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A Shot in the Dark: The Need to Clearly Define a Lawyer's Obligations Upon the Intentional Receipt of Documents from an Anonymous Third Party

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Comments

A Shot in the Dark: The Need to Clearly Define a Lawyer's Obligations Upon the Intentional Receipt of Documents from an Anonymous Third Party

Mitchell James Kendrick*

ABSTRACT

“[R]ight is right, and wrong is wrong, and a body ain't got no business doing wrong when he ain't ignorant and knows better.”¹

Model Rule of Professional Conduct 4.4(b) was adopted because lawyers sometimes receive confidential or privileged information that was mistakenly sent or produced by opposing parties or their lawyers. Under Rule 4.4(b), if a lawyer knows or reasonably should know that such information was sent inadvertently, then the lawyer is required to notify the sender. However, the ABA has made clear that Rule 4.4(b) does not apply when a lawyer is the *intentional* recipient of such information.

*J.D. Candidate, The Pennsylvania State University, Penn State Law 2019. Many thanks to my fellow members of the *Penn State Law Review* for their generous feedback that helped me develop this Comment. I would also like to thank my friends and family for their support throughout law school and the Comment-writing process. Without your encouragement and guidance, none of this would have been possible.

1. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 327 (Harper & Brothers 1896) (1884).

As a result, courts have created confusion for lawyers by imposing different obligations upon lawyers that are the intentional recipients of such information. Some courts have relied on outdated ethics opinions to propose a proper course of conduct, while others have created new standards. Some courts have even advocated that the scope of Rule 4.4(b) should be interpreted broadly to apply in these circumstances. Consequently, lawyers and their clients risk being penalized or placed at a disadvantage during litigation if their chosen course of conduct is viewed as improper in the eyes of a court.

This Comment will argue that a clear standard is needed to govern the duties and obligations of a lawyer upon the intentional receipt of unsolicited privileged or confidential information. A clear standard will help both lawyers and courts distinguish between proper and improper ethical conduct. Moreover, a clear standard is also needed to assist lawyers in managing the tension between their duty of zealous advocacy and staying within the boundaries of proper legal ethics. This Comment will ultimately argue that the ABA is in the best position to set forth a clear standard outlining a lawyer's duties and obligations upon the intentional receipt of unsolicited privileged or confidential documents.

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I. INTRODUCTION

The methods by which information can be obtained prior to litigation and during discovery is governed by the Federal Rules of Civil Procedure, state law, and state ethics rules.² Remarkably, none of these authorities impose any duties or obligations upon a lawyer who is the intentional recipient of unsolicited privileged or confidential information.³ As a result, courts have created confusion for lawyers by imposing different obligations upon lawyers who are the intentional recipients of such information.⁴

Because “discovery is . . . party-driven,” the rules governing this process need to be clearly defined so that lawyers can ensure they are engaging in conduct that is within the bounds of the law and proper legal ethics.⁵ The process of gathering information can be “extremely burdensome,” expensive, and take longer “than any other part of a civil lawsuit.”⁶ This burden is further complicated by “adversarial dynamics” that pressure parties to abuse the process.⁷ Consequently, because no clear standard exists to govern the duties and obligations of a lawyer upon the intentional receipt of privileged or confidential information, recipient lawyers struggle to distinguish between proper and improper ethical conduct.⁸

The root cause of this problem is that the American Bar Association (ABA) has opined that intentionally disclosed information should be treated differently than information that is inadvertently disclosed.⁹ To address the problems of an adversary’s inadvertent disclosure of privileged or confidential information, the ABA adopted Model Rule of Professional Conduct 4.4(b) (“Rule 4.4(b”).¹⁰ Rule 4.4(b) “requires a lawyer who knows that a document or electronically stored information was sent *inadvertently* . . . to notify the sending lawyer.”¹¹ On its face,

2. See JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE 769–771 (Vicki Been et al. eds., 2d ed. 2015) (discussing the scope of discovery and the types of authority that govern a party’s informal investigation before filing a complaint).

3. See *infra* Section III.A.

4. See *infra* Section II.B.

5. See GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 2, at 857.

6. *Id.* at 857–58.

7. *Id.* at 858.

8. See *infra* Section III.

9. See *infra* Section II.A.

10. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006).

11. GEOFFREY C. HAZARD, JR., THE LAW AND ETHICS OF LAWYERING 399 (Robert C. Clark et al. eds., 6th ed. 2017) (emphasis added); see also MODEL RULES OF PROF’L CONDUCT r. 4.4(b) (AM. BAR ASS’N 2002).

however, Rule 4.4(b) does not apply to intentionally disclosed information.¹²

Since the adoption of Rule 4.4(b), the ABA has made clear that Rule 4.4(b) does not impose ethical duties and obligations upon a lawyer who is the intentional recipient of privileged or confidential information.¹³ As a result, lawyers and courts have been grappling with conflicting authority to identify the proper ethical duties and obligations of a recipient lawyer.¹⁴

Part II of this Comment discusses how this lack of clarity has led courts to adopt inconsistent standards when addressing a recipient lawyer's conduct.¹⁵ Some courts have relied on outdated ethics opinions to propose a proper course of conduct, while others have created new standards.¹⁶ Some courts have even advocated that the scope of Rule 4.4(b) should be interpreted broadly to apply in these circumstances.¹⁷

Part III of this discussion focuses on how the emergence of these varying approaches has made it difficult for both lawyers and courts to draw the line between proper and improper ethical conduct under these circumstances.¹⁸ Part III also addresses how leaving ethical boundaries ill-defined can be particularly troublesome in light of the duty lawyers have to zealously assert their clients' position.¹⁹ This Comment ultimately argues that the ABA needs to adopt a clear standard to assist lawyers and courts in ascertaining a recipient lawyer's duties and obligations upon the intentional receipt of privileged or confidential information.²⁰

II. BACKGROUND

To fully explore the ethical obligations that attach to a lawyer who is the recipient of unsolicited privileged or confidential documents, an evaluation of the chronicle of events that has led to this grey area of law is

12. MODEL RULES OF PROF'L CONDUCT r. 4.4(b) (AM. BAR ASS'N 2002) (stating that "[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender").

13. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440 (2006) (stating that "[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b)").

14. See, e.g., *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282, 2017 WL 2831485, at *16-22 (D. Kan. June 30, 2017) (finding that sanctions were appropriate even though the plaintiffs' lawyers insisted that no authority placed an ethical obligation upon them to notify the opposing lawyers that they had received unsolicited privileged and confidential documents from an anonymous source).

15. See *infra* Sections II.B.1-3.

16. See *infra* Sections II.B.1-2.

17. See *infra* Section II.B.3.

18. See *infra* Section III.A.

19. See *infra* Section III.B.

20. See *infra* Section III.C.

imperative.²¹ This section will outline how a lack of guidance from the ABA has resulted in inconsistent standards being applied across different jurisdictions when deciding how a lawyer is to act upon receiving unsolicited privileged or confidential documents.²²

A. *The Lack of Guidance from the ABA and the Model Rules of Professional Conduct*

The Model Rules of Professional Conduct (“Model Rules”) are not binding on anyone or any court; rather, they serve as a model for states’ rules that govern and guide the ethical conduct of lawyers.²³ Since 1983, almost all of the states have adopted a version of the Model Rules.²⁴ While states’ ethical rules may not mirror the Model Rules verbatim, courts often turn to the ABA and “rely on” its rules when evaluating a lawyer’s conduct.²⁵ Unfortunately, when questioning the ethical duties and obligations that attach to a lawyer upon the receipt of unsolicited and intentionally disclosed privileged or confidential documents, the ABA has made clear that lawyers and courts cannot turn to its Model Rules for guidance.²⁶

1. Standard of Conduct Prior to the Adoption of Rule 4.4(b)

Prior to the ABA’s adoption of Rule 4.4(b),²⁷ the Standing Committee on Ethics and Professional Responsibility (the “Committee”)

21. See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 176 (1996) (explaining the importance of knowing more than the ethics rules themselves). The authors stated:

Rules by themselves lack definition, depth, and applicability until and unless they are read along with the stories and narratives that illustrate their content, reach, and purpose. . . . The rules, and the narratives that give those rules purpose and direction, must be understood by the persons whose behavior they seek to shape, and by the private and public institutions and officials who are in a position to enforce them.

Id.

22. See Michele Grant, *Legislative Lawyers and the Model Rules*, 14 GEO. J. LEGAL ETHICS 823, 826 (2001) (discussing how the Model Rules “enable” lawyers to “measure [their] conduct against specific ethical standards”); see also MODEL RULES OF PROF’L CONDUCT pmbl., paras. 1–2, 5 (AM. BAR ASS’N 2002) (stating that lawyers are guided by the model rules, their “personal conscience,” and their “professional peers”).

23. HAZARD, *supra* note 11, at 28.

24. *Id.* at 30 (highlighting that California is the only state that has not adopted a version of the Model Rules; however, California has drawn from the Model Rules in its efforts to revise its ethical rules).

25. *Id.* at 28.

26. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) (stating that “[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b)”).

27. MODEL RULES OF PROF’L CONDUCT r. 4.4(b) (AM. BAR ASS’N 2002).

opined that duties and obligations must be placed upon a lawyer who is the intentional recipient of unsolicited privileged or confidential documents.²⁸ The Committee reasoned that creating standards of conduct was necessary to avoid placing a party “at the mercy” of an adversary who could potentially use the party’s confidential materials.²⁹

The Committee announced these specific duties and obligations in ABA Formal Opinion 94-382:

A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such material or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary’s lawyer that she has such materials and should either follow instruction of the adversary’s lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.³⁰

In formulating these duties and obligations, the Committee articulated a standard of conduct that should apply in circumstances where privileged or confidential documents are intentionally sent to a lawyer.³¹ Formal Opinion 94-382 provided courts with clear guidance for adjudicating matters regarding a lawyer’s actions after the lawyer’s unsolicited, intentional receipt of privileged or confidential documents.³²

28. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-382 (1994) (withdrawn by ABA Formal Opinion 06-440 in 2006); *see also* MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2002) (dealing with the confidentiality of information in the client-lawyer relationship).

29. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-382 (1994) (withdrawn by ABA Formal Opinion 06-440 in 2006); *see also* MODEL RULES OF PROF’L CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS’N 2002) (stating that for the purposes of Rule 4.4, “‘document or electronically stored information’ includes in addition to paper documents, email and other forms of electronically stored information . . .”).

30. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-382 (1994) (withdrawn by ABA Formal Opinion 06-440 in 2006).

31. *Id.*

32. *See In re Meador*, 968 S.W.2d 346, 351 (Tex. 1998) (stating that ABA Formal Opinion 94-382 “represents the standard to which attorneys should aspire in dealing with an opponent’s privileged information,” and that the ABA’s approach “ensures that the harm resulting from an unauthorized disclosure of privileged information will be held to a minimum”); *see also Weeks v. Samsung Heavy Indus., Ltd.*, No. 93 C 4899, 1996 WL 288511, at *3 (N.D. Ill. May 30, 1996) (adopting ABA Formal Opinion 94-382 as the appropriate standard of conduct required by a lawyer upon the receipt of information of an opposing party that may be confidential or subject to the attorney-client privilege).

However, after the adoption of Rule 4.4(b), the ABA withdrew Formal Opinion 94-382 in its entirety.³³ The ABA based its decision to withdraw Formal Opinion 94-382 on the ground that the advice it proffered was not supported by the Model Rules.³⁴ The withdrawal left lawyers and courts without a clear standard to determine whether a lawyer acted properly after receiving privileged or confidential documents.³⁵

2. Rule 4.4(b) Does Not Apply to Intentionally Disclosed Documents

On its face, Rule 4.4(b) does not apply to privileged or confidential documents that are intentionally disclosed to lawyers.³⁶ Rule 4.4(b) provides that “[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was *inadvertently* sent shall promptly notify the sender.”³⁷ Neither the text of Rule 4.4(b) nor its supplementing comments address the receipt of *intentionally* disclosed privileged or confidential documents.³⁸

Moreover, the ABA clarified that Rule 4.4(b) does not apply when documents are sent intentionally by issuing Formal Opinion 06-440.³⁹ Formal Opinion 06-440 explicitly makes clear that “if the providing of the materials is not the result of the sender’s inadvertence, Rule 4.4(b) does not apply.”⁴⁰ Lawyers who are the intentional recipient of such materials are “therefore not required to notify another party or that party’s lawyer of

33. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) (withdrawing Formal Opinion 94-382 in its entirety). The withdrawal of an ABA opinion signifies that the opinion withdrawn is no longer an accurate representation of proper ethical conduct. *See Kyko Glob. Inc. v. Prithvi Info. Sols. Ltd.*, No. C13-1034 MJP, 2014 WL 2694236, at *2 (W.D. Wash. June 13, 2014) (rejecting the defendant’s motion to disqualify plaintiffs’ counsel because it “is based on . . . an outdated ABA opinion”); *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 131 (S.D. W. Va. 2010) (stating that “[t]he court will disregard the cases . . . [that] cite to the withdrawn Opinions”).

34. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) (withdrawing Formal Opinion 94-382 in its entirety).

35. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442, at 2 n.7 (2006) (“[T]here is no Model Rule that addresses the duty of a recipient of advertently transmitted information.”).

36. MODEL RULES OF PROF’L CONDUCT r. 4.4(b) (AM. BAR ASS’N 2002).

37. *Id.* (emphasis added).

38. *Id.*; *see also* MODEL RULES OF PROF’L CONDUCT r. 4.4 cmts. 1–3 (AM. BAR ASS’N 2002) (lacking any discussion regarding intentionally disclosed privileged or confidential information).

39. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) (withdrawing Formal Opinion 94-382 in its entirety).

40. *Id.*

receipt as a matter of compliance with the Model Rules.”⁴¹ Further, the ABA indicated that “[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).”⁴²

3. Reaffirming the Limited Scope of Rule 4.4(b)

In 2011, the ABA reaffirmed the limited scope of Rule 4.4(b), which applies only to situations where documents are sent inadvertently.⁴³ In Formal Opinion 11-460,⁴⁴ the Committee addressed the ethical duties and obligations of lawyers when provided with copies of e-mails between a third party and the third party’s lawyer.⁴⁵ The Committee applied a textualist approach and reasoned that Rule 4.4(b) did not apply to this situation because the e-mails were “not ‘inadvertently sent’ by either” the client or the lawyer.⁴⁶

Formal Opinion 11-460 thus marked the third time the Committee had reasoned that when a lawyer is the recipient of documents that were not inadvertently produced, the lawyer did not have to provide notice to the opposing party upon receipt.⁴⁷ The Committee did advise, however, that lawyers should proceed with caution when they are the intentional recipient of privileged or confidential documents.⁴⁸ The Committee noted that although “the Model Rules do not independently impose an ethical duty” upon a recipient lawyer, “[t]o say that Rule 4.4(b) . . . [is]

41. *Id.*

42. *Id.*; see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006) (declining to interpret Rule 4.4(b) or other Rules to require notice to opposing counsel other than in the situation that Rule 4.4(b) specifically addresses). The Committee reasoned that the “recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information [was] evidence of the intention to set no other specific restrictions on the receiving lawyer’s conduct” *Id.*

43. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011).

44. *Id.*

45. See *id.* The Committee used a hypothetical to illustrate the question they were posed: “When an employer’s lawyer receives copies of an employee’s private communications with counsel, which the employer located in the employee’s business e-mail file or on the employee’s workplace computer or other device, the question arises whether the employer’s lawyer must notify opposing counsel pursuant to Rule 4.4(b).” *Id.*

46. *Id.* (stating that “[a] ‘document [is] inadvertently sent’ to someone when it is accidentally transmitted to an unintended recipient” but that “a document is not ‘inadvertently sent’ when it is retrieved by a third person from a public or private place where it is stored or left”); see also MODEL RULES OF PROF’L CONDUCT r. 4.4(b) (AM. BAR ASS’N 2002); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006) (proffering that if the receipt of “materials is not the result of the sender’s inadvertence, Rule 4.4(b) does not apply”).

47. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-440 (2006).

48. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011).

inapplicable is not to say that courts cannot or should not” place obligations upon lawyers “pursuant to their supervisory or other authority.”⁴⁹

Despite the Committee’s cautionary statements, a void still exists.⁵⁰ Lawyers looking to the Model Rules for guidance on how to handle the intentional receipt of unsolicited privileged or confidential documents will find little instruction.⁵¹ As a result, lawyers often find themselves navigating through a grey area between proper and improper ethical conduct with little instruction.⁵²

B. The Inconsistent Standards from Courts Across Different Jurisdictions

After the ABA adopted Rule 4.4(b) and withdrew Formal Opinion 94-382, courts were left without guidance on how to determine what duties and obligations should be placed upon a lawyer who is the intentional recipient of unsolicited privileged or confidential documents.⁵³ As a result, courts disagree on how to properly make such a determination.⁵⁴ Some courts have relied on withdrawn Formal Opinion 94-382 to propose a proper course of conduct, while others have created new standards.⁵⁵ Some courts have even advocated that the scope of Rule 4.4(b), and states’ rules of professional conduct that mirror it, should be interpreted broadly to govern situations where a lawyer is the intentional recipient of unsolicited privileged or confidential documents.⁵⁶

49. *Id.*

50. *See, e.g.,* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *10 (D. Kan. Jun. 30, 2017) (noting a “lack of clarity and direction” from the ABA Model Rules and opinions).

51. *See* MODEL RULES OF PROF’L CONDUCT pmbl., para. 20 (AM. BAR ASS’N 2002).

52. *See* discussion *infra* Section III.A.

53. *See* HAZARD, *supra* note 11, at 28 (stating that although the Model “[R]ules do not have the force of law . . . the ABA has long been recognized as the leading national organization of lawyers, and it has succeeded in persuading state courts, federal courts, and federal agencies to adopt some form of its model codes,” and that “courts often refer to, rely on and even incorporate ethics rules in applying other law to lawyers”).

54. *See, e.g., In re Meador*, 968 S.W.2d 346, 351–52 (Tex. 1998) (relying on withdrawn Formal Opinion 94-382); *Niceforo v. UBS Glob. Asset Mgmt. Americas, Inc.*, 20 F. Supp. 3d 428, 432 (S.D.N.Y. 2014) (creating a new standard for determining whether sanctions are appropriate); *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 665 (N.J. 2010) (expanding the scope of Rule 4.4(b) to reach its conclusion).

55. *See, e.g., In re Meador*, 968 S.W.2d at 351–52 (relying on withdrawn Formal Opinion 94-382); *Niceforo*, 20 F. Supp. 3d at 432 (creating a new standard for determining whether sanctions are appropriate).

56. *See, e.g., Stengart*, 990 A.2d at 665 (expanding the scope of Rule 4.4(b) to reach its conclusion).

These inconsistent standards have created confusion for lawyers.⁵⁷ Consequently, lawyers and their clients risk being penalized or placed at a disadvantage during litigation because of an improperly chosen course of conduct upon the receipt of such documents.⁵⁸ This section will explore the various approaches taken by courts in an attempt to define what a lawyer's proper course of conduct is upon the intentional receipt of unsolicited privileged or confidential documents.⁵⁹

1. Relying on Withdrawn Formal Opinions

The first approach taken by courts in determining the proper course of conduct is to rely on withdrawn ABA Formal Opinions. Before the ABA adopted Rule 4.4(b) and subsequently withdrew Formal Opinion 94-382, the Supreme Court of Texas in *In re Meador*⁶⁰ determined whether a lawyer should be disqualified for failing to comply with an opposing party's request to return privileged documents that the lawyer received from a third party.⁶¹ The Texas Supreme Court asserted that "ABA Formal Opinion 94-382 represents the standard to which attorneys should aspire in dealing with an opponent's privileged information."⁶²

Relying on the ABA's reasoning in Formal Opinion 94-382, the court established a six-factor test (the "*Meador* test")⁶³ for determining whether

57. See, e.g., *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282, 2017 WL 2831485, at *4-5, *19-20 (D. Kan. Jun. 30, 2017). Plaintiffs' counsel relied on independent counsel, state ethics rules, and caselaw in making her decision not to immediately notify opposing counsel or the court upon the receipt of potentially privileged documents. *Id.* at *4-5. The court ordered evidentiary sanctions upon Plaintiffs' counsel as well as the indemnification of attorney's fees incurred by Defendant's counsel as a result of the Plaintiffs' counsel's failure to notify. *Id.* at *19-20.

58. See *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1320 (10th Cir. 2011) (citing *In re Baker*, 744 F.2d 1438, 1440 (10th Cir. 1984)) ("[W]e have said that district courts enjoy 'very broad discretion to use sanctions where necessary to insure . . . that lawyers and parties . . . fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial.'"); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("Courts of justice are universally acknowledged to be vested, by their creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.").

59. See *infra* Sections II.B.1-3.

60. *In re Meador*, 968 S.W.2d 346 (Tex. 1998).

61. *Id.* at 348-49.

62. *Id.* at 351.

63. In exercising judicial discretion, courts "must consider all the facts and circumstances to determine whether the interest of justice require disqualification." *Id.* at 351. The court in *In re Meador* stated:

[A] trial could should consider, among others, these factors: (1) whether the attorney knew or should have known that the material was privileged; (2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information; (3) the extent to which the attorney reviews and digests the privileged information; (4) the significance of the privileged

a lawyer's course of conduct after receiving potentially privileged or confidential documents warrants disqualification.⁶⁴ Despite the ABA's withdrawal of Formal Opinion 94-382, some courts have continued to rely on the *Meador* test in making such determinations.⁶⁵

In contrast, other courts have declined to adopt the *Meador* test when tasked with making similar determinations regarding the disqualification of a lawyer.⁶⁶ One of the main reasons courts have rejected the *Meador* test is because the test is based on a withdrawn ABA Formal Opinion.⁶⁷ However, in the absence of a rule or opinion from the ABA regarding what would be considered appropriate conduct upon the intentional receipt of privileged or confidential documents, withdrawn Formal Opinion 94-382 continues to serve as a basis both for lawyers to ground their arguments and for courts to make their decisions.⁶⁸

information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice; (5) the extent to which movant may be at fault for the unauthorized disclosure; (6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Id. at 351–52.

64. *Id.* at 351-52 (stating that “[t]he ABA’s approach reflects the importance of the discovery privileges, and ensures that the harm resulting from an unauthorized disclosure of privileged information will be held to a minimum”); *see also* *Richards v. Jain*, 168 F. Supp. 2d 1195, 1205 (W.D. Wash. 2001) (finding that the factors set out in *Meador* are “helpful in evaluating a motion to disqualify”).

65. *See In re RSR Corp.*, 475 S.W.3d 775, 778 (Tex. 2015) (ruling that “[t]he factors explained by *Meador* are appropriate” for evaluating whether counsel should be disqualified); *see also* *Merits Incentives, LLC v. Eighth Judicial Dist. Court of Nev. ex rel. County of Clark*, 262 P.3d 720, 726 (Nev. 2011) (adopting the six-factor *Meador* test).

66. *See Foss Mar. Co. v. Brandewiede*, 359 P.3d 905, 910 (Wash. Ct. App. 2015); *see also* *Foss Mar. Co.’s Response Brief at 22-36, Foss Mar. Co. v. Brandewiede*, 359 P.3d 905 (Wash. Ct. App. 2015) (No.71611-5-I), 2014 WL 7406825, *22–36 (arguing that “[t]he *Meador* test comports with Washington case law governing attorney disqualification and should be adopted and applied by [the] Court”).

67. *See Kyko Glob. Inc. v. Prithvi Info. Sols. Ltd.*, No. C13-1034 MJP, 2014 WL 2694236, at *2 (W.D. Wash. June 13, 2014) (rejecting the Defendant’s motion to disqualify Plaintiffs’ counsel because it “is based on a case applying an old version of the model ethical rules and an outdated ABA opinion”); *see also* *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 131 (S.D. W. Va. 2010) (stating that “[t]he court will disregard the cases . . . [that] cite to the withdrawn Opinions”).

68. *See Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 4368617, at *14-15 (W.D. Va. Oct. 2, 2017) (relying on the six-factor test for the disqualification of counsel established in *In Re Meador*, which is based on the ABA’s reasoning in withdrawn Formal Opinion 94-382); *see also* *Brief of Respondent and Opening Brief of Cross-Appellant at 55-56, In re Marriage of Templin & Klavano* (Wash. Ct. App. Jan. 14, 2016), 2016 WL 1261183, at *55-56 (arguing that a lawyer’s conduct was unethical because he did not act in accordance with withdrawn ABA Formal Opinion 94-382).

2. Expanding the Scope of Rule 4.4(b)

In response to Rule 4.4(b) and the withdrawal of Formal Opinion 94-382, some states and courts have taken a second approach and concluded that the scope of Rule 4.4(b) should be expanded to govern situations where a lawyer is the intentional recipient of privileged or confidential documents.⁶⁹ For example, in *Stengart v. Loving Care Agency*,⁷⁰ the Supreme Court of New Jersey relied on a New Jersey Rule of Professional Conduct⁷¹ “patterned” off of Rule 4.4(b) to conclude that a law firm violated its ethical duties after receiving documents containing privileged and confidential communications between the opposing party and her lawyer.⁷² The court reasoned that because the law firm failed to notify the opposing party after receiving the documents, the law firm violated its ethical obligations under New Jersey Rule of Professional Conduct 4.4(b).⁷³

The law firm argued that it had no ethical duty to notify the opposing party under the New Jersey Rules of Professional Conduct because the documents that it had received were not sent “inadvertently.”⁷⁴ However, the court rejected this argument and concluded that the law firm *did* in fact have an ethical duty to notify the opposing party of its receipt of the documents.⁷⁵ In reaching this conclusion, the court expanded the scope of New Jersey Rule of Professional Conduct 4.4(b),⁷⁶ which mirrored Rule 4.4(b)’s “inadvertently sent” language, to conclude that the law firm was required to give notice to opposing counsel even though the documents were not “inadvertently” provided to the law firm.⁷⁷

Despite the ABA’s opinion that Rule 4.4(b) does not apply when privileged or confidential documents are “not the result of the sender’s inadvertence,” courts have continued to follow the approach in *Stengart* and expand the scope of rules of professional conduct that mirror Rule

69. See *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 665–66 (N.J. 2010).

70. *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010).

71. N.J. RULES OF PROF’L CONDUCT r. 4.4(b) (amended 2016).

72. *Stengart*, 990 A.2d at 665–66.

73. *Id.*

74. *Id.*

75. *Id.* at 666.

76. N.J. RULES OF PROF’L CONDUCT r. 4.4(b) (amended 2016).

77. See *Stengart*, 990 A.2d at 665; see also N.J. RULES OF PROF’L CONDUCT r. 4.4(b) (amended 2016) (providing that “[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall . . . promptly notify the sender”); MODEL RULES OF PROF’L CONDUCT r. 4.4(b) (AM. BAR ASS’N 2002) (providing that “[a] lawyer who receives a document . . . and knows or reasonably should know that the document . . . was inadvertently sent shall promptly notify the sender”).

4.4(b).⁷⁸ For example, in *Merits Incentives, LLC v. Eighth Judicial District Court of Nevada ex rel. County of Clark*,⁷⁹ a lawyer was the recipient of an anonymous package that contained a disk holding allegedly privileged and confidential information of the opposing party.⁸⁰ Upon receiving the disk, the lawyer disclosed his receipt of the disk to the opposing party and provided them with a copy of the disk.⁸¹ The opposing party did not respond to the initial disclosure, but later argued that the lawyer and his law firm violated their ethical duties by reviewing the information on the disk.⁸²

The court, and both the parties, agreed that Nevada Rule of Professional Conduct 4.4(b)⁸³ was not applicable “as written.”⁸⁴ The court then reasoned that applying Nevada Rule of Professional Conduct 4.4(b) “by analogy, which requires an attorney to notify the sender if he or she receives documents inadvertently,” was the appropriate basis on which the court should make its determination, thereby expanding the rule’s application beyond its explicit language.⁸⁵

The ABA has recognized the tendency of some courts to expand the scope of Rule 4.4(b) and its counterparts to require disclosure in situations where documents are intentionally disclosed.⁸⁶ However, this recognition provides little clarity because the ABA simply notes that “other law” may impose obligations upon a receiving lawyer that may prevent the lawyer from keeping and using the received documents.⁸⁷ Additionally, the ABA has stated that various civil procedure rules and courts, pursuant to their “supervisory” authority, may impose obligations upon a receiving lawyer.⁸⁸ Because the ABA has not identified any particular authority that

78. See, e.g., *Merits Incentives, LLC v. Eighth Judicial Dist. Court of Nev. ex rel. County of Clark*, 262 P.3d 720, 724 (Nev. 2011) (expanding the scope of Nevada’s Rule of Professional Conduct that mirrors Model Rule 4.4(b)).

79. *Merits Incentives, LLC v. Eighth Judicial Dist. Court of Nev. ex rel. County of Clark*, 262 P.3d 720 (Nev. 2011).

80. *Id.* at 722–23.

81. *Id.*

82. *Id.*

83. NEV. RULES OF PROF’L CONDUCT r. 4.4(b) (“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”).

84. *Merits Incentives*, 262 P.3d at 724.

85. *Id.* at 725 (adopting a “notification requirement to apply in situations where an attorney receives documents anonymously or from a third party unrelated to the litigation,” and finding that the lawyer “met his ethical duties because he promptly notified” opposing counsel of his receipt of the disk).

86. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011) (citing *Chamberlain Group, Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010)).

87. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011).

88. *Id.*

should govern a receiving lawyer's conduct, however, courts and lawyers have been left to determine for themselves whether expanding the scope of Rule 4.4(b) is appropriate.⁸⁹

3. Setting New Standards

A third approach that courts have taken in response to Rule 4.4(b)'s ambiguity is to determine whether a lawyer or a lawyer's firm should be sanctioned based on whether the potentially privileged or confidential documents at issue were either obtained by improper means or utilized in an improper manner.⁹⁰ For example, during a divorce proceeding in *In re Eisenstein*,⁹¹ a husband accessed his wife's personal email and obtained pay records as well as a list of examination questions the wife's lawyer emailed to her in preparation for trial.⁹² The husband then delivered this information to his lawyer, who did not notify the opposing party and later used the information during pretrial settlement negotiations.⁹³ The court sanctioned the lawyer for utilizing his client's improper acquisition of the opposing party's personal information.⁹⁴

In contrast, the court in *Niceforo v. UBS Global Asset Management Americas, Inc.*⁹⁵ allowed the defendant's lawyer to use allegedly privileged information found in a notebook belonging to the plaintiff, despite having failed to notify the opposing party upon his receipt of the notebook.⁹⁶ The court allowed the use of information contained in the

89. See *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282, 2017 WL 2831485, at *10 (D. Kan. Jun. 30, 2017) ("Despite the lack of clarity and direction from both the Kansas ethics rules and ABA Model Rules and opinions, the Court draws one important conclusion: although the black-letter rules do not specifically govern the situation currently before this court, these rules do not end the Court's inquiry.").

90. See, e.g., *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1315-16 (D. Utah 2016) (criticizing the defendant's lawyers for "unilaterally decid[ing] whether the documents [at issue] were proprietary, confidential, or privileged," and concluding that the court had the inherent authority "to sanction a party who circumvents the discovery process").

91. *In re Eisenstein*, 485 S.W.3d 759 (Mo. 2016) (en banc).

92. *Id.* at 761.

93. *Id.* at 761-62. On the second day of trial the husband's lawyer handed the wife's lawyer a stack of exhibits that included the wife's lawyer's direct examination questions. *Id.* at 761. Before the husband's lawyer turned over these documents, neither the wife nor her lawyer was aware that the husband and his lawyer possessed this information. *Id.* At the request of the wife's lawyer, a hearing was held and the husband admitted to improperly accessing the wife's email, and the husband's lawyer admitted that he had reviewed the information and did not notify the wife's lawyer upon his receipt of the documents. *Id.* at 761.

94. *Id.* at 763-64.

95. *Niceforo v. UBS Glob. Asset Mgmt. Americas, Inc.*, 20 F. Supp. 3d 428 (S.D.N.Y. 2014).

96. *Id.* at 431-36.

notebook at trial and denied sanctions on the ground that the notebook was not obtained by unlawful means.⁹⁷

Because courts have taken different approaches in their efforts to propose a proper course of conduct, inconsistent standards of conduct have developed.⁹⁸ As a result, lawyers are faced with tough ethical questions when they are the intentional recipient of unsolicited privileged or confidential documents.⁹⁹ Lawyers must balance the tension between their duty to zealously advocate for their clients while simultaneously staying within the boundaries of proper legal ethics.¹⁰⁰ However, because such boundaries are ill-defined, a lawyer's chosen course of conduct can have significant consequences if viewed as improper in the eyes of a court.¹⁰¹ If Rule 4.4(b) was amended to make it applicable in circumstances where privileged or confidential documents are *intentionally* disclosed, lawyers and courts would no longer struggle to distinguish between proper and improper ethical conduct.¹⁰²

III. ANALYSIS

The different approaches that courts have taken to determine whether obligations should be placed upon a lawyer that is the intentional recipient of unsolicited privileged or confidential documents have created more harm than good.¹⁰³ The varying standards adopted by courts have cultivated an erratic ethical landscape that breeds uncertainty and continues to create problems for lawyers.¹⁰⁴

The problem is further complicated by the duty of zealous advocacy.¹⁰⁵ Lawyers are more likely to rely on the authorities, or the lack

97. *Id.* at 432, 436 (stating that before the court can exercise its authority to impose sanctions, it “must find that the material was obtained improperly”).

98. *See, e.g., In re Meador*, 968 S.W.2d 346, 351–52 (Tex. 1998) (relying on withdrawn ABA Formal Opinion 94-382); *Niceforo*, 20 F. Supp. 3d at 432 (creating a new standard for determining whether sanctions are appropriate); *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 665 (N.J. 2010) (expanding the scope of Rule 4.4(b) to reach its conclusion).

99. *See, e.g., Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282, 2017 WL 2831485, *4–5, *18–23 (D. Kan. June 30, 2017) (finding that the plaintiffs' lawyers violated their ethical obligations despite consulting rules of professional conduct, case law, and their professional peers in making their decision not to notify opposing counsel of their receipt of potentially privileged or confidential documents).

100. MODEL RULES OF PROF'L CONDUCT pmbll., paras. 1–2, 5 (AM. BAR ASS'N 2002).

101. *See, e.g., Raymond*, 2017 WL 2831485, at *16–23.

102. *See infra* Section III.A.

103. *See infra* Sections III.A–B.

104. *See Chamberlain Grp. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010) (describing a situation in which the plaintiffs' counsel disagreed with the court regarding the applicability of authority governing a lawyer's obligations upon the receipt of privileged or confidential documents from an anonymous source).

105. MODEL RULES OF PROF'L CONDUCT pmbll., para. 2 (AM. BAR ASS'N 2002).

thereof, that allow them to capitalize on advantageous opportunities to advance their clients' cases.¹⁰⁶ Because the ethical boundaries surrounding a recipient lawyer's obligations are ill-defined, disagreement may arise among lawyers and courts about what the proper standard of conduct should be.¹⁰⁷ When this disagreement occurs, lawyers and their clients are subject to the possibility of having to cope with court-imposed sanctions.¹⁰⁸

Therefore, a clear standard is needed to assist lawyers in navigating this ethical terrain without pushing the limits of ethical behavior too far. This section will first argue that because the ABA has not adopted a clear standard, and because various jurisdictions have taken different approaches, lawyers find it difficult to predict where a court will draw the line between proper and improper ethical conduct.¹⁰⁹ Second, this section will explain how a lawyer's duty of zealous advocacy exacerbates the issue by pressuring a lawyer to push ethical boundaries when they are ill-defined.¹¹⁰ Ultimately, this section will recommend that the ABA adopt a clear standard requiring a lawyer to notify the opposing party upon the intentional receipt of unsolicited privileged or confidential documents.¹¹¹

A. *The Difficulties in Distinguishing Between Proper and Improper Conduct*

When a court is faced with addressing a lawyer's duties and obligations upon the intentional receipt of unsolicited privileged or confidential documents, the varying standards adopted in different

106. See HAZARD, *supra* note 11, at 2–3; see also Trial Order, Eastern Waste of New York, Inc. v. Salron Diner Assocs., Inc., No. 15892-98 (N.Y. Sup. Ct. June 14, 2000), 2000 WL 35917304 (stating that the “practice of law has lost the collegiality it once enjoyed,” and that the “time honored rule of ‘Cut your adversary a break if it doesn’t hurt the client’ has given way to ‘Cut your adversary’s throat, if you have the chance.’”).

107. See Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186 (2017) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991)) (stating that federal courts have inherent authority to “fashion an appropriate sanction for conduct [that] abuses the judicial process”); see also Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, LITIGATION, Winter 2010, at 21, 21 (“Each state has its own set of sanctions powers. Often . . . they are modeled after those in federal court.”).

108. For example, agency law can be used to hold parties accountable for the conduct of their lawyers. See, e.g., Gripe v. City of Enid, 312 F.3d 1184, 1189 (10th Cir. 2002) (“Plaintiff argues against the harshness of penalizing him for his attorney’s conduct. But there is nothing novel here. Those who act through agents are customarily bound by their agents’ mistakes. It is no different when the agent is an attorney.”).

109. See *infra* Section III.A.

110. See *infra* Section III.B.

111. See *infra* Section III.C.

jurisdictions clash.¹¹² The best way to evaluate the current implications of these inconsistencies is to view a recent case that directly addressed whether obligations should be placed upon a recipient lawyer.¹¹³ In 2016, the United States District Court for the District of Kansas in *Raymond v. Spirit AeroSystems Holdings*¹¹⁴ ultimately decided the issue of which approach to take in addressing a lawyer's duties and obligations under such circumstances.¹¹⁵

In *Raymond*, a collective action was brought against Spirit AeroSystems, Inc. and its owner, Spirit AeroSystems Holdings, Inc. (collectively "Spirit"), by former Spirit employees alleging employment discrimination.¹¹⁶ The complaint was filed on behalf of more than 200 former employees and alleged that Spirit violated the Age Discrimination in Employment Act¹¹⁷ when carrying out its plans to reduce the size of its work force.¹¹⁸ The heart of the decision, however, rested on the conduct of the plaintiffs' lawyers prior to the commencement of a phased discovery plan.¹¹⁹

In early 2014, the plaintiffs' lawyers conducted an investigation into the viability of legal claims against Spirit.¹²⁰ During their investigation, the director of the labor union¹²¹ to which the former employees were members provided the plaintiffs' lawyers with a packet of documents that he claimed were anonymously delivered to the union's office.¹²² Upon

112. See, e.g., *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282, 2017 WL 2831485, *8 (D. Kan. June 30, 2017) (stating that "[n]o one authority is entirely persuasive").

113. See *id.* at *2.

114. *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282, 2017 WL 2831485 (D. Kan. June 30, 2017).

115. See *id.* at *7 (stating that the "central issue before the court" was whether recipient attorneys had an obligation to notify opposing counsel that they had "anonymously received" potentially privileged or confidential documents, and whether the recipient lawyers also had an obligation to refrain from using them).

116. *Id.* at *1.

117. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2012 & Supp. 2017).

118. Complaint at 2-3, *Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282 (D. Kan. July 11, 2016) (alleging that Spirit specifically terminated, laid off, and refused to rehire its older employees in an attempt to avoid the possibility of incurring large healthcare claims).

119. *Raymond*, 2017 WL 2831485, at *1-2.

120. *Id.* at *3.

121. See *id.* at *1. The workers that were terminated or laid off were all members of the Society of Professional Engineering Employees in Aerospace. *Id.*

122. *Id.* at *3. The package contained information relating to Spirit's Human Resources department's plans to lay off and terminate employees as part of a performance initiative. *Id.* The package of documents also included a handwritten note that read: "[T]his is information regarding the recent layoffs. This is the project plan for the year. Pay attention to the slides they will tell you what the goal was. This information is from [a] good source." *Id.*

later review of the documents, the plaintiffs' lawyers noticed that some of the pages were stamped "privileged."¹²³ The plaintiffs' lawyers then ceased review of the documents and turned them over to their paralegal.¹²⁴ They instructed her to review the materials "only for the purpose of separating . . . and sealing [into] a separate envelope" any materials that were marked as "privileged."¹²⁵ The plaintiffs' lawyers did not notify Spirit's lawyers that they had received these documents.¹²⁶

The plaintiffs' lawyers retained the documents and later used them in preparation of their complaint against Spirit.¹²⁷ The plaintiffs' lawyers were in possession of the documents for two years before Spirit became aware that the plaintiffs' lawyers received the documents.¹²⁸ Spirit's lawyers moved for a protective order and sanctions.¹²⁹ The court granted the motion in part and imposed sanctions upon the plaintiffs' lawyers.¹³⁰

Before *Raymond*, there was no guiding authority from any court in Kansas nor the Tenth Circuit regarding the obligations of a lawyer upon the intentional receipt of unsolicited privileged or confidential documents from an anonymous source.¹³¹ The court in *Raymond* acknowledged the ABA's opinion that "civil procedure rules, or other law may impose" obligations upon a lawyer, yet failed to include any "other law" in its

123. *Id.*

124. *Id.* at *3.

125. *Id.* Plaintiffs' attorneys stated that before separating and sealing the privileged documents, they nor their paralegal read the documents for their content. *Id.* The paralegal also claimed that file maintenance was the extent of her involvement in the case. *Id.* The plaintiffs' attorneys received a second package containing Spirit documents from an anonymous source. *Id.* at *4. Upon realizing that some of the documents were marked as "privileged," the plaintiffs' attorneys again ceased review and gave them to their paralegal for review and separation. *Id.*

126. *Id.* at *4.

127. *Id.* at *5. The complaint was filed on July 11, 2016. *Id.*

128. *Id.* at *1, *3–4. The plaintiffs' received the two sets of documents in the spring of 2014. On October 19, 2016, the court held a scheduling conference regarding the parties' discovery proposal. *Id.* at *2. At that conference, plaintiffs' counsel informed the court that they had received potentially privileged or confidential documents from an anonymous source. *Id.*

129. *Raymond*, 2017 WL 2831485, at *6.

130. *Id.* at *18–23. The court did not disqualify plaintiffs' counsel; however, the court ruled that they were required to "certify, for each set of all future documents produced or discovery responses, that the information upon which the group of responses [was] based ha[d] been independently gathered." *Id.* at *19. The court also ordered that Spirit was entitled to recover "legal fees and costs that they would not have incurred, but for plaintiffs' [counsel's] retention of the documents." *Id.* at *21. In addition, the court rendered the motion for a protective order "as moot" because it had "already addressed the return . . . and future use of the documents in the context of sanctions . . ." *Id.*

131. *See id.* at *7 (stating that "[t]his is a novel issue in this district and . . . in this circuit"; the court also noted that while both parties have cited various authorities, "[n]o one authority is entirely persuasive").

analysis.¹³² If guiding authority on the issue existed, then the court would have likely taken it into consideration because the court turned to many different types of authority in an attempt to find an answer.¹³³

A lawyer that is the intentional recipient of unsolicited privileged or confidential documents would face the same difficulty in trying to determine a proper course of conduct.¹³⁴ Thus, when this “other law” is not clear, ensuring that one’s conduct is consistent with proper ethical behavior can hardly be considered straightforward.¹³⁵

The central issue that makes ethical decisions in these circumstances difficult is the unpredictability of courts drawing the line between proper and improper ethical conduct.¹³⁶ The ABA has stated that courts, “pursuant to their supervisory authority,” may impose obligations upon a recipient lawyer.¹³⁷ However, when a lack of precedent on the issue exists within a particular jurisdiction, predicting how a court will choose to address the problem becomes even more difficult for lawyers.¹³⁸ For example, despite the inadequacy of guiding authority, the court in *Raymond* found it “entirely appropriate to analogize” the issue presented in the case with Kansas Rule of Professional Conduct 4.4(b).¹³⁹ Kansas Rule of Professional Conduct 4.4(b) is identical to Rule 4.4(b).¹⁴⁰ The court stated that it would be “nonsensical to apply a separate . . . standard to intentionally-disclosed documents.”¹⁴¹

However, the plaintiffs’ lawyers in *Raymond* clearly did not anticipate the court’s approach, and their position on the issue is not entirely unfounded.¹⁴² The ABA’s opinion on the matter is consistent with that of the plaintiffs’ lawyers in that Rule 4.4(b) does not apply to the

132. *See id.* at *9; *see also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011).

133. *See Raymond*, 2017 WL 2831485, at *7–16 (analyzing the nature of the documents, Rules of Professional Conduct, Kansas Ethical Rules, ABA Model Rules and Opinions, Kansas Pillars of Professionalism, and illustrative caselaw).

134. *See id.* at *4 (describing how the plaintiffs’ lawyers turned to many types of authority in hopes of finding an answer).

135. *See id.* at *7, *14 (noting how the court was unable to find any authority that was “entirely persuasive,” and instead relied on its inherent authority to impose sanctions).

136. *Compare* Foss Mar. Co. v. Brandewiede, 359 P.3d 905, 910 (Wash. Ct. App. 2015) (declining to rely on withdrawn ABA Formal Opinion 94-382), *with In re RSR Corp.*, 475 S.W.3d 775, 778 (Tex. 2015) (relying on a test based on withdrawn ABA Formal Opinion 94-382).

137. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-460 (2011).

138. *See, e.g., Raymond*, 2017 WL 2831485, at *4 (noting that the plaintiffs’ lawyers researched ethics rules and caselaw but were unable to determine what ethical obligations they had upon the receipt of privileged and confidential documents).

139. *Id.* at *14.

140. KAN. RULES OF PROF’L CONDUCT r. 4.4(b) (2014); *see also* MODEL RULES OF PROF’L CONDUCT r. 4.4(b) (AM. BAR ASS’N 2002).

141. *Raymond*, 2017 WL 2831485, at *14.

142. *See id.* at *5, *7.

specific facts present in *Raymond*.¹⁴³ The difference between the position held by the plaintiffs' lawyers and the court's approach to the issue suggests that these complications could have been avoided all together.¹⁴⁴

With no guiding authority, the plaintiffs' lawyers in *Raymond* came to the conclusion that retaining the documents at issue was proper.¹⁴⁵ The decision by the plaintiffs' lawyers was a decision that they believed to be within the bounds of the law.¹⁴⁶ In reaching their decision to retain the documents, the plaintiffs' lawyers researched the Kansas Rules of Professional Conduct and Tenth Circuit caselaw.¹⁴⁷ However, the plaintiffs' lawyers found that none of the authorities governed the specific issue that they were facing.¹⁴⁸

Moreover, the severity of this issue is demonstrated by the fact that the plaintiffs' lawyers in *Raymond* were regarded as "experienced" litigators.¹⁴⁹ Knowing very well that a poor decision may come back to haunt them and, more importantly, harm their client's case, inferring that experienced lawyers chose to violate their ethical responsibilities is unconvincing.¹⁵⁰ If clear guiding authority existed, the plaintiffs' lawyers likely would have discovered its existence when they conducted an inquiry into their obligations after initially receiving the first package of documents.¹⁵¹ The plaintiffs' lawyers would then have been able to avoid the negative consequences associated with being sanctioned by simply conforming their conduct to accepted standards of legal ethics.¹⁵²

143. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440 (2006) (stating that "[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b)").

144. See *Raymond*, 2017 WL 2831485, at *7 ("Plaintiffs [insisted] they acted under the guide of ethics advice, and they maintain a 'cease review and notify' standard for intentionally-produced documents does not exist in the applicable law.").

145. *Id.* at *4.

146. *Id.* at *7.

147. *Id.* at *4.

148. *Id.*

149. *Id.* at *2 (stating that "[n]ot only are these parties no strangers to litigation, but many of the counsel are familiar with one another and the parties they regularly represent, and they are regarded as experienced counsel").

150. See *id.* at *5, *7. The plaintiffs' lawyers were made aware of the negative consequences associated with failing to notify opposing counsel upon receipt of inadvertently sent documents. *Id.* at *5. They maintained that a "'cease review and notify' standard for intentionally-produced documents" did not exist, and that because no standard existed, "there was no basis for sanctions." *Id.* at *7.

151. See *id.* at *4. On the same day the plaintiffs' lawyers received the first package of documents, they researched the Kansas Rules of Professional Conduct, Kansas caselaw, and Tenth Circuit caselaw regarding their obligations. *Id.*

152. See *id.* at *18-23.

With minimal guidance from case law, state ethics rules, and the ABA Model Rules,¹⁵³ the idea that other lawyers in situations similar to the lawyers in *Raymond* would have conducted themselves in a similar manner is reasonable. Proof that lawyers may be inclined to conduct themselves similarly is found within the *Raymond* case itself.¹⁵⁴ In addition to consulting state ethics rules and caselaw, the plaintiffs' lawyers sought advice from two other lawyers and a disciplinary administrator regarding their possible obligations after their receipt of the documents.¹⁵⁵ These advisors reached the same conclusion as the plaintiffs' lawyers.¹⁵⁶ Importantly, none of the advisors recommended that the plaintiffs' lawyers either notify Spirit's lawyers of their receipt of the documents, or make any effort to return them.¹⁵⁷ The fact that these other lawyers, with no personal interest in the litigation, reasoned that no authority created an obligation for the plaintiffs' lawyers to notify Spirit illustrates the lack of clarity on this issue.¹⁵⁸

Given the likelihood of confusion surrounding a lawyer's obligations upon the intentional receipt of unsolicited privileged or confidential documents, establishing a clear standard to guide lawyers in these situations is necessary.¹⁵⁹ The court's decision in *Raymond* demonstrates that the current lack of guidance on the issue breeds problems for both lawyers and courts.¹⁶⁰ A clear standard is necessary to provide lawyers with notice of what conduct is acceptable when a lawyer receives unsolicited privileged or confidential documents that are intentionally disclosed by a third party.

B. *The Duty of Zealous Advocacy Pressures Lawyers to Push Ill-defined Ethical Boundaries*

Lawyers have an obligation to "maximize the likelihood that [their] client's objectives will be attained."¹⁶¹ This obligation stems from

153. See *id.* at *9–10 (finding that there is a "lack of clarity and direction from both the Kansas ethics rules and ABA Model Rules and opinions").

154. See *Raymond*, 2017 WL 2831485, at *5.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. See, e.g., *id.* at *7 ("Plaintiffs [insisted] they acted under the guide of ethics advice, and they maintain a 'cease review and notify' standard for intentionally-produced documents does not exist in the applicable law.").

160. See *id.* at *7, *16–22 (finding that sanctions were appropriate even though the plaintiffs' lawyers insisted that no authority placed an ethical obligation upon them to notify the opposing lawyers that they had received unsolicited privileged and confidential documents from an anonymous source).

161. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1004 (1990).

lawyers' duty to zealously assert their "client's position under the rules of the adversary system."¹⁶² At the same time, however, "as officer of the legal system," lawyers also have an obligation to "demonstrate respect for the legal system" and "uphold legal process."¹⁶³ Thus, lawyers must balance the tension between their duty to zealously advocate for their clients while simultaneously staying within the boundaries of proper legal ethics.¹⁶⁴ However, when the boundaries of legal ethics are ill-defined, lawyers are inclined to test the limits of the law and uphold their client's position.¹⁶⁵ This truth is bolstered by the fact that the "[r]ules of legal ethics are not universal" and lawyers are pressured to "give a preferred position" to their clients.¹⁶⁶

The pressure to defend a client's position is derived from the reality that lawyers do not "merely encounter choices between the conflicting interests of others," but rather make "a business out of such encounters and partisan positions for money."¹⁶⁷ As a result, in the face of uncertainty regarding their ethical duties, lawyers are inclined to capitalize on the opportunity to utilize unsolicited privileged or confidential documents to advance their client's position.¹⁶⁸

The tension between advancing a client's position and staying within ill-defined boundaries of proper legal ethics is particularly troublesome when a lawyer is the intentional recipient of unsolicited privileged or confidential documents that belong to an opposing party.¹⁶⁹ Such circumstances carry a risk of adverse consequences regardless of whether the lawyer chooses to exploit the unsolicited documents or notify the opposing party.¹⁷⁰ For example, if a recipient lawyer elects to utilize an opposing party's privileged or confidential documents without notifying the opposing party, a client's case can be negatively impacted if a court

162. MODEL RULES OF PROF'L CONDUCT pmbll., paras. 1–2, 5 (AM. BAR ASS'N 2002) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.").

163. *Id.* paras. 1, 5.

164. *Id.* paras. 1–2, 5.

165. *See* HAZARD, *supra* note 11, at 2 (stating that the "application [of] ethics involves a . . . complicated scheme of distinctions and excuses based on role, relationships and practical necessity," and that the office of [a] lawyer begins with having to make distinctions among persons.").

166. *See id.* at 2.

167. *See id.* at 2–3.

168. *See, e.g.,* Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *5 (D. Kan. June 30, 2017).

169. *See, e.g., id.* at *7 (noting that the plaintiffs' lawyers believed they were acting in accordance with proper legal ethics).

170. *See, e.g., id.* at *7, 18–23 (finding that sanctions were appropriate even though the plaintiffs' lawyers believed they were acting in accordance with proper legal ethics).

views the conduct as improper.¹⁷¹ Conversely, if a lawyer elects to refrain from taking advantage of the opportunity to utilize the documents received, then the lawyer may not be acting in accordance with the client's best interests.¹⁷²

The consequences of this tension between zealous advocacy and ill-defined ethical boundaries is demonstrated in *Raymond*.¹⁷³ The plaintiffs' lawyers were presented with documents that significantly advanced their clients' case.¹⁷⁴ After consulting ethics rules and caselaw, the plaintiffs' lawyers believed they were under no ethical obligation to immediately notify the opposing lawyers because the plaintiffs' lawyers were the *intentional* recipients of the documents.¹⁷⁵

However, despite the lack of guiding authority,¹⁷⁶ the court found that a lawyer's inquiry into the proper course of conduct should not be limited to ethics rules themselves.¹⁷⁷ The court stated that not only do lawyers have a duty to adhere to the rules of professional conduct, but lawyers also have a duty to "perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration."¹⁷⁸ Arguably, the plaintiffs' lawyers in *Raymond* met this standard of professionalism and acted courteously.¹⁷⁹ The plaintiffs' lawyers intended to bring the documents to the court's attention at the initial scheduling conference, kept the documents under seal, and did not review any documents that were marked as "privileged."¹⁸⁰

171. See *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1300–01 (2016) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)) (stating that courts have "inherent powers to sanction a full range of litigation misconduct that abuses the judicial process," and that such authority is "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

172. See MODEL RULES OF PROF'L CONDUCT pmbll., paras. 2 (AM. BAR ASS'N 2002).

173. See *Raymond*, 2017 WL 2831485, at *18–23 (ruling that the plaintiffs' lawyers' decision to utilize the privileged and confidential documents that they received was improper and warranted sanctions).

174. *Id.* at *3.

175. *Id.* at *7 ("Plaintiffs [insisted] they acted under the guide of ethics advice, and they maintain a 'cease review and notify' standard for intentionally-produced documents does not exist in the applicable law.").

176. See *id.* (stating that "[t]his is a novel issue in this district and . . . in this circuit"). The court in *Raymond* also noted that while both parties have cited various authorities, "[n]o one authority is entirely persuasive." *Id.*

177. See *id.* at *14; see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-460 (2011); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-460 (2011) (stating that "other law" may impose obligations upon a receiving lawyer that may prevent the lawyer from keeping and using the received documents).

178. See *Raymond*, 2017 WL 2831485, at *10.

179. See *id.* at *4.

180. See *id.* After the plaintiffs' lawyers found no governing authority on the issue, they "decided to retain the documents for three reasons: (1) to seek in camera review by the [c]ourt once a lawsuit was filed; (2) out of concern that relevant information was being

More importantly, the key takeaway from the *Raymond* decision is that the sanctions ordered could have been avoided all together.¹⁸¹ The decision the plaintiffs' lawyers ultimately had to make was grounded in the tension between advancing their client's interests and fulfilling their ethical obligations.¹⁸² If a clear standard outlining the proper course of conduct upon the intentional receipt of privileged or confidential documents existed, the plaintiffs' lawyers would have been able to act in a manner that the court would view as ethically proper.¹⁸³ Instead, the plaintiffs' lawyers had to speculate as to whether their chosen course of conduct would be regarded as proper ethical behavior in the eyes of the court.¹⁸⁴

In sum, because lawyers have an obligation to "maximize the likelihood that [their] client's objectives will be attained" and a competing interest to "uphold legal process," the boundaries of proper ethical conduct need to be clearly defined.¹⁸⁵ Without clear boundaries, lawyers are inclined to capitalize on the opportunity to utilize unsolicited privileged or confidential documents to advance their client's position.¹⁸⁶

C. Recommendation

The ABA is in the best position to set forth a clear standard outlining the proper course of conduct that a lawyer should follow upon the intentional receipt of unsolicited privileged or confidential documents.¹⁸⁷ The ABA should amend Rule 4.4(b) to broaden its scope and make it applicable in circumstances where privileged or confidential documents are *intentionally* disclosed.¹⁸⁸ By amending Rule 4.4(b) to govern in situations where documents are intentionally disclosed, both lawyers and courts will no longer struggle to distinguish between proper and improper

destroyed by Spirit; and (3) because [they] did not review the privilege-marked documents and kept them sealed, [they] believed Spirit could suffer no harm." *Id.*

181. *See id.* at *4–5 (highlighting the plaintiffs' lawyers' efforts to identify guiding authority).

182. *Id.* at *7.

183. *See id.*

184. *See id.* at *7 (recognizing that the plaintiffs' lawyers believed they were acting in accordance with proper legal ethics).

185. Luban, *supra* note 161, at 1004; *see also* MODEL RULES OF PROF'L CONDUCT pmbll., paras. 1, 5 (AM. BAR ASS'N 2002).

186. *See, e.g., Raymond*, 2017 WL 2831485, at *5.

187. Even though the Model Rules are not binding, they serve as a model for states' rules that govern and guide the ethical conduct of lawyers. HAZARD, *supra* note 11, at 28.

188. *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(b) (AM. BAR ASS'N 2002) ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.").

ethical conduct.¹⁸⁹ Moreover, with guidance from the ABA, lawyers will be better able to manage the tension between their duty of zealous advocacy and staying within the boundaries of proper legal ethics.¹⁹⁰

IV. CONCLUSION

Rule 4.4(b) was adopted because lawyers sometimes receive confidential or privileged information that was mistakenly sent or produced by opposing parties or their lawyers.¹⁹¹ Under Rule 4.4(b), if a “lawyer knows or reasonably should know” that the information was sent inadvertently, then the lawyer is required to “promptly notify the sender.”¹⁹² However, the ABA has made clear that Rule 4.4(b) does not impose any duties or obligations upon a lawyer that is the intentional recipient of such information.¹⁹³

As a result, courts disagree with respect to the duties and obligations that should be placed upon a recipient lawyer.¹⁹⁴ The varying standards adopted by courts has created confusion amongst lawyers.¹⁹⁵ This quandary is further complicated by “adversarial dynamics” that pressure lawyers to push the limits of ill-defined ethical boundaries.¹⁹⁶

Given the harsh consequences associated with being penalized as a recipient lawyer whose course of conduct is viewed as improper in the eyes of a court, uniformity within the courts is required.¹⁹⁷ The ABA should amend Rule 4.4(b) to broaden its scope and make it applicable in circumstances where privileged or confidential documents are *intentionally* disclosed.¹⁹⁸

189. *See supra* Section III.A.

190. *See supra* Section III.B.

191. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440 (2006).

192. MODEL RULES OF PROF'L CONDUCT r. 4.4(b) (AM. BAR ASS'N 2002).

193. *See supra* Section II.A.3.

194. *See supra* Section II.B.

195. *See supra* Section III.

196. GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 2, at 858; *see also supra* Section III.B.

197. *See, e.g.*, Raymond v. Spirit AeroSystems Holdings, Inc., No. 16-1282, 2017 WL 2831485, at *16–23 (D. Kan. June 30, 2017).

198. *See supra* Section III.C.