethical analyses. Indeed, he argues that lawyers should be given substantial responsibility for determining whether broad or narrow framing of the issue is appropriate in a particular case. Simon, supra note 13, at 149-56.

\textsuperscript{144} In choosing the most applicable body of substantive law, lawyers should simply locate the closest analogy to the situation at hand. For example, lawyers might consider, among other things, whether a particular problem arises in a civil or a criminal context, the relative roles and responsibilities of the parties involved, and what the consequences of decision may be for those parties. Of course, no analogy is perfect. To the extent factual circumstances vary, lawyers may need to place more or less weight on the guidance and direction offered by the comparative body of law.

\textsuperscript{145} See Adam Smith, Theory of Moral Sentiments (E.G. West ed., Liberty Classics 1976) (1800) (arguing that the standard of what is appropriate in sentiments and motives can be found only in the sympathetic feelings of the impartial spectator).

\textsuperscript{146} For many lawyers, engaging in this process will be fairly unobjectionable and the primary question at issue will be obvious. However, some lawyers and observers may claim that this is simply too much to ask of lawyers operating within an adversarial system where a preeminent value is partisanship. For a discussion of limitations on partisanship, see supra Part II.B.2.
an appeal to common morality.\(^{147}\) Simply put, the argument is that it is inappropriate and unnecessary for lawyers to venture beyond the specific dictates of the rules of professional conduct in search of ethical guidance. Not surprisingly, an ongoing debate rages among legal ethicists on this question. Some scholars contend that lawyers are not immune from common morality principles and that lawyers should be held to the same standards in their professional roles as lay persons when those roles require behavior that is inconsistent with common moral obligation.\(^{148}\) For example, Professor David Luban, a leading proponent of this view, argues that appealing to a role to excuse behavior that is contrary to common moral obligation is legitimate only if the institution creating the role is morally justified or "constitutes a positive moral good."\(^{149}\) Because he believes the adversary system can receive only a pragmatic justification,\(^{150}\) Professor Luban contends that it cannot provide an

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147 In contrast to "common morality" is the notion of "role morality." I use the term role morality in this Article to refer to reasoning premised on the belief that some roles require behavior that would be immoral if performed by a person not occupying the role. Professor Richard Wasserstrom expands upon this definition by noting: This reasoning places weight upon the role that the person occupies and locates concerns about how one ought to behave within a context of what is required, expected, or otherwise appropriate of persons occupying that role. Such reasoning is often used to deflect or defuse potential moral criticism by explaining that the role constitutes a sufficient reason for doing or not doing something that would otherwise be objectionable, criticizeable, or morally wrong to do or not to do. The appeal to the existence of the role becomes a central part of the reasoning about the right thing to do, about what ought to be done, or about what it is morally permissible for an individual to do, with the appeal to the role discharging the dual burden, first, of establishing that the situation is morally different from what it would have been if the role were not in the picture and, second, of justifying the outcome or decision in terms of the requirements of the role.

Wasserstrom, supra note 14, at 25-27. Soldiers are most commonly used to illustrate the operation of role morality. Although soldiers must kill on command, many people find this behavior morally justified within the role. However, in most cases, this conduct would be blatantly immoral if undertaken by nonsoldiers. Similarly, the argument is made that lawyers are professionally obligated to do things on behalf of their clients that would be immoral if done by nonlawyers (e.g., undermining the credibility of truthful witnesses, defeating claims on technicalities, maintaining confidentiality to the detriment of third parties, etc.).

I use the term common morality throughout this paper to refer to a more expansive manner of thinking about moral principles which guide human behavior. By common morality, I refer to those generalized universal norms (or truths) to which all members of society are ordinarily subject (e.g., prescriptions against murder, lying, theft, etc.).

See, e.g., LUBAN, supra note 14, at 148-74; Schwartz, supra note 14, at 150; see also Wasserstrom, supra note 14, at 25-37 (observing that role morality shields morally questionable behavior from criticism in a way that is at odds with the "universalistic dimension of morality" and calling for critical analysis of role-differentiated morality).

149 LUBAN, supra note 14, at 104.

150 Professor Luban argues that we should keep the adversary system "not because it is a mighty engine of truth and justice, nor because it realizes certain intrinsic human or societal goods, but simply because the
excuse for acts that would be immoral if performed by someone who was not acting within the role of lawyer. Other proponents of the application of common morality to lawyers rely on different arguments, among them the assertion that there is and can be only one morality and that talk of role morality is not helpful.\footnote{See Feldman, supra note 15, at 885 n.1. Professor Feldman notes: Talk of role morality tends to assume or foster the idea that role morality is distinct from morality proper. I believe we should strive for a unified moral theory that is sensitive to context (and therefore allows for different moral judgments of the same or similar actions performed under relevantly different circumstances) rather than cultivate a variety of discrete role moralities. A focus on the role tends, I think, to replace careful analysis of specific circumstances with attention to defining an abstract role that offers little assistance in making moral judgments in concrete situations, where attention to particulars can be crucial.}

A number of scholars and practitioners disagree with these views and maintain that lawyers are required to do only that which the adversary system demands of them. These commentators argue that common morality principles should have little to do with the development of professional norms, particularly when common morality principles conflict with other values associated with the lawyer's role in an adversary system.\footnote{See, e.g., Donagan, Justifying Legal Practice in the Adversary System, in The Good Lawyer, supra note 14, at 123; Virginia Held, The Division of Moral Labor and the Role of the Lawyer, in The Good Lawyer, supra note 14, at 60.} Because principles of role morality are usually embedded in ethical rules, arguments advanced in favor of role morality resemble those offered in support of a role-oriented approach. Proponents argue that role morality provides a sort of moral simplification that makes it easier to determine what one ought to do;\footnote{See Wasserstrom, supra note 14, at 29. Although Professor Wasserstrom cannot fairly be characterized as a proponent of role morality, he does an excellent job of outlining and critiquing the psychological and justificatory bases upon which such claims are made. Regarding the point made in the text above, he notes that the ability to determine that one's primary task is to vindicate the interests of clients creates security and satisfaction and "reduces enormously the moral ambiguity and uncertainty that would otherwise prevail in trying to sort out and establish the right and wrong ways of behaving." Id.} that correct moral outcomes are more likely to be generated if persons focus on fulfilling the requirements of their specific roles rather than attempting to ponder the question of what, all things morally considered, one ought to do;\footnote{The argument is that if lawyers pursue their clients' interests in a single-minded fashion as dictated by their professional roles, the legal system will produce more justice to more people than it would under a less focused form of moral deliberation. See id. at 30.} and that the adversary system of justice cannot function properly unless

alternatives to it are not significantly better." Id. For detailed discussion of Professor Luban's arguments, see id. at 50-104; Luban, The Adversary System Excuse, supra note 109.\footnote{See, e.g., Feldman, supra note 15, at 885 n.1. Professor Feldman notes: Talk of role morality tends to assume or foster the idea that role morality is distinct from morality proper. I believe we should strive for a unified moral theory that is sensitive to context (and therefore allows for different moral judgments of the same or similar actions performed under relevantly different circumstances) rather than cultivate a variety of discrete role moralities. A focus on the role tends, I think, to replace careful analysis of specific circumstances with attention to defining an abstract role that offers little assistance in making moral judgments in concrete situations, where attention to particulars can be crucial.}
lawyers operate within the roles they are given. Perhaps the greatest fear of proponents of role morality is that appeals to common morality will be unguided and produce arbitrary results. As a result, these scholars maintain that absent a specific ethical rule prohibiting a particular action, lawyer conduct should not be left to the vagaries of generalized ethical ideals or common morality.

Even if one believes the proposal contained herein rests to some degree upon an appeal to common morality in the sense that it moves away from the rules and asks what a neutral observer would think is the essential question at issue, this fact need not be viewed negatively. The debate between common and role morality advocates unfortunately characterizes a lawyer’s choice between common morality and role morality as an either-or proposition or a zero-sum game. That characterization is misleading because, as I explain below, in many instances the dichotomy between common and role morality is false. Moreover, that characterization is limiting because it serves to decrease lawyers’ willingness and ability to consult sources beyond professional rules—even sources that lawyers routinely use in other aspects of their professional lives. Professor William Simon alludes to these problems when he observes:

The common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary morality on the other . . . bias[es] discussion in favor of conventional, especially libertarian, responses. Typically the conventional response is portrayed as the “legal” one; the unconventional response is portrayed as a “moral” alternative. This rhetoric connotes that the “legal” option is objective and integral to the professional role, whereas the “moral” alternative is subjective and peripheral. Even when the rhetoric expresses respect for the “moral” alternative, it implies that the lawyer who adopts it is

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155 See id.; see also supra notes 110-22 and accompanying text for analysis of the lawyer’s role within the adversary system. In addition to the above points, some role advocates maintain that there is no common morality, only role moralities. For critical analysis of this argument, see Luban, supra note 14, at 107-11.

156 For a critique of these arguments, see Wasserstrom, supra note 14, at 34-37. Professor Wasserstrom notes that:

[U]niversalist morality does not apply only when there are no roles . . . . Even with the role, we are required to determine which interests of others may be neglected and which may not, in which ways, and for which reasons. So, what looked to be a rather simple matter is really a good deal more complicated. Even if role-restricted reasoning makes good moral sense, it is not at all clear exactly what, on moral grounds, the role and its redescription of moral outlook should come to.

Id.
on her own and vulnerable both intellectually and practically. The usual effect is to make it psychologically harder for lawyers and law students to argue for the "moral" alternative. In many situations, however, both alternatives could readily be portrayed as competing legal values.\footnote{Simon, supra note 92, at 1113-14 (1988); see also Simon, supra note 13, at 17-18.}

Picking up on Professor Simon's suggestion, I believe there may be a middle ground between the legal and nonlegal extremes posed by the respective advocates of role and common morality. In some cases, lawyers need not dismiss, shy away from, or assign a lower ranking to common morality because, as Professor Simon points out, often the principles reflected in common morality are legal values.\footnote{See Simon, supra note 13, at 15-17 (arguing that the values that compete with client interests are not just subjective predispositions of individuals, but rather are values solidly grounded in the legal system).} That is to say, what one perceives as private moral principles are really values that are integral to the law.\footnote{See Susan Wolf, Ethics, Legal Ethics, and the Ethics of Law, in THE GOOD LAWYER, supra note 14, at 38 (arguing that lawyers' role obligations are compatible with a more universal morality). The lack of a sharp line of demarcation between common and role morality can be seen readily in the daily operation of our legal system. In making arguments to the courts, lawyers often draw upon common morality. In deciding cases, judges and juries engage in similar behavior. Indeed, entire areas of the law are dependent upon common morality for application and interpretation. See Simon, supra note 13, at 37-40 (noting that many legal norms, such as due process, recklessness, unconscionability, unfair labor practices, etc., take the form of open-ended unspecified general terms that require resort to background understandings). The fact that lay perceptions are involved does not render the resulting conclusions and judgments personal or nonlegal.} This is particularly true and most readily seen when common morality principles have been incorporated into the substantive law.\footnote{Through examination of inadvertent disclosure cases and the doctrine of unilateral mistake in contract law, I demonstrate in Part III.B infra how courts have used common morality principles in formulating substantive legal doctrine.} In the latter case, these principles are not merely extra, superfluous factors that are separate from and secondary to the law; rather, they are integral components of proper decision making. If these principles are sufficiently important to impact substantive law outcomes, then certainly they are important enough to be taken into account in the law of lawyering in appropriate cases. To the extent the role of the attorney is not merely to represent clients, but to uphold the system of justice and the integrity of the law, these common morality principles should not be ignored. Thus, appealing to these values is not inconsistent with, but rather is necessary to, a correct understanding of the lawyer's role.\footnote{See Simon, supra note 13 (arguing that ethical discretion that incorporates moral concerns outside the legal system will best vindicate our legal ideals and contribute to a more effective functioning of the lawyer's role).}
Even if one concludes that role obligations are distinct from common moral obligations, embracing common morality does not require the wholesale abandonment of role obligations. Indeed, if one applies the methodology used in this Article, common morality comes into play only when the rules and their underlying principles are inapplicable or conflicting. In such situations, the role obligations of an attorney are less than clear. Common morality therefore is used not to supplant the dictates of the role, but rather to offer additional guidance. More importantly, the proposal outlined herein does not require that lawyers rely upon common morality principles in any general sense. Rather, the analysis is grounded in the law. When faced with ethical dilemmas, lawyers are directed to assess the ways in which courts have considered the underlying question at issue in analogous areas of the law. Thus, the analysis is situated in an operational context with which lawyers are familiar. To the extent lawyers are called upon to broaden the scope of the question being investigated, they are asked to do no more than that which lawyers do every day in other areas of practice. The act of generalizing and isolating relevant factors through comparative analysis does not render the examination personal or illegitimate.

Admittedly, moving to a more expansive form of ethical decision making requires some reliance upon lawyer discretion and judgment. This fact is also likely to cause some scholars and practitioners to object. The complaints are familiar. Lawyers are simply ill equipped to consider common morality principles and a host of other factors in connection with their roles as legal professionals. There are no adequate bases upon which to rest discretionary judgments. These judgments are subjective and arbitrary. People disagree about them. One person’s justice is another person’s oppression.

The mere fact that lawyers may be called upon to exercise judgment does not necessarily mean the resulting decisions are arbitrary. If the fear is that lawyers may reach differing results, then it may be worthwhile to remember that discretionary judgments are an inherent part of our legal system and that the mere fact that reasonable people may reach different results does not undermine the system or discredit the decision making process.162 If, on the other

162 See Simon, supra note 92, at 1120-22. Professor Simon observes:

As most lawyers understand it, our legal system depends on the possibility of grounded judgments about legality and justice. Such judgments are not subjective in the sense that the choice between vanilla and chocolate ice cream is subjective; they are not arbitrary in the sense that the result of flipping a coin is arbitrary. They often are controversial, but controversy does not preclude legitimacy.
hand, the fear is one of unconstrained moral free agency, then it may be helpful to recall that because rules are inherently limited in scope, and often inconclusive and subject to variable interpretations, legal professionals already have quite a bit of free agency even in a rule-based regime. It is better to direct that agency through clarification and discussion of ethical norms rather than to deny that it exists (and thereby leave it unguided) by reliance solely upon a rule-oriented system.

Undoubtedly, the proposal set forth in this Article will require more energy than lawyers currently expend on ethics analysis, and many lawyers will point to existing pressures of practice to excuse their failure to engage in broadened ethical analysis. To that concern, I offer three responses. First, the time spent on ethical analysis in practice could be minimized if law schools were to incorporate practical frameworks for ethical decision making as part of their ethics curricula. Thus, lawyers would be equipped to address ethical questions more effectively and efficiently in practice. Second, the amount of time expended by individual lawyers might also be reduced if law firms and other legal institutions were to organize (and to encourage the use of) internal ethics committees whose task would be to deal consistently with ethical matters. Third, it seems odd to me that lawyers are willing to exert vast amounts of time and effort contemplating the most complex substantive legal issues on their clients' behalf, and yet balk at the notion of affording more than cursory attention to ethical matters that may, at a minimum, augment the lawyer's professional development and, at best, produce just outcomes. As Professor Luban observes, "It does not seem too much to ask that what one does in order to live with one's client might also be done in order to live with one's self, even in the hard cases where you have to think about it."\(^{163}\)

\[\ldots\] Judges about legality and justice are grounded in the norms and practices of the surrounding legal culture. These norms and practices are objective and systematic in the sense that they have observable regularity and are mutually meaningful to those who refer to and engage in them. Even when lawyers disagree about such judgments, they usually do not regard them as subjective and arbitrary. One indication of this fact is that they do not articulate or experience their disagreement as an opposing assertion of subjective preference or arbitrary will. Rather, they oppose decisions on the ground that they are wrong—wrong in terms of norms and practices that they plausibly believe binding on the decision maker. Moreover, they are often willing to accept a particular decision as legitimate, even when they regard it as mistaken, in part because they recognize it as a good faith attempt to apply the norms and practices of the culture.

*Id.* The methodology employed in this Article requires that lawyers do no more than what we call upon judges, practitioners, and other participants in the adjudicatory process to do routinely in the decision making process.

\(^{163}\) LUBAN, supra note 13, at 142.
In summary, the proposed framework outlined here and the methodology I have used throughout this Article are straightforward. Indeed, I merely suggest lawyers do in the professional ethics context what they otherwise do quite naturally. When faced with an ethical problem, lawyers should first determine whether the law or an ethical rule resolves the specific question at issue. If the law or ethics rules are unclear, conflict, or are otherwise inapplicable, lawyers should examine the principles underlying the rules to determine whether those principles might fairly resolve the problem at hand. If that process is not helpful, then lawyers might obtain additional guidance through examination of judicial treatment of similar problems in analogous areas of the substantive law.

Of course, interesting ideas are truly a dime a dozen. Sound ideas prove themselves useful through practical application. To test the utility of the arguments set forth herein, it is helpful to apply them to the problem of the inadvertent disclosure of privileged information.

III. A TEST CASE: EXAMINATION OF INADVERTENT DISCLOSURE CASES

There are two potential starting points for exploring the ethical obligations of recipients of inadvertently disclosed information: (1) rules of professional conduct; and (2) the case law of waiver. As demonstrated in Part I, commentators uniformly agree that the Model Rules of Professional Conduct do not expressly resolve the problem, and most state bars have not addressed the issue. In addition, the case law of waiver is of limited utility due to (a) lawyers’ inability to know in advance (in most cases) whether a court will rule that waiver has occurred; (b) judicial silence on the question of how lawyers should behave when the law is unclear; and (c) some suggestion in the case law that ethical obligations are distinct from legal obligations. Thus, the ethical rules and the law of waiver may not resolve the ethical question facing the recipient of inadvertently disclosed materials. Fortunately, the inquiry need not end at this point. Indeed, exploration of principles underlying the rules leads to greater understanding of the complex dimensions of inadvertent disclosure problems.

164 See Formal Op. 92-368, supra note 31 ("A satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules."); cf. Freedman, supra note 32 ("T[he ABA's . . . analysis begins with the admission that a 'satisfactory answer cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules.' A translation from the doublespeak is that there is no rule that supports the 'satisfactory answer' the [ABA] wanted to reach.").
165 See supra note 46.
166 See supra notes 86-87 and accompanying text.
A. A Clash of Titans: Confidentiality, Partisan Advocacy, and Inadvertent Disclosures

Inadvertent disclosure cases involve the collision of two fundamental concepts: the rules of professional conduct and the law of lawyering: partisanship and confidentiality—a clash of titans, so to speak. Depending upon one’s point of view, one principle must yield to the other. However, as review of the history and broader context in which these principles operate illustrates, deciding which principle must give way is a difficult, if not an impossible, task.

It is important to note that the following analysis differs from that employed by the ABA and the Freedman camp because the goal is not merely to utilize one principle, while summarily dismissing the other, to justify a pre-determined conclusion. Rather, the analysis set forth here explores both concepts in an effort to determine whether there is a legitimate means, taking into consideration the history of and the functions served by partisanship and confidentiality, for determining which value should assume primacy in inadvertent disclosure cases. Consider first the principle of partisanship.

1. Partisan Advocacy

I have already discussed the principle of partisanship extensively in Part I.B. There, I demonstrated that partisanship has deep historical roots in the United States’ legal system. It is an essential aspect of our adversary system. This fact alone does not mean that partisanship is unlimited or that lawyers must simply do whatever furthers their clients’ interests when ethical dilemmas arise. (I do not mean to suggest that reliance upon partisanship is always inappropriate. Rather, my point is that partisanship should not be treated as an automatic default choice to the exclusion of all else—especially when other important legal values are involved.) As noted in Part I.B, partisanship is curtailed in general terms by the very rules that codify this principle and in a more specific fashion by other ethical and procedural rules designed to promote fair and honest dealings among and between adversaries and the courts. Among the more specific limitations, Rule 4.2, which restricts whom a lawyer may contact in the course of her representation, is particularly pertinent to the present analysis because it involves the question of limiting one side’s

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167 See Hazard, supra note 7, at 1246 (identifying three core values enforced by the ethical rules: loyalty, confidentiality, and candor to the court).
access to probative information in order to safeguard the other side's confidences. Indeed, because it directly raises the question of when the principle of confidentiality may serve as a limitation on partisanship, Rule 4.2 merits closer scrutiny.

Briefly, Model Rule 4.2 states: "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 by law to do so." Commentators uniformly agree that the purpose of Rule 4.2 is to protect the lawyer-client relationship and to prevent lawyers from taking advantage of laypersons by securing admissions against interest. All fifty states, the District of Columbia, and most federal district courts have adopted rules modeled after Rule 4.2, making the rule a well-established and venerable part of the legal ethics landscape.

Although a primary goal of Rule 4.2 is to protect the confidential relationship between an adversary and her client, the rule only prevents an opposing lawyer from taking affirmative acts (i.e., contacting a represented person without consulting her attorney) to undermine that relationship. Prohibiting a lawyer from actively undermining the confidentiality between an adversary and her client is, however, very different from prohibiting that lawyer from using confidential information which has come into her possession by virtue of the other side's inadvertence. Thus, while partisanship may be limited to further confidentiality and the values it promotes, existing limitations on partisanship may not extend to inadvertent disclosure cases.

The absence of an express limitation on partisanship does not mean that the recipient of inadvertently disclosed materials should proceed automatically to use the materials to her client's advantage. The mere fact that rules may not expressly forbid a particular course of action does not render the action desirable—especially if the action in question runs afoul of another important

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169 See Center for Professional Responsibility, American Bar Ass'n, Annotated Model Rules of Professional Conduct 392 (3d ed. 1996) (Rule 4.2 is meant "to prevent lawyers from taking advantage of unrepresented lay persons and to preserve the integrity of the lawyer-client relationship.").

value. In the inadvertent disclosure setting that value is confidentiality. A brief exploration of the principle of confidentiality is therefore warranted.

2. Confidentiality

As with partisanship, the historical roots of the principle of confidentiality are extensive. Early cases reflect the widely accepted notion that a lawyer must never reveal to a third party information obtained in connection with the representation of a client. These cases are founded upon the belief that confidentiality is necessary to encourage clients to disclose freely and completely to a lawyer all information pertinent to the legal matter at hand. Open disclosure in turn increases the lawyer’s ability to render competent legal advice, enables lay persons better to invoke and to protect their rights, and furthers the administration of justice by ensuring greater knowledge of and compliance with the law. In addition to these utilitarian rationales, it is often argued that the principle of confidentiality safeguards individual privacy from government intrusion and thereby enhances the autonomy and liberty of

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171 See, e.g., Arnesley v. Anglesea, 17 How. St. Tr. 1139, 1237 (1743) ("[A]ll people and all courts have looked upon that confidence between the party and attorney to be so great that it would be destructive to all business if attorneys were to disclose the business of their clients."); Greensough v. Guizell, 39 Eng. Rep. 618, 621 (Ch. 1833) ("If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case.").

172 There is limited empirical evidence concerning the extent to which the public actually relies upon the principle of confidentiality and whether elimination of the attorney-client privilege would discourage full and open communications. See Vincent C. Alexander, The Corporate Attorney-Client Privilege: A Study of the Participants, 63 ST. JOHN’S L. REV. 191 (1989); Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351 (1989); Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226 (1962). However, Professor Hazard aptly notes that "it is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have at least some greater ability to gain the trust of at least some clients, and hence to serve them competently." HAZARD & HODES, supra note 120, § 1.6:101, at 128.

173 See, for example, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), in which the court notes: [the purpose of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby [to] promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.

Id.
citizens. Maintaining confidentiality may also enable "lawyers [to] demonstrate the moral values of trust and loyalty." 

Because of its centrality to the lawyer-client relationship, the principle of confidentiality was incorporated in the earliest ethical codes. Canon 37 of the 1908 Ethical Canons stated in part:

This duty [to preserve his client's confidences] outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information.

The Model Code clarified and expounded upon this duty. Disciplinary Rule 4-101 provided:

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of his client.

See, for example, HAZARD & HODES, supra note 120, § 1.6:101, at 131-32, in which the authors observe:

[the principle of confidentiality] creates a zone of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens. Furthermore, lawyers demonstrate the moral values of trust and loyalty when they say they will keep quiet and then do so, even when there are compelling reasons to speak out.

Id.

ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1908).

A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
3. The intention of his client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980).
(2) Use a confidence or secret of his client to the disadvantage of the client.
(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.\(^{178}\)

Rule 1.6 of the Model Rules affords confidentiality the broadest protection to date. That rule states, in part: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."\(^{179}\)

Thus, confidentiality, like partisanship, is a critical aspect of our legal system—a principle that cannot be cast aside easily or without serious justification.\(^{180}\) However, one cannot avoid acknowledging that the principle exacts costs.\(^{181}\) In certain circumstances maintaining confidentiality may impede the

\(^{178}\) Id. DR 4-101(B). The Ethical Considerations accompanying DR 4-101 reiterate the utilitarian justification for the principle by stating that confidentiality between the lawyer and client is necessary in order for the lawyer to be fully informed of all relevant facts and for the client "to obtain the full advantage of our legal system." Id. EC 4-1.

\(^{179}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1998). By substituting the word "information" for the terms "confidence" and "secret," Rule 1.6 offers the greatest protection for client confidences to date. The Model Code defined "secrets" as information that the client "has requested to be held inviolate" or information that would be "embarrassing" or "likely to be detrimental" if revealed. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980). Thus, the rule afforded a weak presumption of confidentiality. The only way a client could secure confidentiality was to demand it specifically. By contrast, the Model Rules create a presumption of confidentiality that applies automatically in all cases. AMERICAN BAR ASS'N, ANNOTATED RULES OF PROFESSIONAL CONDUCT 89-93 (3d ed. 1992).

\(^{180}\) The ethics codes enumerate two circumstances in which a lawyer may deviate from the general rule: to prevent a client from committing a crime and to defend herself in a controversy involving the client. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1998); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980). Obviously, neither of these exceptions applies to inadvertent disclosure cases. The exceptions are more concerned with when a lawyer may voluntarily and deliberately disclose client confidences. By contrast, the question raised in inadvertent disclosure cases is "to what extent may one side access and use information that the disclosing lawyer and her client desire to keep confidential?"

\(^{181}\) Indeed, scholars have vigorously debated whether the costs of the attorney-client privilege (a subset of the principle of confidentiality) outweigh its benefits, whether the privilege should even exist, and to what extent it should exist. See, e.g., S. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 302-25 (David S. Berkwitz & Samuel E. Thorne eds., Garland Publishing 1978) (1827); Albert W. Alschuler, The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?, 52 U. COLO. L. REV. 349 (1981) (arguing that the search for truth is not significantly impaired by the privilege and that abolishing the privilege would entail costs such as breaching the bond of trust between attorney and client); Marvin E. Frankel, The Search for Truth Continued: More Disclosure, Less Privilege, 54 U. COLO. L. REV. 31 (1982) (arguing that attorneys have an affirmative duty to disclose information favorable to the other side); Albert W. Alschuler, The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel, 54 U. COLO. L. REV. 67 (1982) (arguing that Frankel's proposal would prevent lawyers from fulfilling their function in the adversary system and would hurt the perceived fairness of the legal system); James A. Gardner, A
fact-finding process and compromise truth in some fashion. It would indeed be rare that a lawyer would choose to disclose information that might harm her client's cause if a claim of confidentiality might shield the information. In view of these costs, confidentiality may be waived by disclosure to an adversary or a third party. The question thus arises as to whether inadvertent disclosure constitutes waiver, thereby leaving the recipient of the confidential information free to use it in accordance with the principle of partisanship.

As indicated in Part I.A.3., courts have struggled with this legal question in connection with the attorney-client privilege, and the law is in flux on this matter. A few courts have taken the position that inadvertent disclosure always waives the privilege. A few have reached the exact opposite conclusion. However, the vast majority of courts have been unwilling to hold as a general matter that partisanship permits the automatic use of the material or conversely that the important functions served by confidentiality and the attorney-client privilege constrain adversarial zeal even after inadvertent disclosure. Rather, most courts have determined that this question can be addressed only on a case-specific basis and only after assessing the totality of the circumstances leading to the disclosure. The lack of clarity concerning whether inadvertent disclosure results in waiver and the courts' inability to formulate a general rule concerning which principle assumes primacy in this

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Re-Evaluation of the Attorney-Client Privilege (parts 1 & 2), 8 VILL. L. REV. 279; 447 (1963) (arguing that there are more subtle, psychological reasons for the privilege than those commonly invoked, reasons arising out of a respect for human freedom and individualism); Comment, supra note 172 (defending privilege on empirical grounds); Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464 (1977) (critiquing the utilitarian justification for the attorney-client privilege).

182 See Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061, 1062 (1978) ("It seems fair to say [that instances where a client wishes to avoid even the most flattering revelations of his affairs and his self] are greatly outnumbered by those in which the principle of privacy is invoked to conceal legally dubious or dirty business.").

183 Although they overlap, the duty of confidentiality and the attorney-client privilege are not the same. The major difference between the two is that the duty of confidentiality applies to all information the lawyer acquires in the course of representing a client regardless of the source of that information and the purpose for which it is sought. In contrast, the attorney-client privilege protects from compelled disclosure in an adversarial proceeding confidential communications between an attorney and client made for the purpose of rendering or obtaining legal advice. Thus, the principle of confidentiality is broader than the attorney-client privilege. See HAZARD & HODES, supra note 120, § 1.6.103, at 126-37.

184 See supra notes 70-77 and accompanying text.

185 See supra notes 78-81 and accompanying text.

186 See supra notes 61-69 and accompanying text.

187 See supra notes 61-69 and accompanying text.
context creates a situation in which confidentiality may still attach and serve to prevent an adversary's use of the material.\textsuperscript{188}

Having reviewed the history and purposes served by the principle of partisanship and the principle of confidentiality, it is somewhat easier to understand the quandary facing the courts. As the above analysis demonstrates, both partisan advocacy and confidentiality are integral values of the legal profession and the law of lawyering. Using these principles, strong arguments can be made in support of both the outcomes promoted by the ABA and the conclusions advanced by Professor Freedman. In short, partisan advocacy suggests that an attorney should use every morsel of information, every weapon in her arsenal, to promote her client's interests vigorously. However, even in an adversary system, there are limits to partisanship. Although the principle of confidentiality may be one such limit, that principle deals primarily with an attorney's professional duty to preserve her own client's confidences. In the most obvious instances where partisanship and confidentiality collide, the only prescription that has emerged is against one side taking affirmative efforts to undermine the confidential relationship between an adversary and her client. Thus, in the absence of waiver, the opposing side arguably is obliged only to refrain from taking affirmative steps to invade that confidence.

Preventing one side from taking affirmative steps to breach another's confidence is very different from allowing that side to use information that fortuitously came its way. And therein lies the rub: in inadvertent disclosure cases, disclosure results from a mistake. The receiving party has not taken any affirmative steps to undermine the confidential relationship between opposing counsel and her client. Thus, traditional limits on partisanship do not apply, and, by using the material, the receiving attorney arguably has not crossed any ethical lines insofar as partisanship alone is concerned.

However, partisanship is not the only value at stake. In inadvertent disclosure cases, it is not clear that the disclosing party has waived the attorney-client privilege. Consequently, the principle of confidentiality might still apply and serve to prevent the recipient from using the material. Thus, inadvertent disclosure cases fall squarely between two ends of a spectrum. These cases do not fit neatly within any of the limitations placed on partisanship or the protections afforded confidentiality.

\textsuperscript{188} See supra notes 82-87 and accompanying text.
Although conventional means of statutory analysis have proven insufficient to answer the specific problem raised in this Article, this analysis is nonetheless critical because it brings to the forefront the systemic values involved in this ethical conflict and requires that lawyers think about the costs associated with any particular course of action. Thus, this approach fosters a heightened awareness of professional values. In addition, it confirms the existence of a genuine ethical dilemma and underscores the importance of ethical deliberation in resolving it.

B. Inadvertent Disclosures and the Law of Unilateral Mistake: A Question of Fairness

To err is human. To forgive, divine.189

Because analysis of confidentiality and partisanship is inconclusive, lawyers must either make an arbitrary choice or seek additional guidance from other sources. When one sets aside disputes over the relative value of confidentiality and partisanship and broadens the scope of the analysis, a number of intriguing questions emerge. Should the disclosing party be punished for the mistake? Will punishment deter such behavior in the future? Is the recipient of the information entitled to benefit from the mistake? When closely examined, all of these concerns essentially reduce to a question of whether and when it is fair to allow one person to capitalize on another’s mistake.

As a general matter, answering this question involves consideration of two factors: (1) the expectations of the parties to the transaction; and (2) the consequences of the mistake. If parties enter into an engagement expecting that each will maximize her own advantage through the mistake of the other and if the rules suggest it is fair to behave in this fashion, then few would argue that an ethical conflict arises after the fact. For example, envision a chess match between Gary Kasparov and a young upstart by the name of Brinson. Kasparov, still distraught over his defeat by IBM’s “Deep Blue” supercomputer, mistakenly moves the wrong pawn. Seizing upon this error, the newcomer soon places the grandmaster in checkmate. Is the newcomer’s action unethical? It seems not because upon entering the match the parties assumed the upset would take precisely this action if afforded the opportunity. In fact, that is the object of the game; the rules of engagement demand this type of behavior. On the other hand, if Christi negotiates a deal to

buy a car for $10,000, and through a secretarial error, is given a contract with a
$1,000 selling price, it would seem unethical for Christi to refuse payment of
the full price. The expectations of the parties upon executing the deal were
that $10,000 represented a fair price from both the buyer and the seller’s point
of view. To force the seller to incur a $9,000 loss due to a typographical error
seems unjust. Of course, these examples represent opposite ends of a
continuum and more difficult scenarios do occur. For example, assume that
Christi decides to clear out her accumulated junk by holding a garage sale.
She decides to sell for $50 a violin that has been in her attic for ages. Brinson,
who relishes not only the game of chess but also rummaging through other
people’s castoffs in search of hidden treasures, attends the garage sale and
twenty minutes later emerges having purchased a Stradivarius violin at a steal.
Is there an ethical conflict? Perhaps not, because Christi intended to sell the
violin for $50. Moreover, it was her responsibility to determine whether $50
was a fair price. That is, she assumed the risk of error. In addition, the parties
entered into the transaction expecting that each would benefit—Christi by
obtaining $50 dollars and a clean attic and Brinson by obtaining a priceless
treasure at a bargain. That is the nature of a garage sale. The problem that
gives many people pause is that, notwithstanding the expectations of the
participants, the consequences of the error are immense.

These common morality conclusions are neither separate from nor
peripheral to the development of substantive law principles. Nowhere have
they been more important in shaping the substantive law than in the area of
unilateral mistake in contract law. Unilateral mistake cases (in which one
party has unknowingly made a mistake to its detriment) are particularly useful
to the present investigation because often they involve many of the same

190 Although the suggestion that lawyers consult legal principles in other areas of the law does not rest
on a direct appeal to common morality, it is nonetheless helpful to show how these principles have influ-
enced the development of legal principles. This demonstration further dispels the notion that common moral
principles are somehow separate from legal principles and are therefore unworthy of consideration in legal
ethics analysis.

191 Unilateral mistakes occur when only one party has an erroneous view of the facts. See E. ALLAN
FARNWORTH, CONTRACTS § 9.4, at 663 (1982). In contrast, a mutual mistake occurs when both parties
share the same erroneous views as to the facts. See id. § 9.3, at 653; see also Smith v. Zimbalist, 38 P.2d
170 (Cal. 1934) (contract unenforceable where both parties mistakenly believed items to be conveyed were
Stradivarius and Guarnerius violins); Willin v. First Source Bank, 548 N.E.2d 170 (Ind. Ct. App. 1990) (no
meeting of minds and no contract where neither party was aware that property conveyed contained valuable
works of art); Sherwood v. Walker, 35 N.W. 919 (Mich. 1887) (contract rescinded where both parties be-
lieved pregnant cow was barren). Courts more readily rescind contracts in cases of mutual mistake because
of the apparent absence of a meeting of the minds on essential terms of the bargain. See RESTATEMENT
ethical issues raised by inadvertent disclosures. Thus, examination of this law may be helpful in finally resolving the inadvertent disclosure dilemma.

1. The Law of Unilateral Mistake

In recent decades, courts have rescinded or canceled contracts in unilateral mistake cases if the mistake either was known or should have been known to the other party or if enforcement of those contracts would be unconscionable. Unilateral mistake cases often involve bids on construction contracts where one party has made a clerical error in computing the price or in omitting component items. For example, in response to B’s advertisement for

192 See Andrew Kull, Unilateral Mistake: The Baseball Card Case, 70 WASH. U. L.Q. 57, 59 (1992) (critically observing that the current approach to unilateral mistake is “overtly one of ethical regulation . . . . [R]ules that once afforded a qualified promise of individual autonomy are employed instead to police the fairness of the contractual exchange”).

193 Traditionally, courts refused to grant relief if the mistake was not mutual, fearing that to do so would undermine the stability and definiteness of contractual relations. See, e.g., 13 SAMUEL WILLLSTON, CONTRACTS §§ 1573, 1579 (3d ed. 1970); 1 SAMUEL WILLLSTON, THE LAW OF CONTRACTS § 18 (1920); OLIVER WENDELL HOLMES, THE COMMON LAW 242 (Mark De Wolfe Howe ed., 1963); see also Triple A Contractors, Inc. v. Rural Water District, 603 P.2d 184 (Kan. 1979) (applying general rule in Kansas to construction context and holding that, regardless of its cause, unilateral mistake does not excuse nonperformance of contract bid). According to these sources, which follow the objective theory of contract formation, a valid contract was formed solely by objective agreement in expression. The state of mind or subjective intention of the parties was irrelevant.

194 The Restatement (Second) of Contracts states this principle as follows:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in sec. 154, and

(A) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(B) the other party had reason to know of the mistake or his fault caused the mistake.

RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979); see also Elsinore Union Elementary Sch. Dist. v. Kastorff, 353 P.2d 713 (Cal. 1960) (defendant’s error in computing bid sufficient basis for rescission on unconscionability grounds); M.F. Kemper Constr. Co. v. City of Los Angeles, 235 P.2d 7 (Cal. 1951) (same); Boise Junior College Dist. v. Mattea Constr. Co., 450 P.2d 604 (Idaho 1969) (same); Kenneth Curran, Inc. v. State, 215 A.2d 702 (N.H. 1965) (same). The Restatement (Second) of Contracts suggests that even if neither party is aware of the mistake at the time it is made, the mistaken party may avoid the contract if its enforcement would be unconscionable. RESTATEMENT (SECOND) OF CONTRACTS, § 153 illus. 1 (1979). But see Kull, supra note 192, at 72-74 (critiquing the grant of rescission where the nonmistaken party is unaware of the mistake).

195 See Elsinore, 353 P.2d at 714 (rescission granted where contractor accidentally failed to include plumbing sub bids when tallying bid total); Boise, 450 P.2d at 609 (rescission granted where contractor forgot to mark down subcontractor’s bid for glass when computing bid); Curran, 215 A.2d at 704 (rescission granted where adding machine used in computing bid was incapable of recording a total of more than
construction bids, A submits a bid of $50,000 and B accepts. In calculations made prior to submitting the bid, A fails to take into account an item of construction that will cost $5,000. If B knows or has reason to know that A is acting under a mistake, or if enforcement would be unconscionable, the contract is voidable by A. Mistakes also occur in the conveyance of a bid or some other offer. For example, C may decide to sell her services or a particular product to D for $55,000. However, due to a typographical error in transmitting the offer or in reducing it to paper, D may receive a price of $35,000. If D is either aware of the mistake or promptly notified of it and can be placed in status quo ante (i.e., the position he would have occupied before the mistake, not the one the bargain caused him to anticipate), the contract may be rescinded. Unilateral mistakes arise in still other contexts. A recent and colorful example involved the sale of a 1968 Topps Nolan Ryan rookie baseball card for $12. In April 1990, 12-year-old Brian Wrzesinski entered Ball-Mart, a baseball card store owned by Joe Irmen in Addison, Illinois, and purchased the card. Irmen claimed the near-perfect card was priced at $1,200, not at $12.

A clerk, however, with limited knowledge of baseball cards, sold

\footnote{\$99,999.99 resulting in contractor underestimating bid by \$100,000. But see \textit{Triple A Contractors}, 603 P.2d at 186 (unilateral error in calculating costs insufficient basis for rescission). For comprehensive analysis of mistaken bid cases, see \textit{Ernest M. Jones, The Law of Mistaken Bids}, 48 U. CHI. L. REV. 43 (1979).}

\footnote{In many cases, the amount of the mistaken bid is significantly lower than estimated costs and bids submitted by other contractors. \textit{See}, e.g., \textit{M.F. Kemper Constr. Co.}, 235 P.2d at 7 (contractor’s bid approximately \$270,000 less than next lowest bid); \textit{Curran}, 215 A.2d at 702 (subcontractor bid \$102,171 for project when private government estimate was \$158,000 and other contractors’ bids ranged from \$159,957 to \$189,945). Some courts have found this discrepancy sufficient to place the recipient on notice that a mistake has occurred. \textit{See}, e.g., \textit{Curran}, 215 A.2d at 704 (“The disparity of over \$50,000 between plaintiff’s bid, the Department’s own estimates, and that of the next lowest bidder was sufficient to charge it with notice of probable error.”).}

\footnote{It is important to distinguish materiality from unconscionability. In construction cases, materiality goes to whether the error represents a sufficiently large percentage of the total bid. Courts have disagreed over what magnitude of error suffices. \textit{See Boise}, 450 P.2d at 606. Unconscionability, however, focuses on whether it is fair to enforce a contract after a material error has occurred. An unconscionability assessment would thus consider the possibility of substantial hardship or pecuniary loss. For example, omitting a \$25,000 item in a \$100,000 bid would likely be material. However, if the \$100,000 bid included \$50,000 in profit, no hardship would result from requiring that the contractor comply with the terms of the bid. \textit{Id.}}

\footnote{\textit{See \textit{Restatement (Second) of Contracts § 153 Illus. 8}} (1979).}

\footnote{\textit{See}, \textit{e.g., Chernick v. United States}, 372 P.2d 492 (\textit{Ct. Ct.} 1967) (reformation permitted where plaintiff mistakenly entered wrong rental adjustment figure in contract and where defendant should have known of mistake); \textit{Tyra v. Cheney}, 152 N.W. 835 (\textit{Minn.} 1915) (reformation allowed where plaintiff conveyed written bid which erroneously omitted item costing \$963 and which rendered bid less than estimate previously given to defendant).}


\footnote{The card apparently was marked “1200” without a comma and with a slash following the number. \textit{John Lepich, Here’s One “Card Show” That Doesn’t Seem Like Much Fun Anymore}, \textit{CHI. TRIB.}, Mar. 15, 1991, Sports, at 11.}
the card to Wrzesinski for $12.\textsuperscript{202} Of course, being no slouch, Wrzesinski knew the card was worth much more than $12.\textsuperscript{203} Irmen subsequently sued Wrzesinski for either return of the card or payment of the balance of $1,188.\textsuperscript{204}

\textsuperscript{202} Per Irmen: “It happened on my second or third day in (the baseball card) business. I had about 20 people in the store and I needed help. I got the girl next door (from Irmen’s jewelry store) to help me. I was there when the whole thing happened, but I was busy. The price of the card said $1,200. The kid (Wrzesinski) looked at it and said to the girl, “Is this worth $12?” She said yes and he bought it. What the kid did is like stealing. He knew what he was doing and the girl didn’t. He should have told her the card was worth more than $12. She didn’t know if it was 12 cents, $12 or $1,200. She just took the kid’s word for it.” John Lepitch, Boy Stood Over Baseball Card: Shop Says $1200 Item Was Sold by Mistake for $12, Chi. Trib., Nov. 10, 1990, News, at 1.

\textsuperscript{203} Per Brian Wrzesinski: “I didn’t steal the card or do anything wrong. I just went in there to see what they had. It was a card I was looking for. I knew the card was worth more than $12. I saw it priced for $150 and up. I just offered $12 for it and the lady sold it to me. People go into card shops and try to bargain all the time.” Id.

\textsuperscript{204} The case settled in April 1991 (after trial but before the judge rendered her judgment) when the parties agreed to auction the card and to donate the proceeds to charity. John Lepitch, Charity Delivers Winning Pitch in Baseball-Card Suit, Chi. Trib., Apr. 23, 1991, Sports, at 1. The card ultimately sold at auction for $5,000, probably due in large part to the controversy. John Lepitch, Ryan Card Brings $5000 and Another Flap, Chi. Trib., June 22, 1991, Sports, at 1. Although the court was never called upon to render a decision on the merits, the public was not reticent in expressing its views. Indeed, reader comments to the Tribune suggest the public was quite disturbed by the situation. One writer argued:

Baseball-card dealers all over the country make money in just this way, persuading owners to sell cards for less than what they are worth, then peddling them for much higher prices. So it’s hard to feel any deep sympathy for the owner of the Addison baseball-card store . . . on grounds that the boy cheated his store in a transaction . . . [However], it seems reasonably clear from all accounts that (Wrzesinski) knew the card was far more valuable than $12 when he bought it. And if he didn’t know then that the clerk who sold him the card was a novice with no knowledge of the baseball-card business, he certainly does now. Perhaps he was technically within the law, . . . but broadly speaking, he was wrong to take advantage of the store. There is no moral dilemma here, not even close. The father and son should stop posing proudly for TV and newspaper cameras and instead head over to the card store and hand back the Nolan Ryan rookie card.

Eric Zorn, Commentary, Young Collector Way Off Base in Flap Over Trading Card, Chi. Trib., Nov. 15, 1990, Tempo, at 1. Another writer suggested:

The fact that the boy’s father wants to encourage his dishonesty, thereby robbing the storekeeper, is pathetic enough, but for the local media to make this boy into a “folk hero” of sorts is truly revolting. I see no innocence in his young face as he admits on camera that he saw that the price was $1,200.

Kathleen Conklin, Voice of the People, No Folk Hero, Chi. Trib., Nov. 21, 1990, Perspective, at 16. Still another wrote:

What does it profit a boy to gain a coveted baseball card by dubious means and learn nothing from the experience except to make sure he gets a receipt? At one time, most adults might have responded with words like “principles” and “honesty” and “fairness,” all part of a homily on being true to oneself and not taking advantage of others’ ignorance—or innocence. But nowadays, in the era of Trump and Milkin, of how to swim with sharks without getting eaten and the art of the deal, the popular answer probably would be much briefer: $1,188.
In rescinding contracts in cases of unilateral mistake, courts have rejected the notion that a party must necessarily "bear the consequences of his own folly." Negligence or failure to exercise reasonable care alone may not

To Swim with Baseball Card Sharks, Chit. Trib., Nov. 16, 1990, Editorial, at 26. Another writer stated:

When we find a billfold containing money, most of us—or at least some of us—try to locate the rightful owner. Those who have been on the other end of the situation appreciate that most people are decent and honest and ethical and moral and are not trying to take advantage of the situation. I think I know what kind of lesson this has been for the owner of the store, but I wonder what kind of lesson it is to the youngster involved and what message it is when his parents do not help him recognize that this was an honest error on the part of the store owner, and that people of good faith do not take advantage of other people’s misfortunes.


I am incensed that there is even a question as to the propriety of the sale of the $1,200 baseball card for $12. Once an item is sold, paid for and receipted, the sale should be complete. The incompetency of the young sales clerk who acted as the owner’s agent is the owner’s problem, not the buyer’s.

Howard Fishlove, Voice of the People, In the Cards, Chit. Trib., Nov. 21, 1990, Perspective, at 16; see also Bob Verdi, Some Lesson in Diplomacy, Chit. Trib., Apr. 25, 1991, Sports, at 1 ("I was rooting for the kid who bought the $1,200 baseball card for $12 to win in court. Charity was a nice solution to the whole mess, but a deal’s a deal."). As for Bryan Wrzesinski, he concluded by noting, "I’ll probably go back to his store. I’ll still collect. I don’t know if I’d go after a Nolan Ryan rookie card again, although I’m sure I’d handle this the same way if I had to do it all over again." John Leptich, Charity Delivers Winning Pitch in Baseball-Card Suit, Chit. Trib., Apr. 23, 1991, Sports, at 1.

In many ways, the Irmen case is similar to the inadvertent disclosure situation. Here, like in the Errant Fax, Wrzesinski knew (or should have known) of the other side’s mistake. Irmen did not intend to sell the card for $12 just as a disclosing lawyer may have no intent to reveal privileged information to an adversary. Both cases arise in a context where some question exists as to the appropriate course of action for the nonmistaken party. The key question is, "How does one sort all this out?" Does one make an arbitrary decision based upon personal moral belief, or can the law provide more neutral or objective guidance?

3 LINTON CORBIN, CORBIN ON CONTRACTS § 506, at 647-48 (1960). See RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. a (1979), which states:

The mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude either avoidance or reformation. Indeed, since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence.

Id.; see also Crosby-Mississippi Resources, Ltd. v. Prosper Energy Corp., 974 F.2d 612, 619-20 (5th Cir. 1992) (defendant’s error in mistakenly interpreting joint operation agreement insufficient basis upon which to deny rescission); Elsinore Union Elementary Sch. Dist. v. Kastorff, 353 P.2d 713, 717-18 (Cal. 1960) (error in omitting subcontractor’s bid not bar to relief); M.F. Kemper Constr. Co. v. City of Los Angeles, 235 P.2d 7, 10-11 (Cal. 1951) (same); Boise Junior College Dist. v. Mattefs Constr. Co., 450 P.2d 604, 608 (Idaho 1969) (error in omitting component of bid was "one which will sometimes occur in the conduct of reasonable and cautious businessmen" and did not bar equitable relief).
prevent relief. Although the nonmistaken party may be disappointed at being denied the fruits of the mistake, if that party can be placed in status quo ante, courts will rescind the contract. The rationale for rescission rests on the belief that a nonmistaken party should not be unjustly enriched and on the view that denial of relief will not prevent such errors in any event.

Courts are strongly inclined to grant rescission if the other party knew or should have known of the mistake, reasoning that if the nonmistaken party is aware of the mistake, then that party truly has no legitimate expectations to protect. The only interest denied is that of profiting from a mistake of which

206 See Farnsworth, supra note 191, § 9.4, at 667. Of course, courts will deny relief in extreme cases of negligence or recklessness. See RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. a (1979) (“[I]n extreme cases the mistaken party’s fault is a proper ground for denying him relief for a mistake that he otherwise could have avoided.”). However, few courts have done so. See 3 CORBIN, supra note 205, § 606, at 655 (not infrequently, courts desiring to grant relief will minimize the negligence factor); Farnsworth, supra note 191, § 9.4, at 667 and n.25 (Although “there is a degree of carelessness beyond which [a mistaken party] will not be protected . . . few cases have found that degree was exceeded.”).

207 As one commentator has observed:

The entire concept of relief for mistake at American law ultimately may be seen to rest on a basis of unjust enrichment. The idea is that the mistake of one party turns the bargain to the advantage of the other, and that it is unfair for him to retain that advantage. . . . [T]he weight of judicial and academic opinion [is] that the expectation interest of an innocent acceptor should not be protected at the [expense] of loss or forfeiture to a good faith bidder who has made a mistake. This preference is doubly reinforced by a perception that enforcement of contracts against mistaken bidders does not deter negligence in the preparation of bids.


208 See Farnsworth, supra note 191, § 9.4, at 667-68; 13 Williston, supra note 193, § 1573, at 486-87 (“obvious justice” requires affirmative relief in unilateral mistake cases where the mistake was known to the other party to the transaction); Tyra v. Cheney, 152 N.W. 835, 835 (Minn. 1915) (“One cannot snap up an offer or bid knowing that it was made in mistake.”). Courts employ a reasonableness standard to determine whether the nonmistaken party should have known of the mistake. See Chenevick v. United States 372 F.2d 492 (Cl. Cl. 1967). Using that standard, courts probe whether, under the factual circumstances of the case, there were any factors that reasonably should have brought the likelihood of error to the attention of the nonmistaken party. See id. at 496. Such factors may include a wide range of bids or a significant disparity between the bid price and the item which is the subject of the bid. See id. (contracting officer should have known bid was erroneous where bid amount was one tenth of what would be expected, significantly lower than other bids, and inadequate to compensate plaintiff for its costs). Some courts have concluded that awareness of the mistake renders unilateral mistake cases equivalent to cases of mutual mistake. See Elston, 353 F.2d at 717 (“knowledge by one party that the other is acting under mistake is treated as equivalent to mutual mistake for purposes of rescission”); M.F. Kemper, 235 P.2d at 10 (same).

209 See Kull, supra note 192, at 67, 71. Professor Kull notes:

But the case for rescission becomes almost unanswerable if the nonmistaken party knew or had reason to know of the mistake . . . . [W]here the other party has no expectations to be protected, it would be anomalous to impose promissory liability for an involuntary undertaking . . . . If there
the party was aware. To allow the nonmistaken party to benefit by receiving unearned and undeserved desserts is considered wrong and unfair.\(^{210}\)

Courts, however, will not grant rescission if the party seeking relief bears the risk of mistake.\(^{211}\) Commonly, if a mistake involves a question of judgment, the mistaken party will bear the risk and will be held to the resulting contract. Mistakes involving conscious ignorance or erroneous estimations of value fall within this category. For example, assume that X contracts to sell Y a piece of timber-laden land, Whiteacre, for $100,000. If Y accepts X's price without investigating the actual worth of the parcel, courts will not rescind the resulting contract if the land turns out to have a value of only $75,000. In addition, courts will not rescind the contract even if Y conducts an investigation and simply reaches an erroneous conclusion as to the value of the land. Courts have found that in the usual course of business (e.g., absent some fiduciary relationship, fraud, duress, etc.), parties to a negotiation assume the risk that their assessments concerning value may be inadequate or inaccurate.\(^{212}\)

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\(^{210}\) See 3 CORBIN, supra note 205, § 609, at 680.

\(^{211}\) Assigning the risk of mistake may be accomplished in a number of ways. Parties may allocate it by express or implied agreement. A party may deliberately contract knowing that it has limited knowledge of the facts in question. Finally, a court may assign risks in light of the circumstances. See RESTATEMENT (SECOND) OF CONTRACTS § 154 (1979). For illustrative cases and examples, see TONY DOWNS FOODS CO. v. UNITED STATES, 530 F.2d 367 (Ct. Cl. 1976) (poultry supplier who bid on government contracts during price freeze unable to recover when freeze terminated and price of poultry rose increasing supplier's costs and resulting in loss); ANDERSON BROS. CORP. v. O'MEARA, 306 F.2d 672 (5th Cir. 1962) (buyer of barge dredge bound to contract where seller unaware of buyer's intended use and where buyer took inadequate steps prior to purchase to learn if dredge was suited to his needs); WRIGHT v. TOWN OF WILMINGTON, 250 F.2d 30 (1st Cir. 1961) (relief denied where plaintiff undertook work for a specific sum without securing protection against a low estimate even though plaintiff knew defendant's estimate of work to be done was inexact); RESTATEMENT (SECOND) OF CONTRACTS § 154 illus. 6 (1979); FARNSWORTH, supra note 191, § 9.4, at 666.

\(^{212}\) Mistakes involving unequal possession of information also typically fall into this category. For example, in the famous case of LAIDLAW v. ORGAN, a tobacco merchant obtained advance information about the end of the War of 1812. Sussing that the price of tobacco would increase at the war's end, the merchant quickly contracted to purchase tobacco at a low price. When the news of peace reached New Orleans, the price of tobacco rose sharply, and the seller sought to avoid the contract. The Supreme Court held the buyer was not obligated to communicate his special knowledge to the seller. Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817). Both the First and Second Restatements of the Law of Contract support the view that there is no duty to disclose on the part of one who knows another is acting under a mistaken belief as to market conditions or financial situations. RESTATEMENT OF CONTRACTS § 472 (1) (1932); RESTATEMENT (SECOND) OF CONTRACTS § 161 illus. 7 & 10 (1979); see also RESTATEMENT OF RESTITUTION § 12 (1936). This result has caused quite a bit of controversy in recent decades. On the one hand, Professor Kronman has argued that...
In other words, parties enter the bargain knowing the other side will attempt to secure the best deal possible by taking advantage of any mistakes, or lack of knowledge, on the other’s part. Capitalizing on the other side’s mistake is thus considered a normal part of the art of “wheeling and dealing.”

Interestingly, some courts have distinguished between errors of business judgment and clerical or arithmetic errors. The latter enable the mistaken party to avoid the resulting contract. As one court has noted:

there is a difference between mere mechanical or clerical errors made in tabulating or transcribing figures and errors of judgment, as, for example, underestimating the cost of labor or materials. . . . Generally, relief is refused for errors in judgment and allowed only for clerical or mathematical mistakes. Where a person is denied relief because of an error in judgment, the agreement which is enforced is the one he intended to make, whereas if he is denied relief from a clerical error, he is forced to perform an agreement he had no intention of making.

Courts also will not relieve a mistaken party of responsibility if harm (beyond the mere loss of expectation) results to others from the mistake. If the

order to protect the interests of the party who incurs costs to obtain information. The ability to use that information to secure an advantage is the incentive to discover the information and thus promotes optimal use of resources. Anthony T. Kronman, Mistake, Disclosures, Information and the Law of Contracts, 7 J. LEGAL STUD., 1, 12-18 (1978). But see Deborah A. DeMott, Do You Have the Right to Remain Silent? Duties of Disclosure in Business Transactions, 19 DEL. J. CORP. L. 65 (1994).

213 For example, in Boise Junior College District v. Matzke Constr. Co., 450 P.2d 604 (Idaho 1969), the court noted that equitable relief will be granted unless the error results from violation of a positive legal duty or from culpable negligence. The latter involves “carelessness or lack of good faith in calculation which violates a positive duty in making up a bid, so as to amount to gross negligence, or wilful negligence . . . .” It is distinguished from a clerical or inadvertent error in handling items of a bid either through setting them down or transcription.” Id. at 606-07.

214 M.F. Kemper Constr. Co. v. City of Los Angeles, 235 P.2d 7, 10-11 (Cal. 1951). The court went on to note that a clause in the bid form stating that bidders “will not be released on account of errors” related to errors of judgment and not clerical mistakes. The court stated:

[To find otherwise] would mean holding that the contractor intended to assume the risk of a clerical error no matter in what circumstances it might occur or how serious it might be. Such interpretation is contrary to common sense and ordinary business understanding and would result in the loss of heretofore well-established equitable rights to relief from certain types of mistake.

Id. at 11. But see id. at 13, 15 (Carter, J., dissenting) (granting relief for clerical errors serves to undermine certainty of contract and the integrity of the bidding system); Triple A Contractors, Inc. v. Rural Water Dist. No. 4, 603 P.2d 184, 184-85 (Kan. 1979) (refusing to distinguish between clerical errors and errors in judgment).

215 See, e.g., Dreannn v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (when contractor relies upon subcontractor’s mistaken bid in securing main contract, subcontractor bound if general contractor does not know or have reason to know of mistake); Monarch Marking Sys. v. Reed’s Photo Mart, 483 S.W.2d 905

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nonmistaken party has no reason to know of the mistake and has materially changed its position or relied upon the mistake such that the status quo ante cannot be restored, courts will deny rescission. For example, assume that due to a computing error X offers her subcontracting services to Y for $50,000. Y, who is unaware of the mistake, accepts X’s offer, and X subsequently performs. Courts have generally held that X cannot then obtain rescission or a decree compelling Y to pay the reasonable value of X’s work. As Professor Corbin notes, “If the other party did not cause the mistake and did not know of it, it is not just to force him to pay an amount that he did not promise to pay. To the fact that the contractor was negligent and the other party innocent, we must add a change of position that calls for enforcement of the contract.”

Application of the law of unilateral mistake to the examples with which I began this section demonstrates the extent to which that law has embraced common morality principles. Indeed, were it applicable, contract law would produce the same outcomes in the chess match and garage sale based upon the parties’ expectations upon entering those transactions. Although Brinson knew of the mistake in both cases, the fact that Kasparov and Christi assumed the risk would preclude a finding of unjust enrichment. In chess, the rules require that each participant seize upon any errors made by her opponent in order to win. In the garage sale, both sides entered the transaction assuming the risk that their estimate of the value of the violin might be erroneous. Because the parties have implicitly or explicitly agreed to these risk allocations, unjust enrichment will not occur notwithstanding the fact that Brinson was aware of the mistakes when they happened.

Consistent with common morality principles, contract law treats the mistake in conveyance of the price of the car differently. In that case, the parties may have entered the negotiation hoping that each would profit from the other’s erroneous estimate of the car’s value (e.g., that $10,000 would be too high or too low) and each may have assumed the risk of such mistake. In the usual course of business, however, neither would have expected that a

(Tex. 1972) (party who mistakenly ordered four million instead of four thousand labels could not avoid contract when nonmistaken party was unaware of mistake and could not be placed in status quo ante because labels had been printed and delivered). But cf. Union Tank Car Co. v. Wheat Brothers, 387 P.2d 1000 (Utah 1964) (painting subcontractors allowed to withdraw bid after general contractor relied upon it in obtaining general construction contract when subcontractor was unaware of special contract specifications and when general contractor was best positioned to detect and avoid mistake).

216 See Brennan, 333 P.2d at 761.

217 3 CORBIN, supra note 205, § 606, at 652-53.
drastically reduced price due to an error in transmission would be binding or that the seller would assume the risk of such error. In addition, there is ample evidence here that Christi was aware the seller never intended to sell the car for $1,000 and that Christi never expected to purchase it for that amount. Therefore, the action did not reflect the actual intent of the mistaken party (i.e., to sell the car for $10,000), nor did it reflect the legitimate expectations of the nonmistaken party. Thus, in a sense the seller’s action is involuntary, and no meeting of the minds can be said to have occurred. Consequently, courts would likely rescind the contract to prevent Christi from being unjustly enriched.

These outcomes do not rest merely upon whether one side knew of the other’s mistake. As the above summary illustrates, courts will enforce contracts even if the nonmistaken party is aware of the other side’s error if the mistaken party assumed the risk of mistake. The analysis also does not hinge solely on the question of intent or genuineness of consent. No one who makes a mistake ever “intends” to do so. The chess maestro certainly did not. Neither did Christi in selling her violin. And Irmen certainly never “intended” to sell his precious Nolan Ryan card for $12, nor did the dealer who inadvertently sold the car for $1000. However, one could distinguish these cases by arguing that in the baseball card and car examples the action (i.e., conveyance of the wrong price) did not reflect the parties’ actual intent, whereas in the violin and chess cases, the actions reflected the actual intent of the parties at the time even if that intent subsequently was mistaken (e.g., the maestro intended to move his pawn and Christi intended to sell the violin for $50). In other words, the latter involved mistakes in judgment going to the heart of the transaction and for which the parties assumed the risk and should be held responsible, whereas the former are more readily characterized as clerical errors.

The law of mistake therefore illustrates that courts have incorporated and do incorporate common morality principles into analyses of substantive law issues. Courts have developed a well-established legal doctrine embracing the principle that it is unfair to capitalize on another’s mistake when the potential beneficiary knows or should know of the mistake and when the mistaken party did not assume the risk of the mistake which has occurred. In granting rescission on this basis, courts have demonstrated that the principle that it may be unfair to capitalize on another’s mistake is not just an abstract notion floating in the nether lands of common morality, but that it is a concept worthy of legal recognition and merit. To the extent that judicial applications of this
principle in unilateral mistake cases represent a reasoned assessment of fairness, these applications should not be ignored.

2. Application of the Law of Mistake to the Errant Fax Scenario

While representing Bill, Susan has received a fax that is not addressed to her. The fax appears on its face to contain information subject to the attorney-client privilege. Susan's adversary, Alan, and his client do not know the materials have been missed. What should Susan do?

Using the law of mistake to help resolve Susan's dilemma is particularly appropriate because neither the Model Rules nor their underlying principles provide clear answers. Indeed, examination of confidentiality and partisanship demonstrates that the role obligations within which lawyers normally operate do not dictate that Susan proceed in one manner or another. Thus, this is not a case where additional factors are being employed to contradict a clear role obligation. Rather, the law of mistake is used here to assist in determining the preferred course when consideration of a lawyer's role obligations results in impasse. In addition, it is important to remember that the analysis does not rest solely upon individual moral beliefs or preferences. By looking to the law of mistake, the examination is grounded in a legal context and therefore subject to the norms, practices, and values of the legal profession.

Without doubt, the Errant Fax case presents a complex ethical dilemma. The matter, however, can be reduced to a question of whether it is fair for Susan to take advantage of her adversary's mistake. In considering this question, contract law suggests that one examine the expectations of the parties and whether Alan assumed the risk of mistake. That is, should the parties in an adversarial relationship expect that inadvertent disclosure will result in waiver of the attorney-client privilege, and who bears the risk of such a mistake? Normally, the law of waiver would determine the matter. Unfortunately, as demonstrated earlier, the law as a general matter is unclear on whether inadvertent disclosure waives the attorney-client privilege. Moreover, courts have not developed any presumptions concerning whether inadvertent disclosure should waive the privilege. Thus, reliance merely upon the law of waiver to discern the specific expectations and risk allocations of the parties is not helpful as a general matter.

The examination, however, does not end there, for the law of mistake provides additional guidance. In their efforts to discern party expectations and risk allocations, courts have not focused solely on whether legal doctrine
expressly states that the mistake at issue is one for which the mistaken party must assume responsibility. Rather, in the absence of such clarity, courts have drawn distinctions between types or general categories of mistakes. Thus, in the present context, the essential question becomes whether a misdirected fax constitutes a clerical error or an error in judgment.

Because Alan’s error in sending the fax is not a deliberative mistake and did not reflect his true intent at the time, the errant fax scenario is more akin to a clerical mistake. Alan’s action is distinguishable from those cases in which a party sets a price that is too low or discloses documents under the mistaken belief that they are not privileged (i.e., cases where a party has made a deliberate—albeit mistaken—decision to undertake the action resulting in the mistake). Rather, Alan’s action is more similar to a contractor’s omission of a subcontractor’s bid in calculating a bid price or a car salesperson’s erroneous omission of a zero in conveying the price of a car. As a result, it would be unfair to force his client to bear the consequences of Alan’s mistake by allowing Susan to use the material at will (at least before judicial resolution of the matter) and without notifying Alan of its receipt.

The above conclusion is buttressed by the fact that the fax cover sheet and the document attached to it should have alerted Susan to the fact that a mistake had been made. Because Susan knew or should have known of the mistake, she has no legitimate expectations to protect. In addition, although Alan has arguably been negligent, negligence alone is an insufficient basis for permitting use of the material because Susan can be placed in status quo ante. Absent the mistake, Susan would not have had access or any entitlement to the information in the first place, because it would have been confidential and subject to the protections of the attorney-client privilege. Furthermore, without a clear rule concerning whether inadvertent disclosure waives the privilege, Susan would not automatically be entitled to the material as a result of Alan’s inadvertence. Thus, refusing to allow Susan to use the material will deny her only the benefit of profiting from Alan’s mistake. That is, she loses nothing other than that which she hoped to gain from the inadvertent disclosure.

In sum, the law of mistake indicates that Susan should refrain from using the privileged information contained in the errant fax (at least until a court has an opportunity to review the matter)\textsuperscript{218} and that she should notify Alan of its

\textsuperscript{218} Recall that the analysis set forth here is directed at the ethical obligations of recipients of inadvertently disclosed materials at the time of receipt of those materials. The above conclusions would not preclude an attorney from seeking guidance from the court on the legal question of waiver as applied to the
receipt. This conclusion is neither arbitrary nor subjective. Rather, it rests on sound legal principles that have been tested over time by the courts.

3. **Beyond the Errant Fax: Application of the Law of Mistake in Other Inadvertent Disclosure Settings**

The primary goal of this Article has been to equip lawyers with a practical means of engaging in expanded methods of ethical decision making and to illustrate the usefulness of my arguments by applying them to the *Errant Fax* dilemma. It is important, however, to demonstrate the utility of the proposal in other settings. Brief examination of the three additional inadvertent disclosure scenarios raised in Part I illustrates the flexibility of the methodology I have employed and its ability to adjust to subtle factual variations.

a. **The Mysterious Memo**

Upon receipt of a request for documents, Alan Attorney and his associates search their client’s files. Following review of the files, Alan produces forty boxes of materials to his adversary. Unbeknownst to Alan, one of the documents is a memorandum from his client’s inside counsel to the client discussing the subject of the lawsuit. The first page of the memorandum is missing. The memorandum is privileged. Susan now has it in her possession.

If Susan is unaware of the confidential nature of the memorandum in question, then an ethical conflict does not arise between confidentiality and zealousness. Because the question of confidentiality would not even be an issue, the ethical rules and the principles underlying them would suggest that Susan should proceed to use the information to advance her client’s interests.

If, on the other hand, Susan suspects that a mistake has been made (e.g., because of the pace of discovery or the contents of the document), her decision becomes slightly more difficult. If Susan follows the methodology used in this Article, initially she will consult the rules and case law for guidance. Unfortunately, the ethical rules on their face will not definitively resolve the situation because no rule speaks directly to an attorney’s obligations upon receipt of confidential materials contained in a routine document production. Recourse to case law may be more helpful in this scenario because courts have addressed inadvertent disclosures occurring in the context of document facts of her individual case. Nor does this analysis comment on how courts ought to resolve the legal question of waiver as a general matter.
productions much more extensively than they have examined situations involving errant facsimiles. However, their conclusions vary depending upon the circumstances of disclosure. Thus, if Susan is unable to reach an informed judgment by comparing her circumstances with the facts of cases in the controlling jurisdiction, she will need to extend her examination further to consider the principles underlying the rules. Again, the principles of partisanship and confidentiality collide. None of the explicit limitations on partisan advocacy arguably apply, nor would her action necessarily conflict with any of the broader purposes underlying those limitations, because Susan is not affirmatively seeking to undermine her adversary’s confidences. Thus, partisanship would dictate that Susan use the materials to assist her client. Susan, however, cannot overlook the principle of confidentiality and the important purposes served by it. She knows that confidentiality can be waived, and although she may suspect opposing counsel did not intend to waive his client’s privilege, in reality she does not definitely know the answer to that question. One factor may tip the balance in favor of partisanship. There is nothing on the face of the production indicating that an inadvertent disclosure has occurred. In light of this fact, Susan may be justified in assuming that, absent some evidence pointing her in one direction or another, she is not required to second-guess opposing counsel’s actions. Thus, the principle of partisanship may carry the day. The uncertainty about whether confidentiality applies or has been deliberately waived, combined with the ambiguity surrounding the circumstances of disclosure, may be sufficient to tip the scales in favor of partisan advocacy.

Assume, however, that Susan is unsure of her conclusions and desires additional guidance. She suspects a mistake, but does not know if one has

\footnote{\textsuperscript{219} See Stevenson, supra note 27, at 377 (noting that available case law concerning waiver was not designed with email communications in mind).}

\footnote{\textsuperscript{220} Compare United States v. Derr, No. C-91-2782-BAC (FSC), 1993 U.S. Dist. LEXIS 11414 (N.D. Cal. Aug. 10, 1993) (finding no waiver where discovery review lasted more than a year and where attorneys reviewed all documents before disclosure), with Bud Antle, Inc. v. Grow-Tech, Inc., 131 F.R.D. 179 (N.D. Cal. 1990) (holding privilege waived where privilege log not presented until six weeks after initial disclosure).}

\footnote{\textsuperscript{221} Although Susan’s decision to use the material may rest on firmer ground here than in the errant fax situation, it is nonetheless vulnerable. In short, her conclusion rests on the premise that if she does not actually know or is not reasonably sure that a mistake has been made, then she can proceed to use the material. The basis of this conclusion is questionable, for one could argue that Susan should merely ask Alan what his intent in fact was. Instruction gained from the law of mistake again illustrates why we do not require that Susan take this additional action. This situation is analogous to the negotiation of a contract between a buyer and seller for the sale of goods. The seller makes an offer. The buyer believes the selling price slightly low and suspects, but does not know for sure, that the seller is unaware of the true value of the}
been made. Assume also that the law of waiver in her jurisdiction provides insufficient guidance. Is it fair in this situation for Susan to take advantage of her adversary's mistake? Consideration of the law of mistake may be helpful in deciding the issue. The key question becomes the expectations of the parties in this particular context: did Alan assume the risk of mistake?

In responding to this question, it is important to recall that both Susan and Alan operate in an adversarial system of justice. In that system, each side is responsible for marshaling its evidence and presenting its case. Attorneys are required to advocate diligently on behalf of their clients and are free to use any evidence to that end as long as it is ethically and lawfully obtained. In such a system, although there are limits on partisanship, attorneys are not required, nor can they be expected, to second-guess decisions made by the other side just because it is unclear whether those decisions are correct. As designed, the system assumes lawyer competency and does not require a lawyer to ask her adversary, "Are you sure?" Here, there is nothing to alert Susan that these general expectations should not hold. Given the lack of clarity as to whether a mistake in production has occurred, it might be said that Susan could fairly and legitimately expect to use the materials. Although the adversary system excuse may not justify immoral acts,\(^2\) it may be sufficient to relieve Susan of the obligation to second-guess the acts of her adversary when that party's motives are unclear.

In addition, it is unclear whether the case involves a clerical error (an action that because of a mistake does not reflect the true intent of the party) or a mistake in judgment (an action that reflects the true intent of the party, only that intent is based upon an erroneous assessment). Did Alan review the document and decide to disclose it based upon an erroneous application of the attorney-client privilege? Or, did he review it, decide not to disclose it, and yet somehow mistakenly place the document in the wrong stack? In other words, did the mistake result from a lapse of judgment or merely from a clerical error? Again, Susan's inability to make this determination from the facts, coupled with her uncertainty over whether a mistake has even occurred, support using the material without further input from or to Alan.

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item. The buyer accepts the offer and purchases the goods at considerable savings. In that situation, most courts have concluded that the buyer is not required to sacrifice his negotiating position; rather, the buyer can accept the offer. Injustice does not result, because there is no real reason to assume the seller did not intend to sell at the price offered. Also, it is generally understood that absent extenuating circumstances, each party assumes certain risks as to value.

\(^2\) See supra note 122.
b. The Overheard Conversation

While in their law firm, Alan Attorney and his colleague Carol take an elevator to the firm's cafeteria. En route, Alan and Carol discuss damaging information they have just received from their client and their proposed response to it. Unbeknownst to Alan and Carol, an attorney from their adversary's law firm is present in the building on another case and overhears the conversation. That attorney is about to brief Susan as to the contents of the overheard conversation. Should Susan listen?

Again, the ethical rules on their face do not explicitly resolve Susan's conflict. However, resort to the case law of waiver is likely to be of assistance here, for it is quite clear that in this scenario, most courts will conclude that waiver has occurred due to Alan's and Carol's failure to take adequate precautions to protect the confidentiality of the information. Although courts vacillate over whether a mere inadvertent disclosure results in waiver, they are fairly firm in finding waiver when inadvertent disclosure results from inattention or indifference to protecting confidentiality. Unlike the Mysterious Memo scenario, where courts may excuse inadvertence due to the size or circumstances of the production, here courts are unlikely to accept any justification for disclosure in such a public place where the risk of being overheard is obvious and the error is clearly avoidable. This conclusion does not frustrate the principles underlying the rules because the rules contemplate that confidentiality may be waived if it is not afforded due regard. The presence of a fairly clear legal rule supporting a conclusion of waiver thus is sufficient to tip the balance in favor of partisanship and use of the information.

Application of the law of mistake produces similar results. There is little doubt that Susan and her colleague are aware of the mistaken disclosure. They

223 See, e.g., People v. Castiel, 315 P.2d 79 (Cal. Dist. Ct. App. 1957) (attorney-client privilege does not prevent testimony of third-party who was openly present and overheard a conversation between attorney and client); State v. Vennard, 270 A.2d 837 (Conn. 1970) (police officer who overheard conversation between attorney and client could testify to substance of conversation); Schwartz v. Wenger, 1124 N.W.2d 489 (Minn. 1963) (privilege waived when third party overheard attorney-client conversation in public corridor).

224 See Castiel, 315 P.2d at 79. The eavesdropper cases reflect the notion that the "[f]ailure to take reasonable precautions to preserve confidentiality may be considered as bearing on intent to preserve confidentiality." O'Leary v. Parcell Co., 108 F.R.D. 641, 644 (M.D.N.C. 1985). The privilege is waived because the behavior in these situations is seen as "inconsistent with the notion that the communication was intended to be confidential." Suburban Sew 'n' Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981).

225 Determining whether the mistake at issue here is more akin to a clerical mistake or to a mistake in judgment is unnecessary because the expectations of the parties regarding the consequences of the mistake are determinative.
may nonetheless use the information because Alan and Carol assumed the risk of mistake. The expectations of the parties are informed by established law concerning waiver. According to that law, if the disclosing party demonstrates indifference to protecting confidentiality, then confidentiality is waived. Thus, the expectations of both sides were such that if the other were present, then the privilege would be waived and the other side would be free to use the information. That is to say, Alan and Carol assumed the risk under the law that waiver might occur. Given the clarity of the rule and the consequent expectations, no unjust enrichment or unfairness results from allowing Susan to use the material to her client’s advantage. Although Alan and Carol did not specifically intend to reveal the information to their adversary, they demonstrated a lack of due care in a context where they knew that a threat of waiver existed and what the consequences would be. In other words, Alan and Carol displayed a lack of good judgment.

c. The Forgotten File

After a long day of meetings with opposing counsel to discuss settlement options, Alan inadvertently leaves two files containing confidential information in a conference room in Susan’s law firm. Should Susan review the materials?

Because the ethics rules do not explicitly resolve Susan’s dilemma, a particularly opportunistic attorney might conclude that Susan should open the folder and savor its contents. Although courts vary over whether inadvertent disclosure results in waiver, one could question whether there has even been a disclosure in this case. If disclosure has not occurred, then confidentiality has not been waived and Susan would be unable to use the material.226 Although support exists for this proposition,227 there are very few cases directly on point. Thus, it is helpful to examine the principles underlying the rules for additional instruction.

As I have already demonstrated in Part III.A.1, the ethical rules counsel that attorneys should not make affirmative efforts to breach the other side’s confidentiality. Opening the folders and reading their contents arguably would constitute such affirmative efforts. Indeed, that action would be akin to

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226 On the other hand, if disclosure has occurred, then the question of waiver is less clear and analysis of the case law may not provide Susan with sufficient guidance. See supra Part I.A.5.

questioning the former employee of an adversary merely because that person shows up in the lawyer’s office. Thus, analysis of the principles underlying the rules suggests that in this instance, protections afforded confidentiality would limit Susan’s partisan efforts.

The law of mistake supports these conclusions. Here, it is clear that Susan is aware that an error has occurred (unless Alan is turning on his client). The question thus becomes, does the mistake (i.e., leaving the folder behind) fall within the risks contemplated and assumed by the parties? As pointed out above, courts may determine that disclosure has not occurred.\textsuperscript{228} However, because of the paucity of cases directly on point, the law of waiver does not conclusively establish who bears what risk in this circumstance.\textsuperscript{229} The distinction between clerical errors and errors of judgment is, however, helpful. Because forgetting the file is more akin to a clerical mistake than to a mistake in judgment, one could reasonably conclude that Alan has not assumed the risk of error and that Susan should refrain from using the materials.

\textsuperscript{228} See id.

\textsuperscript{229} Other customs, norms, and traditions may supply additional guidance regarding the allocation of risks and party expectations. One could argue that although parties assume the risk that public conversations may be overheard, or that they may accidentally reveal documents in a document production, etc. and that the other side may use these errors to its advantage, they do not assume the risk that an adversary will use information contained in a briefcase or folder left behind in an office following a meeting (or for that matter, information left in folders on a table during coffee breaks, etc.). Taking such action would fly in the face of the mutual trust and civility required for the profession to function effectively.

Although arguably legitimate, this sort of analysis is especially vulnerable to the criticism that it is overly subjective and arbitrary. Indeed, some lawyers may quibble with conclusions based upon this type of reasoning, asserting that these outcomes are based on individual moral intuition and that personal ethics should not dictate the professional choices of others. Indeed, in an impromptu discussion in my office, one of my non-lawyer colleagues concluded that as a matter of moral principle Susan should not view the material. However, the colleague went on to note that many lawyers would conclude that Alan should not have left the materials behind and that Susan has an obligation to further her client’s cause by using the information. Another colleague, a former partner in a major New York law firm, paused for several minutes to weigh Susan’s obligation to her client against professional courtesy concerns. This colleague ultimately concluded that Susan should not use the materials, noting that certain courtesies apply among adversaries and that some sort of tacit trust relationship must exist when adversaries interact. He observed that if this were not the case, lawyers would entice their legal assistants to snatch files while their adversaries were busy in the restroom during breaks. He thought the outcome might be different if the files were left outside somewhere on a street corner. Discussion with Judy Horowitz and Steven Schwarz (July 29, 1998). It is precisely because of the tenous and tentative nature of these conclusions that resort to analogous areas of the substantive law is helpful.
IV. THE CLIENT

Before concluding, it is important to consider briefly the client’s role in the decision making process and whether the client should (or must) be consulted before a lawyer acts (or fails to act) upon inadvertently disclosed information. The Model Rules provide some guidance on this general issue. For example, Model Rule 1.2 states that a lawyer “shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.” 220 Model Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” 221 These rules, however, do not require that lawyers consult with their clients on all matters. Indeed, it is widely accepted that for practical purposes lawyers must possess a degree of autonomous decision making authority, particularly over technical issues and tactical legal choices. 222 Deciding where and how to draw the line and the matters on which a client ought to be consulted in particular circumstances, however, is difficult and subject to debate. 223 Fleshing out the details of this debate is beyond the scope of this Article.

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220 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998). The comments to Rule 1.2(a) add that “[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Id. Rule 1.2(a) cmt.

221 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1998); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-5 (1980) (stating that “[i]n the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself”).


223 Ultimately, the individual lawyer must decide whether to consult with her client. As Professor Stephen Pepper notes:

Rules are likely to be secondary at best . . . . Whether or not a lawyer perceives the issue as one of client choice is more likely to be determined by her understanding of what the appropriate general ethical role of the lawyer is. It is how the lawyer sees the situation which will be determinative.

Stephen L. Pepper, Resisting the Current, 52 Vand. L. Rev. 1015, 1021-22 (1999) (arguing that the client should have been consulted in a situation involving an unauthorized disclosure where the lawyer elected to return information to his adversary). For thoughtful deliberations on the question of when lawyers should seek input from a client concerning moral or ethical dilemmas, see generally Stephen L. Pepper, Lawyers’ Ethics in the Gap Between Law and Justice, 40 S. Tex. L. Rev. 181 (1999); see also Crampton & Knowles, supra note 232, at 90 (arguing that the client should be consulted about whether to disclose information adverse to the client’s cause when important substantive interests are involved).
pause here only to bring this issue to the attention of readers and to offer some initial thoughts on the matter in the context of inadvertent disclosure cases.

This Article has focused on the ways in which lawyers make ethical choices when rules are unclear or inapplicable in circumstances involving important, but conflicting, professional values. I have argued that when faced with difficult ethical dilemmas, lawyers need not automatically default to the dominant view. Rather, lawyers should use all of the tools at their disposal, including the substantive law, to assess their options. Appealing to the client for guidance does not further this analysis or assist in the decision making process. As a general matter, clients are not repeat players in the process. Nor are they required, equipped, or even well situated to weigh all of the variables at issue in ethical dilemmas that involve conflicting systemic values. Moreover, simply running to the client and following client dictates is likely to skew the analysis in favor of partisanship. (Indeed, the very act of appealing to the client shows an inclination toward partisanship.) 234 I am not suggesting that lawyers ignore their duty to represent clients with diligence. However, as I have argued throughout this Article, professional ethics must be about more than partisan advocacy. And, ultimately, the lawyer, not the client, is responsible for determining her professional responsibilities.

In light of the above, rather than seeking guidance from the client in the inadvertent disclosure context, the better approach is to treat this difficult ethical matter like any other difficult legal question. Just as a lawyer must independently investigate different areas of the law and reach conclusions about the legal merits of claims, so too must lawyers carefully and independently probe questions of professional ethics and come to a determination about the merits of any given approach. When a lawyer’s professional obligations clash and when principles central to the law of lawyering are involved, ethical decision making is and should be no different from any other aspect of legal decision making.

Reaching an independent conclusion regarding her professional obligations does not mean that a lawyer should not notify her client of her conclusions

234 In addition, this tactic makes ethical outcomes highly dependent upon client preferences. For example, in the errant fax scenario, following client dictates may result in two lawyers reaching different solutions based upon the views of their clients. The problem is not necessarily the different conclusions, but rather the fact that they do not result from a careful balancing of the lawyer’s professional obligations and consideration of competing systemic values. Instead, these outcomes rest upon nothing more than client predilections, which may be based upon any number of different factors from personal moral intuition to pragmatic concerns (e.g., whether the client is more likely to win if the lawyer uses the material).
before acting on them.\textsuperscript{235} (Note that informing a client of a particular conclusion is very different from asking the client for a solution.) Depending upon the seriousness of the circumstances (e.g., the importance of the disclosed information to the client’s case, how it was obtained, etc.), the lawyer will need to decide whether to inform the client of the situation and the lawyer’s resolution of the matter. At a minimum, appraising the client of the situation will likely prevent future problems that may arise if the client is not informed and subsequently learns of the lawyer’s actions. In any event, the client has a right to know of developments or decisions that may impact her claim in a significant manner.

The act of notifying the client poses some risks. Critics will argue that as soon as the lawyer strays from the dominant view, she will lose out in the competitive market for legal services because the “lawyer down the street” will have no qualms about actively pursuing the client’s interests through any arguably legal or arguably ethical means. By engaging in expanded ethical analysis and informing the client of her conclusions, the conscientious lawyer may simply end up with her client questioning her loyalty, viewing her tactics as weak, and abandoning her services. This concern is neatly captured in the phrase “nice guys (and gals) finish last.”

Although this argument is intuitively appealing, it is susceptible to challenge on a number of fronts. First, it assumes that all clients are ruthless opportunists ready to flee to greener pastures the first time a lawyer shows any sign of engaging in ethical deliberation. This assumption not only generalizes negatively and perhaps unfairly about all clients,\textsuperscript{236} it distorts the way in which these scenarios may play out in practice. In some situations, the client may in fact agree with the outcome reached by the lawyer even if that outcome appears contrary to the client’s immediate interests. The likelihood of this

\textsuperscript{235} Indeed, the Model Rules encourage lawyers to exercise “independent professional judgment” and to render “candid advice.” See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983). In giving such advice, Model Rule 2.1 states that a lawyer may “refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.” Id.; see also Rob Atkinson, \textit{How the Butler was Made to Do It: The Perverted Professionalism of the Remains of the Day}, 105 YALE L.J. 177, 193-216 (1995) (discussing the benefits of a moral dialogue between lawyers and their clients); Cramton & Knowles, supra note 232, at 86 (noting that “the good counselor engages in a moral dialogue with a client concerning the rightness or goodness of various courses of conduct”); Pepper, \textit{Lawyers' Ethics}, supra note 233, at 181 (same).

\textsuperscript{236} For further discussion of this point, see Cramton & Knowles, supra note 232, at 94-97 (questioning the assumption that clients are oblivious to moral obligation and are guided only by selfish concerns); Pepper, \textit{Lawyers' Ethics}, supra note 233, at 191 (“It is disrespectful to the client to assume her preferences and interests, to assume that she wants the most possible money or the most possible freedom . . . .”).
occurring is increased if the lawyer’s conclusion does not rest solely upon her personal moral beliefs. 237 Second, this argument minimizes the counseling function of the lawyer and discounts the positive “coaxing” influence that lawyers can and do have on their clients. Third, even if the client is unpersuaded by the lawyer’s reasoning in the inadvertent disclosure context, the mere fact that the lawyer raises the matter does not mean that the client will high-tail it to the lawyer next door. Reaching this conclusion requires that one ignore the overall quality of the relationship between the lawyer and the client and instead focus heavily on what will likely be a few isolated situations in which the lawyer will bring a complex ethical matter to the attention of the client.

Admittedly, there is a risk that some clients will be self-interested and may find the lawyer’s efforts objectionable. Indeed, the risk of client flight may cause some lawyers to shy away from the methodology utilized in this Article. This fact does not, however, undermine the legitimacy of the methodology. Rather, it simply suggests the need for scholars, courts, bar associations, and other entities involved in developing regulatory policies to embrace ethical decision making techniques like that set forth herein. If these entities were to take such action, not only would their efforts produce more thoughtful ethical outcomes, they would encourage and validate the use of more expansive ethical decision making techniques by individual lawyers.

CONCLUSION

Many promising developments in the field of legal ethics have occurred over the last three decades. Law schools now offer ethics courses regularly and professional responsibility professors are conscientiously searching for and developing new and innovative pedagogical techniques to engage law students. Notwithstanding this substantial progress, public regard for the profession is low, and lawyers appear hesitant to engage in rigorous deliberation about ethical matters, preferring rather to adopt a rule-oriented approach to ethical decision making and to rely heavily on the dominant view. I believe these problems stem, in part, from the fact that the profession has yet to develop techniques for ethical decision making that are based on more than individual moral intuition.

237 See Simon, supra note 13, at 16-17 (noting that ethical conflicts usually do not involve questions of personal morality pitted against the interests of clients).
This Article has sought to invigorate discussion concerning the ways in which lawyers make ethical choices. I have argued that when faced with ethical conflicts or questions, lawyers should first look to ethics rules and any applicable laws for guidance. If those rules are unclear or not on point, the inquiry should not end. Rather, lawyers should examine the principles upon which the rules rest. This examination will not only confirm whether an ethical dilemma in fact exists, it will also bring to the forefront the systemic values involved in any particular conflict and encourage lawyers to think carefully about the costs associated with any chosen course of action. Admittedly, resort to the principles underlying the rules will not always provide sufficient guidance or answers. The inadvertent disclosure example illustrates that when important principles such as confidentiality and partisan advocacy conflict, impasse may occur. When that happens, I have argued that lawyers should not hesitate to consult additional sources for guidance. I have recommended the substantive law as one such source. More specifically, I have argued that lawyers should examine analogous areas of the substantive law in which courts have explored issues similar to those raised by the ethical conflict in question. To the extent courts have struggled with similar issues in a legal context and reached rational conclusions, lawyers should not ignore what may in fact be very helpful guidance. In addition, by grounding the analysis in a legal context, lawyers are likely to find the approach more legitimate than one based solely upon individual moral intuition, and consequently are more likely to use it.

This Article is designed to demonstrate in a very practical manner the wisdom of expanded ethical analysis and to provide some degree of assistance to those lawyers who are conscientiously seeking guidance. My hope is that the arguments set forth herein will foster serious and conscientious discussion of the profession's treatment of ethical questions. Such discussion is vital and may very well thwart the perceived demise of what was, and can still be, a great and noble profession.