COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

March 14, 2014 9:00 a.m.
Colorado Supreme Court Conference Room 4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver
Call-in numbers: 720-625-5050 or 888-604-0017 - Access Code: 49535610#
WiFi Access Code: @cce$$0123

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1. Approval of minutes:

   a. October 11, 2013 meeting [1-17]

   b. December 6, 2013 meeting [to be distributed separately]

2. Report on Supreme Court hearing on proposed new Comment [2A] to CRPC 8.4 and new Rule 8.6 [Marcy Glenn and others]

3. Report from Subcommittee on ABA Amendments to Model Rules [Michael Berger, pages 18-56; also pages 68-284 of October 11, 2013 meeting materials]

4. Report from Subcommittee on Recommended Pro Bono Policies for In-House and Governmental Attorneys [Dave Stark]

5. Administrative matters: Select next meeting date

6. Adjournment (before noon)

Chair
Marcy G. Glenn
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These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On October 11, 2013
(Thirty-Seventh Meeting of the Full Committee)

The thirty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 11, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Committee members Federico C. Alvarez, Michael H. Berger, Helen E. Berkman, Gary B. Blum, Cynthia F. Covell, Thomas E. Downey, Jr., John M. Haried, Judge William R. Lucero, Christine A. Markman, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Boston H. Stanton, Jr., David W. Stark, James S. Sudler III, Anthony van Westrum, Lisa M. Wayne. Present by conference telephone were members Judge John R. Webb and E. Tuck Young. Excused from attendance were members Nancy L. Cohen, James C. Coyle, and Eli Wald. Also absent was member David C. Little.

Present as guests were Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation; Philip E. Johnson, of the law firm of Bennington Johnson Biermann & Craigmile, LLC, the president of the board of directors of the Foundation; and William A. Bianco, of the law firm of Davis, Graham & Stubbs, a member of that board of directors.

I. *Meeting Materials; Minutes of July 26, 2013 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, and she apologized for the large size — approximately 285 pages — of the package. The material included submitted minutes of the thirty-sixth meeting of the Committee, held on July 26, 2013, and those minutes were approved as submitted.

The secretary noted that he has occasionally inserted footnotes in the minutes — sometimes with and sometimes without attribution to the secretary — that he felt added to the discussion but which might contain information that has not been presented, or even alluded to, by the participants to the discussion; and he asked for a sense of the Committee as to whether or not that was appropriate. The Committee members voiced their approval of such notes.

II. *Amendment of Rule 1.15.*

The Chair requested James S. Sudler III, chair of the subcommittee considering revisions to Rule 1.15 — including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts — to report on the subcommittee's recommendations. At its thirty-sixth meeting, on July 26, 2013, the Committee had received a preliminary report from Sudler on the subcommittee's activities and, after a lengthy discussion, had approved the direction that the subcommittee had taken in

its proposal but had directed the subcommittee to incorporate the points discussed by the Committee at that July meeting.

Sudler began by noting that, at the Committee's July meeting, the Chair asked that Committee members send to Sudler their comments on the subcommittee's proposal as it stood at the time of that meeting. The subcommittee had received comments from just one member, and Sudler said it had considered but determined not to incorporate any of those comments in its current proposal, except that, pursuant to the member's suggestion, the subcommittee moved the all of the comments — which are intended to apply generally to the entire "series" of trust account rules, Rule 1.15A through Rule 1.15E — up to the front of the group, following Rule 1.15A.

At the last meeting, Sudler noted, the Committee had directed the subcommittee to consider the issue of whether a lawyer should give some notice to the client when drawing earned legal fees from the client's trust account funds. Sudler said the issue, and the wording expressing the principle, had been extensively debated by the subcommittee following the July meeting, and a majority of the subcommittee approved of the following addition to Rule 1.5(f) to deal with the issue (reflecting changes to the current text of the provision):

> (f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited In the lawyer's trust account pursuant to Rule ~~1.15(f)(1)~~ ***1.15A*** until earned. If advances of unearned fees are In the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule ~~1.15(a)~~ ***1.15A***. ***The lawyer shall give written notice to the client that i) fees have been earned and ii) funds will be or have been transferred from the lawyer's trust account, or property other than funds will be transferred to pay earned amounts, within a reasonable time before or after the transfer.***

Sudler commented that the subcommittee's discussion had included the questions of whether the provision should be lodged in new Rule 1.15C and whether the required notice should be given before, after, or contemporary with the transfer of the funds or property from the trust account or other location to the lawyer in payment of the earned fees. The discussion even included the basic question of whether such notification provision should be made explicit, it not being found in current Rule 1.5 or Rule 1.15. Sudler added that a minority of the subcommittee had felt that the imposition of a notification requirement simply burdened the lawyer unnecessarily, particularly when the client has agreed to a flat-fee arrangement.

Sudler distributed to the Committee new text for Rule 1.15B(i) that the subcommittee proposed to substitute for that which had been included in the meeting materials package, text that deals with the "lookback" provision that enables a lawyer to recover, from the Colorado Lawyers Trust Account Foundation, interest that had been earned on COLTAF trust account deposits that, in hindsight, did not meet the COLTAF criteria of being funds that are nominal in amount or are expected to be held for a short period of time.[1]

Sudler noted that a member of the subcommittee had suggested that, in the event a refund from the Colorado Lawyers Trust Account Foundation would be due upon such a lookback request, the refund could simply be made by a Foundation deposit into the lawyer's COLTAF account from which the interest had originally been drawn under the COLTAF program. At this point, Diana Poole, the director of the Foundation, spoke to explain to the Committee that such a redeposit could not be done in practice.

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1. *See* current Rule 1.15(h)(2) and proposed Rule 1.15B(b). The text that Sudler distributed at the meeting is attached to these minutes as an appendix.

She explained that the Foundation makes a refund by a check issued to the lawyer or law firm that requests the refund and that it is left to the lawyer or law firm to give those funds to the proper recipient and to provide the recipient with any required tax form — a Form 1099 — to report the interest or dividends earned and now received by the refund from the Foundation. She explained that, ordinarily, Forms 1099 are issued by the bank holding the lawyer's COLTAF account or any separate trust account that may have been established for the benefit of a particular client or third person; but she added that a bank that received a refunding deposit from the Foundation into a lawyer's COLTAF account as the member had proposed would not know what to do with the deposit, as it would not then be interest that had been paid by the bank itself. And, she pointed out, the member's proposal would still obligate the lawyer to withdraw the refunding deposit from that COLTAF account and direct it to the proper recipient and to issue a Form 1099 for interest earnings the deposit represents.

With no further discussion on the correction to Rule 1.15B(i) and the manner of handling "lookback" refunds from the Colorado Lawyers Trust Account Foundation, the Committee turned to the balance of the subcommittee's report.

A member questioned the parenthetical cross-reference that the subcommittee had inserted after the caption to Rule 1.15A and before its first words of text, reading, "(See also Rules 1.15B, 1.15C 1.15D and 1015E)." A member who had been a member of the subcommittee commented that it served the purpose of flagging that the "Rule 1.15 series of Rules" is different in structure from all of the other Rules — consisting of five separate rules of equal status with each other and with all of the other Rules but all part of an overall context of a lawyer's responsibilities for the funds and properties of others — and should be considered together when questions arise under that context.

The Chair asked Sudler whether he wished the Committee to vote first on the Rule 1.15 Series and then consider the subcommittee's proposed amendment to Rule 1.5(f) or, rather, to consider them all together. Sudler asked that the Chair do the latter, noting the inter-dependency of the amendment to Rule 1.5(f) and the other changes that the subcommittee has proposed to current Rule 1.15, where the concept of "severance" that is now behind the proposed amendment to Rule 1.5(f) is currently found in Rule 1.15(c). Sudler said that, if the Rule 1.15 Series were approved but the amendment to Rule 1.5(f) were defeated, the Office of Attorney Regulation would return to the Committee with some further proposal for a required client notification when a lawyer draws earned fees from a trust account. He explained, further, that the second sentence of proposed Rule 1.15A(c) now deals only with disputes over trust funds and does not require, as does current Rule 1.15(c),"an accounting and severance of . . . interests" for undisputed withdrawals. Regulation Counsel has relied on that "accounting" requirement to support its position that some contemporaneous notice must be given to the client upon a withdrawal of earned fees from a trust account, but that phrasing would be deleted from proposed Rule 1.15A(c). Under the subcommittee's proposal, it would be preserved but relocated to Rule 1.5(f).

Despite Sudler's request that all of the proposals be considered at one time, another member, who had been a member of the subcommittee suggested that the consideration could be bifurcated as the Chair had proposed; and the Chair determined to proceed in that manner.

A member who had experience with the analyses of the Office of Attorney Regulation differed with Sudler's explanation of the importance of the Rule 1.15(c) provision for an "accounting." She said that the crux of the matter — the flat fee — implicates the *Sather*[2] case, where a lawyer had not properly

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2. *In re* Sather, 3 P.3d 403 (Colo. 2000). In its opening paragraph, he Court outlined the circumstances of the case as follows:

In this attorney regulation proceeding, we address the conduct of the attorney-respondent, Larry D. Sather, who spent

provided for his "flat fee" in his fee agreement and had claimed unearned fees as "non-refundable" rather than placing them in his trust account until they were earned or returned to the client upon discharge of the lawyer.

This member said she was not aware of any disciplinary case that has involved the earning of stated fees upon the accomplishment of stated milestones — for example, a lawyer's fee agreement that provides for an initial draw of $1,000 upon conclusion of discovery. In her view, if the client in that arrangement has been advised in the fee agreement of the "milestone" by which the lawyer has earned a flat $1,000 upon the conclusion of discovery, there is no practical need for the client to get further, contemporaneous notice that the milestone has been reached and the fee will be drawn from the trust account. She added that, for a lawyer who has many clients with many such milestones, the burden of giving contemporaneous notice of the draws would be substantial. She added that the burden could be felt not only by lawyers engaged in criminal law practices but also by lawyers with commercial and transactional practices. Why, she asked, impose the burden? What is the benefit, if the fee agreement adequately advises the client of the bases — the milestones — for earning increments of fees?

That member concluded by referring to the question of whether a lawyer must give notice to the client contemporaneously with his destruction of the client's files after a period of time that had been identified and agreed to in the fee agreement. It is understood, she said, that no contemporaneous notice need be given if the engagement agreement has provision for file destruction.[3] Why, she asked, should the fee withdrawal be treated differently, particularly when the client is more likely to have a contemporaneous understanding of the state of the case than he would have about file destruction some years after the conclusion of the case? In her view, a requirement of some contemporaneous notice in addition to a statement of the fee arrangement in the fee agreement would simply be a trap of lawyers without significant benefit to clients. She said it would also be a change in the Rules; in that case, she asserted, we should need a particularly strong case before imposing the requirement. She concluded by saying that the subcommittee should include lawyers who regularly utilize flat fees in their practices.

Another member disagreed with those comments. In his view, the client should be told when the lawyer is spending the client's money to pay the lawyer's fee. When the lawyer sends monthly invoices, the lawyer should advise the client about the handling of the flat fee funds that had been deposited in the trust account. This member was surprised to find that there could be any question about that procedure, for this is what lawyers actually do in practice. He was opposed to changing the subcommittee's proposal for Rule 1.5(f).

Another member expressed her concern that the message that would be read in a lawyer's contemporaneous notice that she was about to withdraw, or just had, withdrawn, fees from the trust account would be, "now is your time to object to my taking those fees." That, she posited, would raise a lot of problems.

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and failed to place into a trust account $20,000 he received as a "non-refundable" advance fee for a civil case. Because Sather treated these funds as his own property before earning the fee, Sather's conduct violated Colo. RPC 1.15(a). Sather labeled the $20,000 fee "non-refundable" even though he knew that the fee was subject to refund under certain circumstances, thereby violating Colo. RPC 8.4(c). After being discharged by his client, Sather failed to return all of the unearned portion of the $20,000 promptly, in violation of Colo. RPC 1.16(d).

3. Rule 1.16A(d) provides—

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

Another member agreed with those comments, The notice requirement would especially burden the sole practitioner who had a lot of "small clients." If the lawyer has given adequate disclosure of the payment arrangement in the fee agreement, the lawyer should have no further burden to report the actual draws as they occur; and she noted that the burden would be especially onerous for the lawyer who does not have the administrative backup of a large law firm. Surely the lawyer should be clear about his entitlement to payment by using a well-drafted engagement agreement, but that should be sufficient and contemporaneous notice of the draws should not be required.

To the last comments, another member asked whether it is common for a lawyer to rely on a "comprehensive fee agreement" that enunciates the milestones upon which fees will be earned, and then simply draw the funds without further, contemporaneous notice of the draws. The member who had previously spoken about the special burden that would be placed on the sole practitioner said that is commonly done — she establishes milestones in the initial agreement and then draws funds from her trust account, without further notice, as the milestones are reached. On the other hand, when she undertakes an engagement on an hourly basis, she sends monthly bills and then draws the earned fees, returning any unearned fees from the trust account at the end of the engagement.

Sudler asked why it would actually be more unduly burdensome to give the client written notice of the drawing of earned fees in the flat-fee, milestone case than it would be to issue periodic invoices as hours are accrued and fees are earned. He saw no difference in the "burden" between the two modes of charging for services.

To that, the member who had previously spoken replied that the hourly-fee engagement is a "limited situation," in which the client will want to know whether the accrual of fees is getting out of hand. To the contrary, in the flat fee situation, the maximum fee is already defined. The hourly fee, she asserted, is usually much larger than the flat fee. In answer to Sudler's question of why it was more burdensome to give notice in the flat fee case than in the hourly fee case, she said it is not more burdensome, it is just unnecessary: The client has agreed to the flat fee arrangement, to the earning and taking of the flat fee as the milestones are reached, and needs to hear nothing more about the fees.

The member who had referred to the *Sather* case pointed out that the lawyer who is billing on an hourly rate has not typically agreed to a limit on the fee amount, and the amount of the bill depends on the accrual of time. Thus, the billing statement says, "This is how much of your money I've spent so far." The client has no idea, in advance, of what the fee will be. On the other hand, in a flat-fee case — whether it is a criminal matter, a transactional matter, or perhaps an undertaking such as the preparation of a will — when the lawyer has reached the established milestone, the lawyer has earned the agreed fee. Flat fees, the member asserted, are a benefit to clients, providing certainty about legal fees. That's not easy for the lawyer to provide in a matter of civil litigation or a complex transaction, but in other circumstances the lawyer can make decisions about the likely nature and extent of the work that will be done and can agree to a fixed payment for the work that is done, whether it is the same as, or has varied from, what the lawyer expected. That is beneficial to the client, who has anticipated the milestone and agree to the fee for reaching it.

A member who supported the proposal that notice be given of draws from advanced fee deposits said he was not suggesting that the notice needed to be given in advance of the draw, contemplating that it could be give after the draw but would in any case be given near the time of the draw. He said he could not square the argument that such contemporaneous notification need not be given with the principle that the lawyer is a fiduciary to the client and has a duty always to report and account for funds given to the lawyer in that trust relationship.

To that, the member who had previously spoken about the special burden that would be placed on the sole practitioner responded that the lawyer could anticipate the client's desire for information about the status of the fee and its relation to the agreed milestones by simply noting, in the fee agreement, that the client is free to, and should, ask questions when in doubt about those matters. That being possible, the Rules should not mandate that contemporaneous notice be given as draws actually occur.

The member who had not been able to square an omission of notification with the lawyer's fiduciary duty to account commented that the fee agreement should not only clearly explain that the deposit toward legal fees will be held in a trust account but, also, how and when the funds will flow from that account to the lawyer in payment of services. When another member pointed out that the fee agreement alone can provide sufficient notice of how and when fees will be earned and paid from the trust account, the first member responded that it's an ordinary practice for lawyers to send invoices for their services and that all that can be explained in a fee agreement can also easily be reflected on the actual invoices.

Sudler took the discussion back to the distinction between flat and hourly fee arrangements and pointed out that the distinction is not actually controlling; the issue, he said can arise also for lawyers who are billing on the basis of accrued time. If it were an issue that just implicated the flat fee, an exception could be designed to take care of that. But, if that would not quell the objections, then there must be more to the matter than just the fixedness of the flat fee. By a billing, he notes, the client is advised that the lawyer has decided that she has earned the stated fee.

But one of the members who had spoken about the flat fee pointed out that, while the client has a right to know what services have been provided by the lawyer, that can be known by the accomplishment of an established milestone.

Another member, who had not previously spoken, contrasted that flat-fee/milestone situation from the hourly rate situation; in the latter, the client has no idea — until receiving a statement — how much the lawyer thinks the lawyer has earned. In the former, that lack of knowledge is not a problem, but the client might well question whether the milestone has in fact been accomplished.

This member said that he would want to see whatever clarification is thought necessary be lodged in Rule 1.5(f) — commenting that he was blindsided by Sudler's explanation of the importance to Attorney Regulation Counsel of the "accounting" requirement in current Rule 1.15(c). For him, the only matter of dispute was whether a statement of the timing of draws from the deposit to pay earned fees could be sufficient explanation of an objective event. That event is stated as a milestone in the fee agreement, which says that the lawyer will be entitled to draw a stated amount upon the accomplishment of the stated event. Should the lawyer also have to notify the client when the stated event has actually occurred? He was of the view that such additional notice was not necessary if the fee agreement had stated clearly enough that, upon the event, a stated amount of fees would be withdrawn from the deposit. Yet, the catch was whether the client would always know whether the event had occurred; he suggested — as a circumstance in which the client might not know — the completion of the discovery process as a stated milestone.

To that, the member who had said that the client would know of the earning of fees by the accomplishment of milestones acknowledged that that would depend on the quality of the other communications between the lawyer and the client, noting that, in a federal, case entailing lots of discovery and discovery issues, the conclusion of discovery might not be apparent to the client without some additional communication from the lawyer. In answer to a question from the member who had just spoken, this member said that she bills separately for accrued expenses and does not draw them from the client's deposit as if pursuant to a milestone attained.

The member who had asked that question concluded by saying that the essence of the matter is that the client should know that the lawyer has become entitled to draw the fee for performed services; if attainment of the milestone is sufficiently self-evident to provide that knowledge, contemporaneous notice of the fact is not necessary, but, if the nature of the milestone does not provide that knowledge, then the lawyer should give the client specific notice, contemporaneous with the event, that a fee has been earned and will be drawn from the deposit.

A member who had not previously spoken pointed out that clients want fast and efficient service. To the extent that lawyers can provide that kind of service with flat fee structures, the Rules should accommodate and encourage that. The Rules should not unduly burden the process.

A member who had not previously spoken asked whether the lawyer could establish, as the milestones the discussion has been contemplating, the earning of a stated amount of fee: "I will make a withdrawal from the deposit when my hourly accrual has reached $10,000." A member who had argued that milestone-based withdrawals should not require contemporaneous notice to the client said that kind of milestone was not what she had in mind and would not assure the client had adequate knowledge of the right to withdrawal, without some further explanation of the work that had been done to earn that fee.

The member who had been a member of the subcommittee and who had agreed with the Chair that the discussion could be bifurcated to deal first with the subcommittee's proposed amendment to Rule 1.5(f) commented that the subcommittee had discussed whether the contemplated notice of draw could be given before, with, or after the actual draw. The subcommittee intended that the draw not be a "gotcha" event from the client's viewpoint. It was to be part of a flow of communication between the lawyer and the client and thus expected by the client. On that basis, the member had voted for the notification proposal of the subcommittee, but she commented that communication can be difficult and noted that she has trouble getting the lawyers who serve under her to keep their clients well-informed about their cases. She added that there is usually a lot of communication going on in emails and that notice of draws can be provided in that ongoing communication or can regularly be given at the end of each month.

A member who had not previously spoken said that he agreed with both sides of the discussion. And that, he added, got him to considering the practical application of integrated software for billing, trust accounting, and the like. The argument that draws can be based on the accomplishment of previously agreed to milestones sounded good, but what happened when the lawyer missed the milestone? His understanding was that the milestone billing event could be programed into software billing packages so the milestone event would not be missed. Upon the occurrence of the milestone event, the software would trigger an internal notice that the draw could now be made, and also generate a billing statement to the client providing "notice" that the draw had been made. While the concept of constantly giving notices as milestones are reached might sound daunting, the software packages might make compliance easy as a practical matter.

To that, a member who is a solo practitioners said that she thought herself unusual in being a solo practitioner who employed that kind of software, given that it is expensive, requires a good deal of "IT support," and can be a "rabbit hole." Solo practitioners are not typically handling cases for very wealthy clients; they are handling small cases, each of which is not likely to accrue as much as $5,000 in aggregate fees. A requirement of contemporaneous notice of draws of those fees from deposits would be a lot for the Committee to expect of those lawyers. The flat fee simplifies office overhead and billing structures. She said that, when she offers a flat fee, the client is able to question the fee, and the answer should be easy: "You agreed that I could draw $Y when I accomplished Milestone X; I accomplished Milestone X at such-and-such time." An additional requirement of contemporaneous notice seems

merely to be the addition of a gratuitous risk for the lawyer, to be added to the bundle of charges if a grievance is filed.

The Chair asked for a summation: What do we think, as a whole?

A member said he was concerned about the issue that had been under discussion, although he did not personally encounter the problem in his mode of practice. He thought it unwise to make a matter of good billing practice a matter of discipline by elevating it to a requirement contained in the Rules. And, he noted, the problem would be compounded by requiring the retention of billing and trust files for seven years, as is currently required by Rule 1.15(c) and would be continued by Rule 1.15D(a). That compounded requirement seemed to him to be an excessive burden to lay on the many practitioners who serve clients who are not wealthy, whose legal fees, while large in their eyes, do not justify the imposition of expensive timekeeping, billing, and notice obligations. The flat fee mechanism is one reason for saying this requirement is unnecessary, but, to this member, the contemporaneous notice requirement was an excessive burden to lay on lawyers no matter what the fee arrangement, a burden that did not provide a worthwhile benefit. This should be regarded as a matter of good billing practice, not a disciplinary matter.

The Chair asked for a vote on the concept. A member responded by suggesting a two-tiered vote, first on whether any contemporary notice was needed for withdrawals from advance fee deposits, and second, whether, in the flat fee situation, sufficient notice could be given in the fee agreement's specification of the arrangement.

The Chair rejected that suggestion, asking why, if a notice of the time and basis for any draw should be mandated by a rule, a statement in the fee agreement could suffice for that notice. The member who had suggested the two-tiered vote responded with the example that had been given before, where the lawyer's policies regarding the destruction of the client's files may be stated and agreed to in the engagement agreement, without the need for further, contemporaneous notice at the time the files are actually destroyed. But the Chair rejected the analogy, because the proposal for notice of specific fee draws could be given before or after the actual draws — within the ongoing representation — so long as it was contemporaneous therewith.

In answer to a member's question, Sudler said that his research has not uncovered a similar rule in any other state's disciplinary regulations.

A member asked whether any other state has any case law agreeing with the proposition that an accounting requirement akin to that found in current Rule 1.15(c) includes a requirement that notice be given to each client contemporaneously with a draw of an earned fee from a deposit. Sudler said that the Office of Attorney Regulation Counsel has had many cases in which this matter has been raised, none of which has resulted in a sanction for failure to give the contemplated notice. He commented that it is not realistic to think that the Office can prosecute all lawyers engaged in bad practices in this regard, but the matter is taught by the Office in its educational programs about trust accounts, where lawyers are told that they should give that contemporaneous notice. And Sudler said, firmly, that the Office believes that contemporaneous notice should be given and that the Rules should, somewhere, require that notice.

In the ensuing straw vote, the proposition that the Rules should require that notice of the draw of earned fees from advance fee deposits should be mandated was defeated.

To the Chair's question of where Sudler would like the Committee to turn next, he asked that it turn to a consideration of the remainder of the subcommittee's Rule 1.15 Series proposal, with the

expectation that we would return later to a more refined consideration of the matter of contemporaneous notice of fee draws.

A member who had been a member of the subcommittee remarked that the concept contained in the proposed change to Rule 1.5(f) that the lawyer "shall give written notice to the client that i) fees have been earned and ii) funds have been or will be transferred from the lawyer's trust account . . ." covers a lot of ground and that our difficulty seems to be over the words requiring that notice to be given "within a reasonable time before or after the transfer." He asked whether the proposed change to the rule would be sufficient if the latter phrase, regarding the timing of the notice, were omitted? If that change were made, he believed, a statement in the fee agreement establishing milestones and associated fee payments would suffice.

To that, another member, who had also been a member of the subcommittee, said the subject phrase about the timing of the required notice was the only reason he had voted against the proposal when it was considered by the subcommittee. This member believed that, if the lawyer is billing by the hour and fails to provide a notice contemporaneously with the drawing of his fee from the trust account, then Regulation Counsel would conclude that no statement about the billing arrangement in the fee agreement could suffice for the requisite notice of the subsequent draw, and Regulation Counsel would charge that Rule 1.5(f) had been violated, even if the rule did not contain the timing phrase.

The member who had spoken previously said that he would not think such a charge would be justified in that case.

Another member said he could not agree that, under the language proposed by the subcommittee but excluding any statement of the timing of the required notice, a statement in the fee agreement could be sufficient, unless the subcommittees' proposal were modified in some way to make that apparent.

Another member asked how a notice that fees have been earned could be given in advance, in the fee agreement itself.

To that, another member responded that, with a rule requiring that written notice be given to the client that fees have been earned and funds have been or will be transferred from the lawyer's trust account but omitting any requirement about when that notice must be given, that would just mean that lawyers must adapt their fee procedures to meet that first requirement; if their billing methods are such that the required information can be given in an initial fee agreement, then they may do that, but, if their billing methods are not amenable to that approach, then they might have to provide a contemporaneous notice in order to comply with the rule's simply-stated mandate.

The Chair noted that the conversation had returned to the proposed changes to Rule 1.5(f) rather than to balance of the subcommittee's recommendations, regarding the Rule 1.15 series of rules. After some discussion, the Committee decided not to deal further with Rule 1.5(f) at this meeting, and the Chair asked that Sudler consider the question further and check what other states have done with respect to the matter of giving clients adequate notice about when and how much fees will be withdrawn from trust account deposits.

To the Chair's request, Sudler noted that Colorado's *Sather* case had been at the cutting edge of the issue among all the licensing jurisdictions in 2005, but he agreed to check further as the Chair had requested.

A member, who practiced at a large law firm, commented that her colleagues there are constantly reminded that they need to find ways to bill other than on an hourly rate. This is, she said, an important

and timely matter. Another member noted that Jim Calloway, of the Oklahoma bar, has gathered information about fees and billing practices for the American Bar Association.[4]

Upon a vote, without dissent, the Committee approved recommending to the Court that current Rule 1.15 be replaced by the subcommittee's proposed Rules 1.15A through 1.15E.

The Chair thanked the members of the subcommittee for their efforts, and Diana Poole, speaking as the director for the Colorado Lawyer Trust Account Foundation, thanked the subcommittee and the whole Committee for their work on the changes.

III. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage.*

The Chair turned the Committee's attention to the pending proposals to amend the Rules to accommodate the recent amendments to the Colorado Constitution regarding marijuana use and commerce by noting that, at its thirty-sixth meeting, on July 26, 2013, the Committee had agreed to adopt the proposal submitted to the Committee by the marijuana amendments subcommittee at that meeting, with some limited changes to be made thereafter by the subcommittee under instruction from the whole Committee. The expectation had been that the additional changes could then be approved by the whole Committee by email communications. But the subcommittee's work turned out to be more extensive and time-consuming than had been anticipated, and the email approval of further changes was never undertaken. Part of that delay, the Chair said was attributable to the comments that Committee member Anthony van Westrum, who had not been a member of the subcommittee, emailed to the subcommittee. The Chair added that there was a conflict between speed and getting it right; she noted that the Committee needed to get a proposal to the Court quickly but also needed to consider any further, helpful, comments.

The Chair asked Judge Webb, the chair of the marijuana amendments subcommittee, to lead the discussion from there.

Webb pointed the members to page 50 of the meeting package for the subcommittee's Second Supplemental Report, noting that van Westrum's email to the subcommittee begins at page 56 of the package.

Following the thirty-sixth meeting of the Committee, Webb said, the subcommittee had two pending tasks, dealing with proposed Rule 8.6 and with proposed changes to Rule 8.4.

With respect to proposed Rule 8.6, the whole Committee had approved changes to the subcommittee's earlier proposal, which moved references to specific marijuana provisions in the Colorado Constitution out of the comments and into to the text of Rule 8.6, worded in a way that would accommodate future amendments that might be made to the Constitution. That was a mechanical process that involved dropping what had been proposed as Comment 2 to Rule 8.6. In the course of that drafting, the Chair, though not a subcommittee member, had spotted an ambiguity that might be read to require the lawyer to assure that proposed activity by a client actually complied with the state's applicable marijuana laws, an ambiguity that was resolved by insertion of a "reasonable belief" qualifier.[5]

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4. *See, e.g.*, http://www.americanbar.org/publications/law_practice_magazine/2013/may-june/practice-management-advice.html.

5. *See* the subcommittee's report at page 53 of the materials provided to the Committee members for this thirty-seventh meeting.

Webb noted that van Westrum objected, in his email, to what he perceived as an unnecessary and misleading paraphrasing of Rule 8.6 in the proposed comment to it, as revised by the subcommittee.[6]

As to the proposed changes to Rule 8.4, Webb explained that the subcommittee believed that, at the Committee's thirty-sixth meeting, on July 26, 2013, the Committee had approved the subcommittee's submission subject to a concern that the safe harbor that would be provided to Colorado lawyers with regard to marijuana activities that conformed to Amendments § 14 and § 16 of Colorado Constitution should extend only to the lawyer's personal use, not also to the lawyer's participation in commercial activities that are provided for in Amendment § 16(1)(b). After the Committee's July 26, 2013, the subcommittee worked through several iterations of changes to provide that limitation, acting by email. Again, van Westrum objected, as stated in the email that is included in the meeting package, to the use, in proposed Comment [2A], of the phrases "medical use" and personal use" to characterize activities that are thereafter specifically delineated in the comment by direct citation to particular provisions within the two constitutional amendments, Amendment § 14 and Amendment § 16. Van Westrum had noted that the constitutional text extends "use" beyond its common limitations to include such things as cultivation, transport, and gifts, even without regard to the amendment's reach into commercial activities, suggesting that the paraphrasing in the comment might be deemed to limit the activities that lawyers may engage in to a narrower subclass than the full breadth of activities permitted by the actual constitutional provisions. Additionally, van Westrum pointed out that the amendments permit marijuana activities in care-giving roles that might not be included in the subcommittee's paraphrasing about a "lawyer's 'medical use' or 'personal use' of marijuana"; that, Webb said, was a swamp the subcommittee chose not to wade into.

Webb reported that the third issue van Westrum had raised with the subcommittee was the distinction between a lawyer's personal use of marijuana and the lawyer's engagement in marijuana commerce. The members of the subcommittee believed that the matter had been closed by the vote of the whole Committee at its thirty-sixth meeting, in July. Van Westrum had pointed out to the subcommittee that some of the commercial activities permitted by Amendment § 16(4)(a) through (e) do not require licensure; included in these activities are selling marijuana accessories — which might include implements for growing marijuana — and leasing property to others for lawful marijuana activities. These are activities that some Colorado lawyers are likely to want to engage in, particularly if they own and lease cropland. But the subcommittee viewed the distinction between personal use and commercial use to be a bright line that could be utilized in the proposed comment. Underlying the subcommittee's view, Webb said, was the feeling that, if the Federal government were to begin actively to enforce Federal anti-marijuana law in Colorado, it would likely target commercial activities. He questioned whether the Court would want to take a public stand permitting lawyers to engage in those commercial activities, even if they are permitted to other Colorado citizens under the state's laws.

Webb then asked van Westrum to state his position, which he did largely by repeating what he had said in the email that had been provided to the members in the meeting package.

In partial answer to van Westrum's concern that the paraphrasing "medical use" and "personal use" were unnecessarily narrowing, Webb pointed out that the phrase "personal use" — while not defined in Amendment § 16 nor used in its text[7] — is the caption for Amendment § 16(3). Webb agreed that

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6. *See* page 59 of the materials provided to the Committee members for this thirty-seventh meeting.

7. Amendment § 16(2)(b) uses the term "personal use" in the definition of "consumer": "'Consumer' means a person twenty-one years of age or older who purchases marijuana or marijuana products for personal use by persons twenty-one years of age or older, but not for resale to others." And the section is captioned "Personal use and regulation of marijuana."

headings are not sufficient to determine the meaning of a provision but he felt that it would be inaccurate to say that "personal use" is without meaning in Amendment § 16.

A member said that she saw an additional issue, after reading van Westrum's email. She asked whether the Committee should revisit the whole matter. The change in Colorado law regarding the use of marijuana is in a complete state of flux, she said, with lots of state deadlines not being met. Legislation is needed to implement the voters' amendments to the Constitution, and the state will be working on the issues for years to come. The proposals that are before the Committee, she felt, have not helped at all to deal with the many issues. The proposed comment stresses that we would protect only activities that are permitted under Colorado marijuana law, notwithstanding that those activities will remain violative of Federal marijuana laws. But workers in the marijuana industry will be stepping on lots of law besides the specific Federal law criminalizing marijuana activities — she mentioned tax law and credit card and banking laws as examples. All of those laws are implicated in marijuana commerce, in which commercial lawyers are trying to provide legal services. Many federal laws, besides the marijuana criminal laws, will be violated in that activity, but the comment does not protect the lawyer against advice that implicates those other violations.

The Chair responded to those comments by saying she did not know what the member intended. Would she like to see a safe harbor for government lawyers?

The member said she was not seeking special treatment for government lawyers. Rather, she favored protecting lawyers' personal use of marijuana, permitting them to engage, without fear of discipline, in marijuana activities as others can do, personally, in Colorado. But that activity is not the activity that lawyers engage in when they provide legal services. The Committee, she said, was not addressing the commercial side of marijuana activities, though that may entail the kinds of activities that lawyers engage in as lawyers. We are just addressing personal use.

To the Chair's comment that Rule 8.6 has been written to permit lawyers to counsel and assist clients with respect to their commercial marijuana activities, the member countered that government lawyers do not counsel or assist *their* clients to engage in the conduct that is covered by references to Amendments § 14 and § 16. The proposal before the Committee does not protect government lawyers in the kinds of services they provide to their government clients regarding marijuana laws.

A member said that he agreed with the Chair, that proposed Rule 8.6 covers all activities in which lawyers may counsel or assist others regarding marijuana laws, including counseling or advising governmental entities about matters that relate to marijuana commerce or the development of laws and regulations for that industry.

A member spoke to say that the member who first spoke about government lawyers had effectively made a motion to table the discussion, and this member seconded that motion. This is the wrong forum, she commented, for these issues to be considered; she added that the Colorado Attorney General is considering these issues.

The member who now found that her comments had been taken as a motion to table the discussion, a motion that had been seconded, agreed that the Chair could take her comments as that motion. She asked that the subcommittee take a second look at all of the matter; and she clarified, in an answer to another member's inquiry, that her motion went to the entirety of the subcommittee's proposals, including the proposed Comment [2A] to Rule 8.4 as well as proposed Rule 8.6 and its comment.

The member who had said that he agreed that proposed Rule 8.6 covers all activities in which a lawyer may counsel or assist others regarding marijuana laws commented that he disagreed with the

proposition that this Committee should do nothing with respect to the situation created by the amendments to the Colorado Constitution that liberalized marihuana usage; he understood the proposition, he added, but he did not agree with it. He did not see why, given the comments about government lawyers, the proposed Rule 8.6 should be questioned. It is urgent, he said, that lawyers be permitted to provide counsel and assistance to those in the state who will now be engaged in marijuana commerce or in regulating that commerce, and to provide that counsel free from discipline by the Office of Attorney Regulation Counsel.

Webb added that he strongly opposed tabling of the matter, given the resources that the Committee and its subcommittee had devoted to it. He added that he had not anticipated such a backsliding from where the Committee had gotten to at its thirty-sixth meeting, in July. He noted that the subcommittee's initial report had spoken of a chilling effect on lawyers in the absence of particular treatment of the matter in the rules.

Van Westrum added that, although he had concerns about the details of the proposals, as he had expressed in his email, he did not want to see the matter tabled. Noting the state's need for lawyers' counsel and assistance if the commercialization of marijuana is to be accomplished as contemplated by the constitutional amendments, he asked for positive action on both of the proposals, on Rule 8.4 and on Rule 8.6.

On a vote of the members, the motion to table was defeated.

A member moved approval of the subcommittee's proposal for Rule 8.6 and its comment, saying that he would ask for a vote on Rule 8.4 after Rule 8.6 w as dealt with.

A member said she was concerned about the statement in the comment to Rule 8.6 that "[t]he phrase 'standing along' clarifies that this rule does not preclude disciplinary action" The comment's reference then to "federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana" is, she said, too limiting, because it implies that a lawyer may be disciplined for counseling conduct that violates laws other than "those prohibiting use, possession, cultivation, or distribution of marijuana"

The member who had expressed concern for the impact of the proposals on government lawyers said she was concerned, too, that the proposed comment to Rule 8.6 left open the possibility that the lawyer could be subject to "disciplinary action" for counseling or assisting a client with respect to marijuana-related conduct that violated "federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana," such as Federal tax law, credit and banking law, and the like. The words, she said, cut back on what we intend to be protection for lawyers who advise clients about all aspects of marijuana commerce.

Another member said she agreed with that observation. The text found in Rule 8.6 itself did not present that problem, she said, because, there, the "standing alone" phrase was not a limiting phrase. The comment, however, used the phrase in a different sentence structure, causing the problem that the other member had noted.

A member asked whether the problem could be resolved by deleting the phrase "a lawyer reasonably believes to be permitted" and leave the text dealing only with conduct that is in fact permitted by the Colorado Constitution.

To that, another member said that the concern had been directed toward the marijuana dealer who wants to open a bank account but finds that doing so would violate Federal law proscribing the deposit of drug-sourced money in a federally insured deposit account.

The member who had raised the issue said that she did not believe the issue was found in the text of Rule 8.6 but only in the wording of its comment.

To that observation, a member proposed that the Committee strike the proposed comment to Rule 8.6 in its entirety, leaving just the text of the rule itself, as proposed by the subcommittee. In his view, the identified problem was a troublesome one and that solution would work, because the paraphrasing of the comment was not useful. He added that, in this one instance, he would agree with van Westrum's concerns about paraphrasing, as expressed in his email.

On a vote, the Committee approved recommending to the Court the text of Rule 8.6 as proposed by the subcommittee, omitting any comment to the rule.

On a vote, the Committee then approved recommending to the Court Comment [2A] to Rule 8.4, as proposed by the subcommittee.

IV. *ABA Model Rules Changes.*

The Committee then turned briefly to the recent changes proposed to a number of the Model Rules of Professional Conduct by the American Bar Association, but it decided to leave discussion of its subcommittee's report on those changes to the next meeting of the whole Committee.

A member asked for a brief summary of those changes. Michael Berger, the chair of the subcommittee that has been considering them explained that, in 2012 and 2013, the ABA House of Delegates approved some of the amendments to the ABA's Model Rules that had been recommended by its "20/20 Commission." The impetus for those amendments had been the expansion of electronically stored and distributed information within the legal profession, an expansion that had become prominent since the ABA's last significant revisions to the Model Rules in 2002 and 2003 — the Model Rules that served as the basis for the Rules of Professional Conduct that became effective in Colorado in 2008. The subcommittee has studied these most recent amendments to the Model Rules in order to recommend which, if any, should be adopted in Colorado. The subcommittee's charge, Berger added, included proposing or rejecting any of those ABA changes or proposing other changes to the Colorado Rules.

Berger said that the subcommittee approached the task similarly to the manner by which a subcommittee of the Committee had considered the 2002 and 2003 amendments to the ABA Model Rules, which led to the recommended amendments to the Colorado Rules that the Court adopted in 2008. The subcommittee first divided the recent ABA amendments between the many that are minor and non-controversial, and those that are more substantive and deserving of more consideration. Working groups then studied in depth the latter group of the ABA amendments. Those working groups then reported to the whole subcommittee, which considered and acted upon their recommendations.

In addition to that activity, Berger said, a number of the subcommittee members believe that there are problems with Colorado Rules 4.4(b) and 4.4(c), regarding the inadvertent disclosure of documents — problems that the ABA had not addressed because the ABA Model Rules do not have provisions similar to those Colorado provisions. The subcommittee tasked with considering the ABA changes had recommended that another subcommittee be formed to give special consideration to Rules 4.4(b) and 4.4(c), but the Chair asked the subcommittee itself to do that work. Berger said the subcommittee would

have one more meeting, to consider Rules 4.4(b) and 4.4(c), and would provide a supplemental report to the Committee after that meeting.

Berger commented that the subcommittee's extant report on the ABA changes is found at page 68 of the meeting package for this meeting. The report is, he said, just twenty pages long, and the reader need not review all of the supporting material to understand the subcommittee's proposals.

Berger recommended that the whole Committee consider the subcommittee's report at its next meeting, at which time it can vote, serially, on the recommendations.

V. *Model Fee Agreements; Typo.*

James Sudler noted to the Committee that, during a break in the discussion at this meeting, a number of members had discussed the prospect of providing model fee agreements, or model provisions for engagement agreements regarding fee structures, for Colorado lawyers. Such models might, he noted, be added to the Rules by appendix, as the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms are now appended to Rule 6.1.

Another member suggested, instead, that the Colorado Bar Association be urged to develop such models. He was joined in that suggestion by another member, who noted that the development of such models could be a very large undertaking; that member suggested that the work product of such an effort should not be issued under the Court's imprimatur.

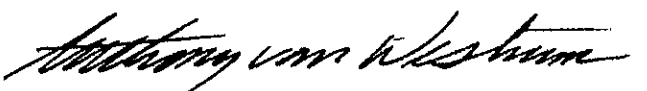
Another member noted that the Court already provides a model contingent fee agreement,[8] but he agreed that this new undertaking should not be pursued by this Committee for adoption by the Court.

The Chair remarked to Sudler that there is a typographical error in current Rule 1.5(f): The text refers to Rule 1.15(f)*(1)*, but it should refer simply to Rule 1.15(f), for that provision has no subdivisions.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, December 6, 2013, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These submitted minutes have not yet been approved by the Committee.]

8. *See* Colorado Rules of Civil Procedure, Chapter 23.3, Rules Governing Contingent Fees, Rule 7, Forms.

The substitution distributed to the Committee at the meeting, by James S. Sudler III, regarding the "lookback provisions" of Rule 1.15B read as follows:

Substitute the following as the text of Rule 1.15B(i), presently found on p. 4 of Exhibit A to the report of the Rule 1.15 Subcommittee dated October 2, 2013, p. 28 of the Meeting Materials provided by the Chair for the Thirty-seventh Meeting of the Supreme Court Standing Committee on Rules of Professional Conduct on October 11, 2013:

> (i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF of the interest or dividends, for the benefit of such client or third persons, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

The substitution differs from the text contained in the report as follows:

> (i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF ~~to the COLTAF account~~ of the interest or dividends, ***for the benefit of such client or third persons,*** in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

The substitution changes the text of Current Rule 1.15(h)(3) as follows:

> If **a** ***the*** lawyer or law firm discovers that funds of ~~**any**~~ ***a*** client or third person have mistakenly been held in a **trust** ***COLTAF*** account ~~**for the benefit of COLTAF**~~ in a sufficient amount or for a sufficiently long time so that interest ***or dividends*** on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and

accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer ~~or~~ ***shall request, or shall cause the*** law firm ~~**shall request COLTAF to calculate and remit trust account**~~ ***to request, a refund from COLTAF of the*** interest ~~**already received by it to the lawyer or law firm**~~ ***or dividends,*** for the benefit of such client or third ~~**person**~~ ***persons,*** in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

NEW ABA RULES SUBCOMMITTEE

SUBCOMMITTEE REPORT REGARDING RULE 4.4
February 25, 2014

The ABA Rules Subcommittee submits this report to address an issue severed from the Subcommittee's October 3, 2013, Report and Recommendations concerning the ABA's 2013 amendments to the Model Rules of Professional Conduct ("Model Rules"): potential amendments to Colorado Rule 4.4.

A. The 2012 ABA Changes to Model Rule 4.4(b)

In 2012, as part of its Ethics 20/20 amendments to the Model Rules, the ABA amended the text of Model Rule 4.4(b) and Comment [2] to that Rule in minor respects. *First*, it added the words "or electronically stored information" after the word "document" in both the text and comment to reflect that in today's world, much information is not contained in a physical document. This is a non-controversial amendment but it is cumbersome in application. In the Subcommittee's view, a cleaner approach is to define the term "document" to include "electronically stored information" and then to continue to use only the term "document" in the text and comment. Comment [2] to current Colorado Rule 4.4 takes that approach by providing: "For purposes of this Rule, 'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form." Rather than defining a term in the Comment, the Subcommittee now recommends that a new definition of "document" be included in Colorado Rule 1.0, the definitions section of the Colorado Rules.

Second, the ABA added language in Comment [2] to address when a lawyer's receipt of metadata creates a notification duty under Model Rule 4.4(b). The ABA revised comment reads:

> For purposes of this Rule, "document or electronic stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule

only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

The Subcommittee recommends the adoption of new ABA Comment [2]. Because virtually every computer generated document contains metadata and because there is no basis to presume that all senders of computer generated documents did not intend to communicate metadata, limiting the disclosure obligation under Rule 4.4(b) to those situations in which the lawyer knows or reasonably should know that the metadata was inadvertently sent is consistent with the general structure of Colorado Rule 4.4(b).

In its Formal Opinion 119, the CBA Ethics Committee addressed the use and "mining" of metadata. The Committee observed that most metadata is insignificant; it usually consists of benign information such as computer formatting information, which enables the computer to present the information in readable form. However, under some circumstances, some metadata (such as the content, dates, and authors of edits to a document) can be important, and metadata may contain privileged or protected information (such as a lawyer's analysis of provisions within a document).

The CBA Ethics Committee concluded that if the receiving lawyer knows or reasonably should know that the metadata contains or constitutes confidential information, the receiving lawyer should assume that the confidential information was transmitted inadvertently and must then comply with Rule 4.4(b).

Although the focus of the analysis in Formal Opinion 119 differs slightly from the new ABA Comment language, in the end the Subcommittee believes they are consistent and therefore recommends the adoption of new Model Rule Comment [2].

B. Consideration of Non-Uniform Changes to Colorado Rule 4.4

When the Subcommittee addressed the 2012 changes to Model Rule 4.4(b), discussed above, several members expressed the view that the Standing Committee should also consider potential amendments to Colorado Rule 4.4(c), which has no counterpart in Model Rule 4.4. Rather than appointing a separate subcommittee, the Chair of the Standing Committee directed the Subcommittee to broaden its mandate with respect to Rule 4.4 and to make whatever recommendations the Subcommittee thought were appropriate with respect to that Rule. In

particular, the Subcommittee's charge was to consider whether to recommend changes concerning the duties of a lawyer who receives documents relating to the representation of the lawyer's client, which the receiving lawyer knows were inadvertently sent.[1]

a. History of ABA Model Rule 4.4 and Colorado Rule 4.4

A brief history of ABA Model Rule 4.4 and Colorado Rule 4.4 may be helpful as the Standing Committee considers whether to propose substantive changes to Colorado Rule 4.4(b) or (c), concerning the scope and contours of a receiving lawyer's duty upon the receipt of inadvertently sent documents. We provide that history in chronological order, and include pertinent ABA and Colorado ethics opinions related to the subject of inadvertently transmitted or produced documents.

1983 – The ABA adopted the Model Rules. As initially adopted, Model Rule 4.4 did not address inadvertently transmitted documents.

1992 – The ABA issued Formal Opinion 92-368,[2] which opined that "[a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege of otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should [a] refrain from examining the materials, [b] notify the sending lawyer[,] and [c] abide the instructions of the lawyer who sent them." The ABA did not rely on text in Model Rule 4.4, which at that time did not address inadvertently transmitted documents. Instead, it reached its conclusion based on the importance of the principle of confidentiality under Model Rule 1.6, an analogy to some courts' analysis of inadvertent waiver of the attorney-client privilege, the law of bailments governing missent property, analogous cases involving inadvertent omissions in contract provisions, and "good sense and reciprocity."

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[1] The term "sent" encompasses electronic, regular mail, and hand delivery. The term "inadvertently sent" encompasses (a) accidental transmission (for example, when the sender hits the "Reply To All" button instead of the "Reply" button), (b) intentional transmission to an inadvertently improper recipient (for example, when a clerical employee improperly sends opposing counsel a courtesy copy of an attorney-client communication), and (c) inadvertent production of non-discoverable documents (for example, when a lawyer intentionally produces documents, but inadvertently fails to detect a privileged document in the larger production).

[2] ABA Formal Opinions are not attached to this Subcommittee Report because of the ABA's copyright policy. However, the Formal Opinions discussed may be found on Westlaw by using the following citation format: ABA Formal Op. __-___ (*e.g.*, "ABA Formal Op. 94-382").

1993 – The Colorado Supreme Court adopted the Colorado Rules. As initially adopted Colorado Rule 4.4 also did not address inadvertently transmitted documents.

1994 – The ABA issued Formal Opinion 94-382, which largely extended the duties stated in Opinion 93-368 to unsolicited confidential or privileged documents of an adverse party that were intentionally sent to the receiving lawyer, presumably by someone other than opposing counsel. The ABA concluded: "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 materials 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 instructions 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." Again, the ABA Ethics Committee recognized that "the Model Rules do not offer explicit guidance on the present issue," and it instead relied predominately on Opinion 92-368, despite cited state ethics opinions to the contrary.

2000 – The CBA Ethics Committee issued Formal Opinion 108, attached as Appendix A, which concluded that "[t]he ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depends on whether the receiving lawyer knows of the inadvertency of the disclosure before examining the documents." If the documents "on their face appear to be privileged or confidential," the lawyer "has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality." The CBA concluded, however, that "the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, for example, if the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents." In that situation, in addition to the duty of notice, "the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition." The CBA Ethics Committee acknowledged that "the Colorado Rules of Professional Conduct do not expressly address these

issues," but it relied on Colorado Rule 8.4(d) (which prohibits conduct that is prejudicial to the administration of justice), Colorado Rule 8.4(c) (which prohibits dishonest conduct), and Colorado Rule 1.15 (which states the lawyer's duties concerning property of others), as well as ABA Formal Opinion 92-368, in reaching its conclusions. The CBA Ethics Committee recognized the split in authority on this issue and that the ABA was then considering an amendment (which eventually would become Model Rule 4.4(b)) that would limit the receiving lawyer's duty to notice to opposing counsel.

2002 – The ABA made extensive revisions to the Model Rules, pursuant to the recommendations of its Ethics 2000 Commission. The ABA adopted Model Rule 4.4(b), attached with its comments as Appendix B, which provided: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The ABA adopted Model Rule 4.4(b) Comments [2] and [3], which further addressed a lawyer's duty upon receipt of inadvertently transmitted documents.

2005 – The ABA adopted Formal Opinion 05-437, which withdrew Opinion 92-368. The opinion recognized that Model Rule 4.4(b), adopted in 2002, ten years after the issuance of Formal Opinion 92-368, "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."

2006 – The ABA adopted Formal Opinion 06-440, which withdrew Opinion 94-382. "Under the same reasoning that led the Committee recently to withdraw Formal Opinion 92-368, on which Formal Opinion 94-382 was based," the ABA Committee concluded that Model Rule 4.4(b) "requires only that a lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. The Rule does not require refraining from reviewing the materials or abiding by instructions of the sender." The ABA Committee specifically criticized its reliance, in Formal Opinion 94-382, on "principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity, and professional courtesy."

The Committee recognized that "[a]pplication of other law is beyond the scope of the Rules," and that "the considerations that influenced the Committee in Formal Opinion 92-368, which carried over to Formal Opinion 94-382, . . . are not . . . an appropriate basis for a formal opinion of this Committee, for which we look to the Rules themselves."

2008 – The Colorado Supreme Court amended Colorado Rule 4.4, attached as Appendix C, to address inadvertently transmitted documents. The pertinent portions of that rule, subsections (b) and (c), read as follows:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.
>
> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

As amended, and as still in effect, Colorado Rule 4.4(b) is identical to the then-current ABA Model Rule 4.4(b). Colorado Rule 4.4(c) has no counterpart in the Model Rules or, to our knowledge, to the rules of any other jurisdiction. The Standing Committee recommended adoption of Colorado Rule 4.4(c) because it concluded that Model Rule 4.4(b) provided insufficient protection for inadvertently sent documents, and it agreed with the conclusion reached in CBA Ethics Opinion 108, "that when a lawyer actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, including when the sender notifies the recipient of the erroneous transmission, Current Colorado Rule 4.4 requires the lawyer to not examine the documents and to abide by the sending lawyer's instructions as to their disposition." Colo. Supreme Ct. Standing Comm. on the Colorado Rules of Professional Conduct, *Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct*, 88-89 (Dec. 30, 2005). This summary of Opinion 108 was erroneous. As noted above, that opinion correctly observed that "the Colorado Rules of Professional Conduct do not expressly address these issues [related to inadvertently transmitted documents]." The CBA Ethics Committee did not rely on Colorado Rule 4.4 (which in 2000 did

not address inadvertently transmitted documents) as the basis for imposing duties upon the receiving lawyer.[3] Comments [2] and [3] to Colorado Rule 4.4 largely track the then-current Comments [2] and [3] to Model Rule 4.4, although there are some amendments to reflect Colorado Rule 4.4(c).

2012 – The ABA made the Ethics 20/20 revisions to the Model Rules that our Committee is now considering. It amended Rule 4.4(b) and Comments [2] and [3] to expressly include "electronically stored information" within the scope of those provisions. We discuss those relatively minor amendments, which the Subcommittee largely supports, above. However, the ABA did not change the scope of a lawyer's duty upon the receipt of inadvertently transmitted documents.

b. Additional Background Regarding Colorado Rule 4.4(c)

Colorado Rule 4.4(c) was a compromise of sorts, a balance between the views of those who think that the innocent recipient of inadvertently sent material (and the recipient's client) should not be unduly burdened by the sender's mistake, and the views of others that rules of legal ethics should impose certain restrictions on the use of information that the recipient

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[3] There is another inconsistency between CBA Opinion 108 and Colorado Rule 4.4(b) and (c). Opinion 108 states that "the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. This includes the situation where the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, it is the opinion of the Committee that, as a matter of legal ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition." Thus, under Opinion 108, the heightened duty to not merely give notice but also to refrain from examining the document and to abide by the sender's instructions, applies whenever the receiving lawyer "actually knows" that the docs were inadvertently sent -- not in the limited situation where the receiving lawyer receives that notice from the sender. Opinion 108 identifies notice from the sender as an *example* of when the receiving lawyer would have that advance notice, but it could also occur where a document is addressed to opposing counsel's client and it is an obvious attorney-client communication, not intended for receipt by the receiving lawyer. Under Opinion 108, in that additional situation, the receiving lawyer would have a duty beyond mere notice. Yet, Colorado Rule 4.4(b) says the opposite – that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows . . . that the document was inadvertently sent shall promptly notify the sender." Current Colorado Rule 4.4(c) imposes the additional obligations only where the lawyer "before reviewing the document, receives notice from the sender that the doc was inadvertently sent," which, depending upon how "notice from the sender" is construed, may not be consistent with Opinion 108.

receives solely because of the sender's mistake, at least where the recipient is informed of the mistake before reviewing the document.

With the explosion of electronic communications, the likelihood of such mistakes has increased substantially. Many attorneys and their staff members can recount incidents when emails have inadvertently gone to the wrong recipients, for example, because the sender inadvertently pressed "reply to all" instead of "reply," or because the user's computer software "auto-populated" the "To" or "Cc" field with the wrong email address.

In addition, the increase in electronically stored documents and correspondingly large production of documents in litigation has increased the risk of inadvertent production of privileged or otherwise confidential documents. It is increasingly difficult for lawyers to review millions of pages of emails and other electronic information without making some mistakes regarding the identification and segregation of privileged or other confidential information. The risk of error is inversely proportional to the expense of such a review. The more time and more effort spent on such a privilege review, the less likely that mistakes will be made. But as some have observed, the incentive to spend increased amounts of time (and money) on the task is in tension with the necessary goal to reduce the costs of litigation. In fact, in cases involving modest amounts in controversy, the cost of the privilege review process may exceed the amount in controversy. See Advisory Committee on Civil Rules, U.S. Standing Committee on Rules of Practice and Procedure, Advisory Committee Notes, 2006 Amendments. Given these realities, many lawyers and commentators favor some type of "claw back" procedure, through which the sender can recall inadvertently sent information and can prohibit its use by the recipient at least until a court adjudicates claims of waiver.

The federal courts have adopted such a procedure in Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure.[4] That rule permits the sender of information produced in discovery to "claw back" information that is subject to a claim of privilege or protection as trial preparation materials.[5] When such a claw back demand is made, the recipient of the information must

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[4] Colorado has not adopted a counterpart to Federal Rule 26(b)(5)(B), but the Colorado Supreme Court Civil Rules Committee will consider such a rule in 2014.

[5] It has become commonplace for lawyers to include in stipulated protective orders voluntary claw back procedures similar to those imposed by Federal Rule 26 (b)(5)(B).

"promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim." *Id.* The rule itself does not prescribe when the privilege or protection has been waived. That determination is made, in federal proceedings (and when there are concurrent federal and state judicial proceedings), under Rule 502 of the Federal Rules of Evidence. In Colorado state court proceedings, the question of waiver of inadvertently produced information is generally governed by a common law test adopted by the Court of Appeals in *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 808-09 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999); *see also In re Marriage of Amich and Adiutori*, 192 P.3d 422, 424 (Colo. App. 2007).[6]

Colorado Rule 4.4(c) does address this issue, but, in the views of some observers, perversely. Because a lawyer is constrained from reviewing or using inadvertently sent information only after receiving notice from the sending lawyer, the rule incentivizes immediate review (and use) of the material before the sending lawyer has realized the error and has given notice under Rule 4.4(c).

C. The Subcommittee's Fractured Views

The Subcommittee debated at length whether Colorado Rule 4.4(b) and (c) should be amended or abrogated. Other than a fleeting majority vote favoring an amendment that would address the perverse incentive identified above in Rule 4.4(c), the Subcommittee did not reach any consensus and, therefore, decided to present to the full Committee all the alternatives the Subcommittee considered.[7]

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[6] The Subcommittee is advised that the Colorado Supreme Court Committee on the Colorado Rules of Evidence has declined to recommend to the Supreme Court the adoption of a Colorado counterpart to Federal Rule 502. As a result, unless the Supreme Court elects to adopt such a rule change *sua sponte* or addresses this issue in its cases, the Court of Appeals' decisions will continue to govern the determination of whether a waiver has occurred and the extent of any such waiver.

[7] The Subcommittee also could not reach consensus on what the governing mental state of the receiving lawyer should be (assuming that there should be any ethical constraints upon the receiving lawyer). Some believe that only the mental state of knowledge (as defined in Colo. RPC 1.0(f)) should trigger any ethical responsibilities; others support a mental state of "knows or should know."

Alternative 1: A very slim majority of the Subcommittee (with one member not participating) was in favor of modifying Colorado Rule 4.4(c) to read as follows:[8]

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, within a reasonable time thereafter also receives notice from the sender that the document was inadvertently sent, shall not make any use of the document and shall abide by the sender's reasonable instructions as to its disposition.

This amendment would extend the receiving lawyer's duties (to not make use of the document and to abide by the sender's instructions as to its disposition) from the circumstance identified in current Colorado Rule 4.4(c) – when the receiving lawyer has received notice of the inadvertent transmission before reviewing the document – to a broader time period of "within a reasonable time" after receipt of the document. The rationale for this proposed amendment is that it reduces the perverse incentive for the receiving lawyer to immediately review and use materials that the lawyer knows were inadvertently sent. The critics of this Alternative note that the perverse incentive is not fully dissipated and also question how the lawyer who has reviewed the document purges his or her knowledge gleaned from review of the document (and avoids "mak[ing] use of the document") if notice is not received until after the review.

Alternative 2: Leave Rule 4.4(c) as it is, or at most make a clarifying amendment to Comment [2]. Several members of the Subcommittee believe that existing Rule 4.4(c), which has been in effect since 2008, is working and does not require revisions. However, those Subcommittee members believe that a simple amendment to Comment [2], shown in underlining in the quote below, would provide helpful guidance as to the scope of the Rule.

> [2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the

[8] The vitality of this majority is in question. Following the vote, the Subcommittee member whose vote created the majority wrote an email to the Subcommittee indicating that he dissented from the proposal; therefore, for current purposes it probably makes sense to ignore the fact that for a few hours there was majority support for this proposal.

document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. The phrase "reviewing a document" as used in paragraph (c) refers to any examination of the document by the lawyer. For example, if the lawyer has opened an email, or has looked at the letterhead, address field, or subject line of a document or email before receiving notice from the sender that the document was inadvertently sent, then the lawyer has begun to "review" the document, and the additional duties imposed by paragraph (c) would not apply. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. See Rule 3.4(c) (providing that a lawyer "shall not . . . knowingly disobey an obligation under the rules of a tribunal"). For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

The proponents of this Alternative 2 believe that Colorado Rule 4.4(b) and (c), and CBA Ethics Committee Formal Opinion 108 before them, have worked well for many years. Together they strike an appropriate balance between the obligations of the sender and the obligations of the receiving lawyer, all without encroaching on areas of conduct governed by new and anticipated rules of civil procedure. They avoid the sometimes harsh irrevocability of the sender's mistake that is inherent in ABA Model Rule 4.4, as well as the undue shift of disciplinary responsibility from the sender to the receiving lawyer that is inherent in Alternative 5 (see below). In these Members' views, existing Colorado Rule 4.4(c) does not create a "perverse incentive" for the receiving lawyer to quickly read inadvertently sent documents before the sender can notify and stop her. In most circumstances, once the receiving lawyer has opened an inadvertently sent email, package or letter, she has "reviewed" the document within the meaning of subsection (c) such that it does not require her to stop and abide by the sender's instructions even if she has not finished reading the entire document.[9]

[9] The following discussion on Alternative 2 was submitted by proponents of this Alternative and does not reflect the views of the entire Subcommittee.

Colorado Rule 4.4(c) was based on CBA Formal Ethics Opinion 108 (See Colorado Supreme Court Standing Committee on the Rules of Professional Conduct, REPORT AND RECOMMENDATIONS CONCERNING AMERICAN BAR ASSOCIATION ETHICS 2000 MODEL RULES OF PROFESSIONAL CONDUCT at 89-91 (December 30, 2005)). As noted in Opinion 108, the ethical obligations of a lawyer who receives documents that were inadvertently disclosed "depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents." CBA Formal Ethics Opinion 108, Syllabus. The primary focus of Formal Opinion 108 is the ethical duty of the lawyer who receives from a sending lawyer documents that on their face appear to be privileged or confidential. However, another scenario addressed by Formal Opinion 108 is when the receiving lawyer actually knows of the inadvertence of the disclosure before examining privileged or confidential documents. Id., Syllabus. In this situation, Formal Opinion 108 concludes that the receiving lawyer "must not examine the documents and must abide by the sending lawyer's instruction as to their disposition." Id.

The scope of Rule 4.4(c) is very narrow. As described in Formal Opinion 108, it addresses "the situation where the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents." Id. (emphasis added). The paradigm situation where this would occur is when the sending lawyer inadvertently sends documents by mail or by overnight to the receiving lawyer, realizes the error after sending the package, and notifies the receiving lawyer before the package with the documents is even opened or received. In fact, in its discussion, Formal Opinion 108 cites to American Express v. Accu-Weather, Inc., No. 92 CIV 705, 1996WL 346388 at *2 3 (SDNY June 25, 1996), which involved a Federal Express package. In American Express, the District Court sanctioned a lawyer for reviewing a package and failing to return it, where the sending lawyer called the receiving lawyer and told the receiving lawyer that he would soon be receiving a Federal Express package containing discussion privileged information that was inadvertently addressed to him and that the package should be returned. Id.

This conclusion in Formal Opinion 108 is based on two alternative rationales. First, the receiving lawyer in this situation knows that the documents which were inadvertently sent are not his or her property; as a result, the receiving lawyer has a duty to safeguard the documents as

property belonging to others under Rule 1.15(a) and to return the documents if requested under Rule 1.15(b). Formal Opinion 108, supra, at 4-345. Second, the receiving lawyer is prohibited from acting dishonestly under Rule 8.4(c), and in this situation, it would be dishonest for the receiving lawyer to examine the privileged or confidential documents knowing that they were sent inadvertently. Id. at 4-345 to 4-346. In support of this rationale, Formal Opinion 108 quotes from Ethics Opinion 256 of the District of Columbia Bar Association, as follows:

> Reading materials under these circumstances should be equivalent to the lawyer opening the closed file folder of his adversary in a conference room, while the adversary was out of the room. Such conduct has been found in other jurisdictions to be dishonest. See, e.g., Lipin v. Bender, 644 N.E.2d 1300 (N.Y. 1994).

D.C. Bar Association Opinion 256 (footnote omitted), quoted in Formal Opinion 108 at 4-346.

The proponents of Alternative 2 believe that some of the other Alternatives are based on a fundamental misunderstanding of Rule 4.4(c). These alternatives are reflected in Alternatives 1, 4, and 5, all of which would modify Rule 4.4(c) to different degrees.

Alternatives 1, 4 and 5 to current Rule 4.4(c) posit that the Rule creates a "perverse incentive" for the receiving lawyer to review more quickly than they otherwise would have documents produced in discovery, including electronically stored information (ESI). In reality, Rule 4.4(c) does not create a "perverse incentive" at all. As demonstrated above, Rule 4.4(c) applies only in the narrow situation where the receiving lawyer has not yet even seen the documents, because the sending lawyer notifies the receiving lawyer of the inadvertence before the receiving lawyer has even received the package by mail or overnight. Additionally, Rule 4.4(c) and Formal Ethics Opinion 108 as it addresses this scenario do not deal specifically with discovery. To the extent that Rule 4.4(c) does, by its terms, potentially relate to documents produced in discovery, the Rule does not create a "perverse incentive." When one party produces documents to the other in discovery, the receiving lawyer has an ethical duty of competence and common law duty of care to review those documents promptly, and that is not affected by the Rule.

Instead, these Alternatives represent a direct assault on Rule 4.4(b), and more importantly, they would impose on the receiving lawyer duties that the ABA rejected in adopting

Model Rule 4.4(b) and that the Colorado Supreme Court may have implicitly rejected when it adopted Colorado Rule 4.4(b). As adopted, Rule 4.4(b) limits the duty of a lawyer who first realizes that a document may have been inadvertently disclosed by reviewing it to notifying the sending lawyer. These Alternatives would impose on the receiving lawyer duties above and beyond notice, in varying degrees. These unwarranted duties, which are enforceable in discipline, are imposed on the receiving lawyer who has done nothing wrong and is without fault. It is for these reasons that the ABA rejected the approach in ABA Formal Ethics Opinions 92-368 and 94-382 when it adopted Model Rule 4.4(b), and ultimately withdrew Formal Ethics Opinions 92-368 and 94-382.

The Alternatives that suggest major modifications to Rule 4.4(c) base their approach on the likelihood of mistakes in disclosure of confidential or privileged information, especially with "the explosion" of ESI in discovery. These other Alternatives note changes in the Federal Rules of Civil Procedure addressing this issue, Fed.R.Civ.P. 26(b)(5)(B) and Fed.R.Evid. 502, and predict that the Colorado Supreme Court may adopt similar Rules. However, there is an important difference between Civil Rules and Rules of Professional Conduct. Though related somewhat, they serve completely separate purposes. This is recognized in the Comments to Rule 4.4: "Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these rules, as is the question of whether the privilege status of a document has been waived." Colo. RPC 4.4, cmt. [2]. As noted above, the Rules of Civil Procedure are evolving to deal with the issue of inadvertent disclosure of privileged or confidential documents, especially in the context of ESI, and the issue of waiver is a matter of the substantive law of evidence, whether based on statute, Rule, or common law. The Rules of Civil Procedure are enforceable by the courts in disputed matters (as in American Express v. Accu-Weather, supra), and knowing disobedience of an obligation under the rules of the tribunal may subject a lawyer to discipline under Rule 3.4(c).

Not every Rule of Civil Procedure should essentially be incorporated into the Rules of Professional Conduct, enforceable in discipline. Indeed, the United States District Court for the District of Colorado has gone so far as to decline to adopt Colorado Rule 4.4(b), because the obligations of lawyers in this situation in the litigation context are addressed in the Federal Rules of Civil Procedure. To add the obligations under the Rules of Civil Procedure to Rule 4.4(c) is a

bad idea for several reasons. It would expose to discipline lawyers in litigation for simple errors in discovery (receiving lawyers who, as discussed above, did nothing wrong and are without fault). It would become another adjunct to discovery fights in litigation. And it would add to the burden of the disciplinary system disputes that are really discovery disputes for the civil courts.

In summary, the proponents of Alternative 2 believe that the changes to Rule 4.4(c) proposed in Alternatives 1, 4 and 5 require fundamental changes in Rule 4.4(b), because the approach they advocate in various degrees is an approach that the ABA and the Colorado Supreme Court rejected when they adopted Model Rule 4.4(b) and Colorado Rule 4.4(b). As discussed above, the reasons advanced in support of these Alternatives do not justify such a radical change, and numerous reasons support continuing the approach that the ABA endorses and that the Colorado Supreme Court embraced when it adopted Colorado Rule 4.4(b).

Alternative 3: At least one member of the Subcommittee favors the repeal of Colorado Rule 4.4(c), thus making Colorado Rule 4.4 identical to Model Rule 4.4. Such an amendment would limit the ethical constraint upon the receipt of inadvertently produced information to a duty to notify the sender. Additional constraints, if any, would be supplied only by other law, including the federal and Colorado procedural rules, prophylactic agreements between the parties to address inadvertent production and transmission of documents, and the common law of bailments. This alternative would add to Comment [2] the text proposed in Alternative 2, cross-referencing Colorado Rule 3.4(c): "*See* Rule 3.4(c) (providing that a lawyer "shall not . . . knowingly disobey an obligation under the rules of a tribunal")." However, the proponents of Alternative 3 would *not* add the text proposed in Alternative 2 regarding the meaning of "reviewing a document" as used in Colorado Rule 4.4(c), because Alternative 3 would delete subsection (c) altogether.[10]

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[10] The Comment proposed by one member of the Subcommittee would read as follows:

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

The supporters of Alternative 3 provide several reasons for its recommendation to the Standing Committee. *First*, they believe that substantive law, not the rules of legal ethics, should address any substantive constraints on the use of inadvertently provided information, and that the notice to the sender required under Colorado Rule 4.4(b) is sufficient to protect the sender's interests. They agree with the views of the ABA Standing Committee when it adopted Formal Opinion 06-440 and withdrew Formal Opinion 94-382, that "principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity, and professional courtesy" are not bases for imposing an additional ethical obligation on the receiving lawyer.

Second, they believe that Rule 4.4(c) is self-protectionist in nature. It seems primarily designed to protect a sending lawyer from his or her own negligence, which the supporters of Alternative 3 believe is not a good enough reason for an ethics rule that could subject a wholly innocent receiving lawyer to professional discipline.

Third, they believe that current Colorado Rule 8.4(c) creates the strong potential for imposing inconsistent duties on the receiving lawyer under court procedural rules and the Colorado Rules.

Fourth, they view Colorado Rule 4.4(c) as unnecessary in many contexts because Colorado Rule 3.4(c) independently subjects lawyers to discipline for violations of court rules, including procedural rules governing inadvertently transmitted documents.

Fifth, they emphasize the benefit of uniformity between the Model Rules and the Colorado Rules. In that connection, they note that 29 jurisdictions appear to have adopted

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information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. *See* Rule 3.4(c) (providing that a lawyer "shall not . . . knowingly disobey an obligation under the rules of a tribunal")." For purposes of this Rule, ''document or electronically stored information'' includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

versions of Rule 4.4 that track the Model Rules in that they include identical or virtually identical versions of Model Rule 4.4(b), but no counterpart to Colorado Rule 4.4(c).[11]

The members who oppose Alternative 3 do so on a number of grounds. *First*, this position was considered at length when the current version of Rule 4.4 was being debated by the Standing Committee and was rejected both by the Standing Committee and, by its adoption of the recommendation of the Standing Committee, the Supreme Court.

Second, in its adoption of recent amendments to C.R.C.P. 45, the Supreme Court has at least implicitly rejected the arguments that establishing an orderly process to adjudicate claims of waiver based upon the inadvertent sending of confidential or privileged information are (or should be) either beyond the authority of the judiciary or against public policy. C.R.C.P. 45(d)(2)(B) adopts a clawback procedure similar to Fed.R.Civ.P. 26(b)(5)(B). Rule 45 permits a privilege holder (irrespective of whether the privilege holder was the person who produced the documents pursuant to subpoena) to make a claim (as to previously produced information) of privilege or protection as trial preparation material. After notification of such a claim, the receiving party must promptly return, sequester or destroy the specified information and must not use it until the claim is resolved. Rule 45 does not contain any substantive rules regarding how the claims of privilege or waiver of the privilege must be resolved by the court; it merely provides a mechanism by which such claims may be adjudicated in an orderly fashion before the value of the information to the privilege holder is completely eviscerated. The U.S. Supreme Court and Congress have made similar judgments in the promulgation of Fed.R.Civ.P. 26(b)(5)(B).

Third, a number of American jurisdictions, acting through their supreme courts, have rejected the position taken by advocates of Alternative 3 and have, to the contrary, concluded that there should be and are ethical dimensions to a lawyer's receipt of inadvertently sent confidential and privileged information. At least eleven states have modified their Rule 4.4 (or equivalent) to impose ethical obligations upon lawyers who receive inadvertently sent

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[11] *See* ABA CPR Policy Implementation Committee, Table: *Variations of the ABA Model Rules of Professional Conduct, Rule 4.4* (last updated Sept. 6, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_4.authcheckdam.pdf.

confidential or privileged information.[12] These obligations range from the limited non-use restriction imposed by Colorado Rule 4.4 (c) to a blanket ethical prohibition upon reading or using such information until the claim of privilege or protection is resolved by a court.

Fourth, state bar ethics committees, including the Colorado Bar Association Ethics Committee, have concluded that the receipt of inadvertently sent communications does have ethical implications and imposes ethical responsibilities upon the receiving lawyer.[13] Indeed,

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[12] *See id.*; *see also* Summary of State Rules/Opinions on Inadvertent Distribution (Spring 2007), authored by the American Bankruptcy Institute, attached as Appendix D.

[13] CBA Formal Ethics Opinion 108 was adopted in 2000, **before** the adoption by the Supreme Court of current Rule 4.4(c), effective January 1, 2008. Indeed, formal Opinion 108 provided the conceptual basis for current Rule 4.4(c). Thus, both the Standing Committee and the Court have already has accepted the proposition that the receipt of inadvertently sent documents has ethical implications for the receiving lawyer and have rejected the contrary view. The Syllabus of Formal Opinion 108 reads as follows:

> The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.
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> A lawyer who receives documents from an adverse party or an adverse party's lawyer ("sending lawyer") that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the receiving lawyer's only ethical obligation in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.
>
> However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, for example, if the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, as a matter of ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

CBA Formal Opinion 108 was expressly relied upon by the Standing Committee in its 2005 Report and Recommendations in proposing the addition of a Colorado-specific Rule 4.4(c). See n. 3, *supra*.

Fifth, the opponents of Alternative 3 respond to the legitimate concern regarding confusion between an ethics rule and the requirements of other law by noting that it would be easy to add comment language which would state that other law (giving examples) may impose different or additional requirements on the receiving lawyer and when that is the case, the lawyer must comply with the other law. This is not a concept foreign to the Rules. Many rules advise the reader that other law may impose greater or different requirements than the Rule. See, e.g., Rule 1.6(b)(7) (exception to the rule of confidentiality to comply with other law).

Sixth, the proponents' argument that the duties of the receiving lawyer should be left to the substantive law is under inclusive. Even if the Supreme Court were to adopt the federal discovery clawback civil rule, neither that rule nor C.R.C.P. 45 would apply to inadvertent disclosures outside of the discovery process or non-litigation matters generally.[14]

Seventh, if the receipt of inadvertently sent information does not have any ethical overlay but is subject only to the requirements of law other than the Rules of Professional Conduct, then the question of what, if any responsibilities the receiving lawyer has challenges the ethical underpinnings for even a notification provision such as Model Rule 4.4(b) or Colorado Rule 4.4(b).

See also District of Columbia Bar Association, Opinion 256 (when receiving lawyer knows of the inadvertence, the failure to abide by sending lawyer's instructions would constitute a dishonest act in violation of Rule 8.4(c)).

[14] To give but one example of an inadvertent disclosure that is outside of the discovery process and thus outside of the ambit of Fed.R.Civ.P. 26 (b)(5)(B) and C.R.C.P. 45, suppose that a lawyer prepares a written evaluation of a client's litigation matter. The evaluation undoubtedly contains information protected both by the attorney-client privilege as well as the work-product privilege. The lawyer inadvertently emails the evaluation to his or her litigation adversary. Other than Current Colorado Rule 4.4(b) and (c), no federal or Colorado law or rule addresses the duties, if any, of the recipient of such information.

Alternative 4: At one point in the Subcommittee's deliberations, a majority of Subcommittee members voted to recommend the adoption of the following changes to Rule 4.4(c):

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who also receives notice from the sender or from a third person that the document was inadvertently sent and that the sender or third person claims the document is subject to a claim of privilege under § 13-90-107, C.R.S. or of protection as trial-preparation material, shall promptly return, sequester, or destroy the document and any copies thereof and shall not use or disclose the document until (i) the claim of privilege or protection is resolved by the agreement of the parties (and the holder of the privilege, if applicable), (ii) by an order of a court; or (iii) until the passage of a reasonable period of time during which the person who inadvertently sent the document (or the holder of the privilege or right of protection, if applicable) failed to seek judicial relief regarding the claim of privilege or protection.

Because of its cumbersome nature and for other reasons, a majority of the Subcommittee no longer favors this Alternative 4.

Alternative 5: Some members of the Subcommittee would substantially strengthen Colorado Rule 4.4 by imposing a duty upon the receiving lawyer not to use inadvertently sent information when the receiving lawyer knows that the information was inadvertently sent. Such a rule is typified by District of Columbia Rule 4.4(b) which provides:

> (b) A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

Accord: Louisiana Rule 4.4(b); Maine Rule 4.4(b); New Hampshire Rule 4.4(b); New Jersey Rule 4.4(b); Tennessee Rule 4.4(b).

This alternative imposes the greatest ethical obligations upon the "innocent" lawyer who receives inadvertently sent information. The rationale for imposing such an ethical obligation on the receiving lawyer is that the use of confidential or privileged information based upon an error made by the sending lawyer before a court has a reasonable opportunity to adjudicate claims of

waiver is not right and therefore should not constitute ethical conduct by a lawyer. The argument against this proposal, addressed at length above, is that neither the innocent receiving lawyer nor that lawyer's client should suffer the consequences for another lawyer's mistake; the lawyer making the mistake (and his or her client) should suffer whatever consequences there might be and if the client is harmed by the lawyer's error, the client has recourse against the lawyer by filing a legal malpractice suit.

Alternative 6: At least one Subcommittee member has expressed the view that any restriction upon a lawyer's (or a litigant's) use of information lawfully obtained that would advance the client's cause distorts the judicial process and, therefore, must have a compelling justification. It is unclear whether this member would also abrogate Colorado Rule 4.4 (b). According to that member, imposing ethical constraints upon a lawyer who has received relevant information based solely upon his or her adversary's error is not justified either by the Colorado statute that creates the attorney-client privilege or by any valid exercise of authority by the Colorado Supreme Court in its rulemaking role. Rather, a malpractice action against the sending lawyer can protect the interests of the person (usually a client) who has been harmed by the inadvertent transmission.

Most members of the Subcommittee reject this analysis because they believe that a lawyer's receipt of information that was inadvertently communicated does have ethical implications and those implications should be addressed in the rules of ethics.

D. Conclusion.

The Subcommittee recommends that the full Committee recommend the adoption of the 2012 amendments to Model Rule 4.4 and its Comment, with the minor change to the placement of the definition of "document" discussed above. However, the Subcommittee cannot agree on what recommendations, if any, the Standing Committee should make to the Court regarding the scope of a lawyer's duties upon the receipt of inadvertently sent documents, under Rule 4.4(b) and (c).

Respectfully submitted,

Michael H. Berger, Subcommittee Chair

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APPENDIX A

CBA Ethics Committee Formal Opinion 108

Inadvertent Disclosure of Privileged or Confidential Documents

Adopted May 20, 2000

108 INADVERTENT DISCLOSURE OF PRIVILEGED OR CONFIDENTIAL DOCUMENTS

Adopted May 20, 2000.

Introduction

This opinion addresses the ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed, whether in a civil, criminal, or administrative proceeding or in a context that does not involve litigation. This opinion does not purport to address all the situations in which a lawyer receives privileged or confidential documents belonging to a person other than his or her client.[1] For purposes of this opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a civil, criminal, or administrative action or proceeding, even if they are not "privileged" *per se*.

Syllabus

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

A lawyer who receives documents from an adverse party or an adverse party's lawyer ("sending lawyer") that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the receiving lawyer's only ethical obligation in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.[3]

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, for example, if the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, as a matter of ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

Opinion

Although the Colorado Rules of Professional Conduct do not expressly address these issues, the Committee concludes that Rule 8.4(d) requires a lawyer to respect the privileged and confidential status of documents belonging to non-clients in order to ensure the orderly administration of justice. Colo. RPC 8.4(d). *See* CBA Formal Ethics Ops. 86, 102; *see also State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 808 (Cal.Ct. App. 1994); Utah State Bar Ethics Op. 99-01 (1999). As the California Court of Appeals concluded:

> The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information or the

> retention of the privileged information by an adversary who might abuse and disseminate the information with impunity. In addition, it has long been recognized that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."

WPS, 82 Cal.Rptr.2d at 808 (citations omitted).

Typically, an inadvertent disclosure of privileged or confidential documents occurs in two situations. One situation is where a lawyer receives documents 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. This may occur because the document is addressed to the sending lawyer's client, but it is inadvertently sent to the physical address, facsimile transmission number, or e-mail address of the receiving lawyer, his or her adversary. Another situation is where one party inadvertently produces documents that are privileged or confidential to the adverse party in a civil, criminal, or administrative proceeding or in a context that does not involve litigation, such as a business transaction.

The facts in these situations are critical and vary widely. Accordingly, the courts and bar associations that have addressed the ethical obligations applicable to these situations have taken slightly different approaches. Almost all require the receiving lawyer to notify the sending lawyer that documents which appear on their face to be privileged or confidential have been disclosed. *American Express v. Accu-Weather, Inc.*, 1996 WL 346388 at *2 (S.D.N.Y. 1996); *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187 (N.D.Ohio 1996); *Resolution Trust Corp. v. First of Am. Bank*, 868 F.Supp. 217, 219-20 (W.D.Mich. 1994); *WPS*, 82 Cal.Rptr.2d at 807-08; ABA Formal Op. 92-368 (1992); Utah State Bar Op. 99-01; North Carolina Bar Ass'n, Proposed RPC 252 (1997); Maine Advisory Op. 146 (1994); Florida Bar Ass'n Op. 93-3 (1993); *but see In Re Meador*, 968 S.W. 2d 346, 352 (Tex. 1998) (*dictum*).

The authorities differ, however, as to the receiving lawyer's obligations beyond giving notice. In a seminal opinion, the Standing Committee on Ethics and Professional Responsibility of the ABA addressed the situation where a lawyer inadvertently sends a document that is privileged or confidential to his or her adversary instead of the intended recipient, such as by a misdirected fax. [ABA Formal Op. 92-368.] In this situation, the ABA Committee concluded that the receiving lawyer should not examine the documents once the inadvertence is discovered, should notify the sending lawyer of their receipt, and should abide by the sending lawyer's instructions as to their disposition. *Id.* Several courts have followed ABA Formal Opinion 92-368. *American Express*, 1996 WL 346388 at *2; *First of Am. Bank*, 868 F.Supp. at 219-20; *WPS*, 82 Cal.Rptr.2d 799 at 807-08.

However, ABA Formal Opinion 92-368 is not universally followed. *See, e.g.*, Ohio Bar Ass'n Op. 93-11 (1993); Philadelphia Bar Ass'n Op. 94-3 (1994); *see also* Florida Bar Ass'n Op. 93-3 (requires only notice, but does not cite or analyze ABA Formal Opinion 92-368); *cf.*, D.C. Bar Ass'n Op. 256 (1995) (following ABA Formal Opinion 92-368 in part; receiving lawyer's duties depend on whether he or she knows of the inadvertence of the disclosure before examining the documents). Indeed, the Ethics 2000 Commission of the ABA has recently proposed for comment a new Model Rule of Professional Conduct that would depart dramatically from the approach in ABA Formal Opinion 92-368. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft) (Nov. 15, 1999). As proposed by the Ethics 2000 Commission, the new rule would require the receiving lawyer only to notify the sending lawyer that the document was inadvertently disclosed and would not prohibit the receiving lawyer from reviewing the document or require the receiving lawyer to abide by the sending lawyer's instruction as to its disposition. *Id.*

Further, where one party inadvertently produces documents that are privileged or confidential to an adverse party in a civil, criminal, or administrative proceeding, courts that have considered the ethical issues, rather than simply the evidentiary issue of waiver of privilege or confidentiality, have required the receiving lawyer to either follow the instruction of the adverse party's lawyer with respect to the disposition of the documents or refrain from using them until a definitive resolution is obtained from a court regarding their proper disposition. *Transportation Equip. Sales*, 930 F.Supp. at 1187; *WPS*, 82 Cal.Rptr. 2d at 807-08; *cf.*, *In re United Mine Workers of America Employee Benefit Plans Litigation*, 156 F.R.D. 507

(D.D.C. 1994) (motion to reconsider magistrate judge's order compelling production of documents, including privileged and confidential documents that were inadvertently released for inspection by adverse parties; district court acknowledged the ethical issue, noted ABA Formal Opinion 92-368, but decided the motion based solely on the evidentiary issue of waiver of privilege and confidentiality).

In contrast, bar association ethics opinions are less stringent in this situation. The Utah State Bar concluded that once notice of the disclosure has been given, the lawyers can assess whether a waiver has occurred; that in some instances the lawyers may be able to agree how to handle the disclosure; but that in other instances, "it may be necessary to seek judicial resolution of the legal issues." Utah State Bar Op. 99-01. Similarly, the Florida Bar Association concluded that after the receiving lawyer has notified the sending lawyer, "[i]t is then up to the sender to take any further action." Florida Bar Ass'n Op. 93-3; *accord* Maine Advisory Op. 146 (a lawyer who receives documents that are privileged or confidential from an adverse party as part of a production of documents in a litigation should notify the producing lawyer of the disclosure and provide a copy of the documents to the producing lawyer if requested, but the receiving lawyer may use the documents in any way allowed under the rules of procedure and evidence). In this situation, too, the new rule proposed by the ABA Ethics 2000 Commission would require only notification. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft).

It is the opinion of the Committee that a lawyer who receives documents from an adverse party or an adverse party's lawyer that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the attorneys may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.

The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure in an effort to support a determination of waiver or to embarrass the sending lawyer, for example, by filing the arguably privileged or confidential documents in the public court file as attachments to a pleading or paper, or by quoting the content of the documents in pleadings or papers filed in the public court file. Although not prohibited as a matter of legal ethics, the Committee does not condone such practices. In this situation, both parties can litigate the matter without publicly disclosing the documents or their contents, for example, by filing the documents under seal or submitting them for *in camera* review and by referring to the content of the documents generally.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. This includes the situation where the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, it is the opinion of the Committee that, as a matter of legal ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition. *E.g.*, *American Express*, 1996 WL 346388 at *2 (S.D.N.Y. 1996); D.C. Bar Ass'n Op. 256; *see also* ABA Formal Op. 92-368.

The receiving lawyer who actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents has these additional duties for two reasons. First, in this situation, the receiving lawyer knows that the documents which were inadvertently sent are not his or her property; therefore, the receiving lawyer has a duty to safeguard the documents as property belonging to others under Rule 1.15(a), and to notify the sending lawyer and return the documents if requested under Rule 1.15(b). Second, the receiving lawyer is prohibited from acting dishonestly under Rule 8.4(c), and in this situation it would be dishonest for the receiving lawyer to examine the privileged or confidential docu-

ments knowing that the documents were sent inadvertently. As the District of Columbia Bar Association noted in this regard:

> Reading the materials under these circumstances should be treated as the equivalent of a lawyer opening the closed file folder of his adversary in a conference room, while the adversary was out of the room. Such conduct has been found in other jurisdictions to be dishonest. *See, e.g., Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994).

D.C. Bar Ass'n Op. 256 (footnote omitted).

Myriad situations will arise between these two extremes, where the receiving lawyer knows of the inadvertence of the disclosure before examining the documents and where the receiving lawyer does not know of the inadvertence before examining the documents. In these situations, there may be conflicting indications on the face of the document or in the overall context whether the disclosure was inadvertent or intentional. For instance, a letter meant for the sending lawyer's client might be put in an envelope addressed to the receiving lawyer or sent with a facsimile transmission sheet directed to the receiving lawyer, and the letter itself might be ambiguous whether it was meant for the receiving lawyer or the sending lawyer's client. *See, e.g.,* Philadelphia Bar Ass'n Op. 94-3. Whether the receiving lawyer "knows" of the inadvertence of the disclosure before examining the documents depends on the specific facts and circumstances in each case. D.C. Bar Ass'n Op. 256. For this purpose, knowledge "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Colo. RPC, Terminology.

By requiring the receiving lawyer at least to give notice to the sending lawyer, as a matter of legal ethics, the interests in privilege and confidentiality that are so essential to the administration of justice will be protected, because the sending lawyer will be able to take protective measures. Moreover, as the Utah State Bar concluded, this approach has the virtue of separating the legal merits regarding waiver from the ethical determination of what an attorney ought to do. Utah State Bar Op. 99-01.

In this regard, it should be noted that these issues of legal ethics are separate and distinct from the evidentiary issue of waiver of privilege or confidentiality. A substantial body of law exists in the field of evidence regarding the waiver of attorney-client privilege and work product protection by inadvertent production. *See, e.g., Alldread v. City of Granada*, 988 F.2d 1425 (5th Cir. 1993); *United States v. de la Jara*, 973 F.2d 746 (9th Cir. 1992); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329-30 (N.D.Cal. 1985); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997). *See generally, e.g.*, Section of Litigation, American Bar Association, *The Attorney-Client Privilege and the Work Product Doctrine* at 193-96 (3d ed. 1997).

Conclusion

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depend on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

In the situation where a party or a sending lawyer inadvertently discloses to an adverse party or an adverse party's lawyer documents that on their face appear to be privileged or confidential, the Committee concludes that the receiving lawyer, upon recognizing their privileged or confidential nature, has an ethical duty to notify the sending lawyer that he or she has the documents. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the documents, based on the substantive law of waiver.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. In this situation, as a

matter of legal ethics, the receiving lawyer also must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

NOTES

1. For example, this opinion does not address the ethical obligations of a lawyer who receives documents that are privileged or confidential from a non-party witness pursuant to a subpoena *duces tecum* in a civil or criminal action or proceeding. Instead, these obligations are addressed in Revised Formal Opinion 86 and Formal Opinion 102 of the Ethics Committee of the Colorado Bar Association.

Similarly, this opinion does not address the ethical obligations of a lawyer who purposefully obtains such documents from an adverse party directly or through his or her agent, such as the practice referred to colloquially as "dumpster diving" — that is, rifling through the garbage of an adverse party or an adverse party's lawyer in an effort to find documents that might be helpful to the rifling party's case. *See, e.g., McCafferty's, Inc. v. The Bank of Glen Burnie*, 179 F.R.D. 163 (D.Md. 1998); *Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D.Ill. 1981). *See generally* Solovy & Byman, "Federal Practice/Discovery: Fighting Those Who Dive Into Hi-Tech 'Dumpsters,'" *The National Law Journal* (Dec. 21, 1998).

In addition, this opinion does not address the ethical obligations of a lawyer who obtains such documents from his or her client.

2. Examples of such confidential documents may include those subject to the work product doctrine, *e.g.*, Fed. R. Civ. P. 26(b)(3); C.R.C.P. 26(b)(3); documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way, Fed. R. Civ. P. 26(c)(1), (4), (7); C.R.C.P. 26(c)(1), (4), (7); records of services to the mentally ill, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1)(a), C.R.S.; and reports of AIDS or HIV-related illness, § 25-4-1404(1), C.R.S. In contrast, for purposes of this opinion, "confidential" documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a civil action or proceeding, such as research, development or commercial information and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination). *See* CBA Formal Ethics Ops. 86 (revised 1998), 102 (1998).

3. The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure, in an effort to support a determination of waiver or to embarrass the sending lawyer. Although such practices are not prohibited as a matter of legal ethics, the Committee does not condone them.

APPENDIX B

ABA Model Rules of Professional Conduct

Rule 4.4. Respect for Rights of Third Persons

Amended, February 2002 and August 2012

ABA Model Rules of Professional Conduct, 2002

Rule 4.4. Respect for Rights of Third Persons.

As Amended, February 2002

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4

ABA Model Rules of Professional Conduct, 2012

Rule 4.4. Respect for Rights of Third Persons.

As Amended, August 2012

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

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

APPENDIX C

Colorado Rules of Professional Conduct

Rule 4.4. Respect for Rights of Third Persons

Amended 2008

Colorado Rules of Professional Conduct

Rule 4.4. Respect for Rights of Third Persons.

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] In the circumstances of paragraph (b), some lawyers may choose to return an inadvertently sent document. Where a lawyer is not required by applicable law or paragraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

APPENDIX D

American Bankruptcy Institute

Summary of State Rules/Opinions on Inadvertent Distribution

Spring 2007

SUMMARY OF STATE RULES/OPINIONS ON INADVERTENT DISCLOSURE

Arizona:

ER 4.4 Respect for Rights of Others

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

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

Arkansas:

Rule 4.4 Respect for Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

California:

In *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App 4th 655, the Court of Appeal stated: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We, do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact." (*Id.* At p. 1174).

Delaware:

Rule 4.4 Respect for the Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Idaho:

Rule 4.4: Respect for Rights of Third Persons

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender

Indiana:

Rule 4.4 Respect for Rights of Third Persons

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Iowa:

Rule 32:4.4 Respect for the Rights of Third Persons

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Louisiana:

Rule 4.4 Respect for Rights of Third Persons

(b) A lawyer who receives a writing that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing was not intended for the receiving lawyer, shall refrain from examining the writing, promptly notify the sending lawyer, and return the writing.

Maryland:

Rule 4.4 Respect for Rights of Third Persons

(b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonable should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

Mississippi:

Rule 4.4 Respect for Rights of Third Persons

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Montana:

Rule 4.4 Respect for Rights of Third Persons

(b) A lawyer who receives a writing and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Nebraska:

Rule 4.4 Respect for the Rights of Third Persons

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

New Jersey:

RPC 4.4 Respect for Rights of Third Persons

(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

North Carolina:

Rule 4.4 Respect for the Rights of Third Persons

(b) A lawyer who receives a writing and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Ohio:

Rule 4.4: Respect for Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document was inadvertently sent shall promptly notify the sender.

Oregon:

Rule 4.4 Respect for Rights of Third Persons; Inadvertently Sent Documents

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Pennsylvania:

Rule 4.4 Respect for Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

South Carolina:

Rule 4.4 Respect for Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

South Dakota:

Rule 4.4 Respect for the Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender, and or sender's lawyer if sender is represented.

Utah:

Rule 4.4 Respect for the Rights of Third Persons

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

(b) A lawyer who receives a document relating to the representation of the lawyer=s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.