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The Legal Ethics of Metadata: Accidental Discovery of Inadvertently Sent Metadata and The Ethics of Taking Advantage of Others' Mistakes

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ABSTRACT[+]

In an effort to explore the potential threats that technology creates within the facets of the legal professions, the present article touches upon the ethical obligations of a lawyer receiving metadata inadvertently sent, in a non-discovery context. This analysis emphasizes the ethical pitfalls of the handling of metadata that is discovered by the recipient, without taking deliberate active steps to uncover metadata through mining. Although the present investigation builds on the current U.S. regulatory framework, in particular the American Bar Association (ABA) Rules of Professional Conduct (Model Rules) and on the opinions of the different state bars' ethics commissions, the ethical considerations advanced herein and the further issues raised can be transposed in other jurisdictional arenas, overcoming a narrow normative positivism, and identifying overarching ethical issues that call for further reflection, rather than universal responses.

[+] For comments, criticism, and constructive engagement, I am grateful to Professor Andrew L. Kaufman, Charles Stebbins Fairchild Professor of Law at Harvard Law School.

Table of Contents

I. FRAMING ETHICAL DILEMMAS FOR TECH-SAVVY AND LUDDITE LAWYERS

"One should not ask what . . . can be done with technology, rather what technology has done, is doing, and will do to us, even before we can do anything about it."

— Günther Anders[1]

[1] Over the past two decades, the near-constant use of sophisticated technological tools has become an essential and indispensable aspect of the practice of law, offering flexibility and convenience, and generating time and cost efficiencies.[2] Since clients expect their counsel to take full advantage of opportunities to enhance their representation, and despite the enduring myth of the Luddite lawyer,[3] savvy attorneys are fully aware that they must keep up with ever-evolving legal technologies to stay competitive in a crowded marketplace.

[2] With increased globalization and exponential growth in the creation, collection, use, and retention of electronic data, the challenges to all lawyers, especially those who may not have technology backgrounds or a

[1] GÜNTHER ANDERS, L'UOMO È ANTIQUATO, LIBRO II: SULLA DISTRUZIONE DELLA VITA NELL'EPOCA DELLA SECONDA RIVOLUZIONE INDUSTRIALE 254 (Bollati Boringhieri ed., Riccardo Tremolada trans. 2003).

[2] *See* Florence Fermanis, *6 Ways Technology Is Changing Law*, MEDIUM (Nov. 29, 2017), https://medium.com/groklearning/6-ways-technology-is-changing-law-6cc3f386754c [https://perma.cc/2HRL-G5W7] (describing how technology has expedited low-level legal work and decision-making).

[3] *See, e.g.*, *Saturday Night Live: Unfrozen Caveman Lawyer* (NBC television broadcast 1991) ("Sometimes when I get a message on my faxmachine [sic], I wonder: 'Did little demons get inside and type it?' I don't know! My primitive mind can't grasp these concepts."); *see also Unfrozen Caveman Lawyer*, SNL TRANSCRIPTS TONIGHT (Oct. 8, 2018), https://snltranscripts.jt.org/91/91gcaveman.phtml [https://perma.cc/85VT-N956] (providing the written transcript for the Saturday Night Live episode, *Unfrozen Caveman Lawyer*).

natural aptitude for the mechanics of these innovations, are multiplying with spectacular speed. Nevertheless, many attorneys are either blissfully unaware of the power and potential danger associated with the tools they now find themselves using on a daily basis, or they are willfully avoiding a confrontation with reality.[4] For lawyers, technological knowhow is no longer just a desirable skill: it now poses complex and novel ethical conundrums for lawyers already subject to a web of professional duties concerning competence and confidentiality. Yet, whereas competent client representation demands a minimum level of technological proficiency, many lawyers come up short with respect to this fundamental component of their professional responsibilities.[5] This ever-evolving scenario should not correspond with a lessening of legal ethics, and lawyers must always be thoughtful not to overlook the ethical dangers that technological advancements present. One of these dangers is the use of metadata by lawyers receiving electronic documents.

[3] Metadata, or data about data,[6] is usually defined as electronically stored information that describes the "history, tracking, or management of an electronic document."[7] It is incorporated in electronic documents, often

[4] *See* Mark A. Cohen, *Lawyers and Technology: Frenemies or Collaborators?*, FORBES (Jan. 15, 2018, 5:56 AM), https://www.forbes.com/sites/markcohen1/2018/01/15/lawyers-and-technology-frenemies-or-collaborators/#443d6a0d22f1 [https://perma.cc/6KZ9-VX4E] (describing the "curious ambivalence" many lawyers have towards technology).

[5] *See* Victoria Hudgins, *States Require Lawyers to Have Tech Competency, but Observers See Some Struggling*, LEGALTECH NEWS (Oct. 25, 2018, 12:00 PM), https://www.law.com/legaltechnews/2018/10/25/states-require-lawyers-to-have-tech-competency-but-observers-see-some-struggling/ (last visited Apr. 11, 2019) ("…32 states…officially require tech competency of its lawyers. The trend nationwide, however, is one that observers said some lawyers aren't prepared for.").

[6] *See* David Hricik, *I Can Tell When You're Telling Lies: Ethics and Embedded Confidential Information*, 30 J. LEGAL PROF. 78, 80 (2006).

[7] Aguilar v. Immigration & Customs Enf't Div., 255 F.R.D. 350, 354 (S.D.N.Y. 2008) (quoting Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005)).

in a way that is not immediately perceptible to the recipient of a final version of the document, though it is recorded and stored regardless of whether the user opts to view it.[8] Every lawyer who has ever sent documents to opposing counsel electronically has likely also inadvertently provided the recipient with metadata.[9] Virtually every single electronic document has metadata, which can sometimes reveal a wide range of crucial information.[10] For instance, the metadata can reveal the file's name; the name of the original author of the document; the content, location, format, type, and size of that document; all changes and who made those changes; the date the document was created and edited; notes or comments to the document that do not

[8] *See* Elizabeth W. King, *The Ethics of Mining for Metadata Outside of Formal Discovery*, 113 PENN ST. L. REV. 801, 805–07 (2009). Metadata can be catered into two principal classes: (a) system metadata, comprising information on a computer's hard drive or memory, but not embedded within a document. For instance, data about the location and size of a file on a computer; and (b) application metadata, that is, information embedded in a file that is not immediately visible to the viewer, such as file designation, create and edit dates, authorship, comments, and edit history. *See* Michelle K. Chu, *The Use of Non-Confidential and Limited Confidential Information Obtained by Metadata Mining Outside the Context of Discovery Should Be Ethically Permissible*, 16 PITT. J. TECH. L. & POL'Y 6, 7–8 (2015). Another article primarily analyzes application metadata as it represents the category of metadata that is more commonly exchanged between lawyers (documents created by word processing programs, spreadsheets, and the like) and that lawyers are most anxious about. *See* Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 7–8 (2007); *see also* Daniel Harris Brean, *Foreword*, 16 PITT. J. TECH. L. & POL'Y 1, 4 (2015).

[9] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS'N 2018). According to a 2015 report, "attorneys on average were creating or receiving more than 70 documents every day […] includ[ing] emails, email attachments, Word documents, Excel spreadsheets, PDFs, client records, opposing counsel records, etc. That's more than 26,000 documents a year!" *Surprising Statistics About Lawyer Information Overload*, METAJURE (Apr. 25, 2016), https://metajure.com/surprising-statistics-lawyer-information-overload/ [https://perma.cc/FY5H-JBG5].

[10] *See* Favro, *supra* note 8, at 45.

appear in the final version; and who has permission to read or edit it.[11] Embedded metadata can also include formulas and hidden columns in spreadsheets, track changes or comments in a word processing file, or notes in a presentation file.[12] Metadata, precisely because it is to an extent concealed and private, presents remarkable and distinctive issues at the crossroads of data security, privacy, and ethics.

[4] Given the widespread use of technology in law practice, lawyers are turning more frequently to word-processing programs that allow proactive removal or *scrubbing* of metadata.[13] Although a transmitting lawyer has tools at her disposal that can reduce the amount of metadata embedded in a document she is transmitting, those tools still may not delete all metadata.[14] In parallel, another phenomenon has emerged, generally referred to as *mining*, which describes the process by which attorneys "intentionally and actively search for data hidden within a document,"[15] with or without the sender's permission.[16] Failure on the sending lawyer's end to remove edited or deleted text that may still be embedded in the electronic code of the document may disclose significant information as to the contents of

[11] *See id.* at 4 n.11, 7–10; *see also* The Sedona Conference, *The Sedona Conference Commentary on Ethics & Metadata*, 14 SEDONA CONF. J. 169, 173, 173 n.3 (2013) [hereinafter *Sedona Conference*].

[12] *See* Favro, *supra* note 8, at 10; *see also* King, *supra* note 8, at 805–07; *Sedona Conference*, *supra* note 11, at 173 n.3.

[13] *See* King, *supra* note 8, at 822, 829.

[14] *See id.* at 832.

[15] Bradley H. Leiber, *Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata*, 21 GEO. J. LEGAL ETHICS 893, 897 (2008).

[16] *See* Andrew M. Perlman, *The Legal Ethics of Metadata Mining*, 43 AKRON L. REV. 1, 3 (2015).

previous edits such as negotiation tactics, abandoned strategies, claims, interests, sensitive figures, and demands.[17]

[5] Metadata poses a multitude of ethical problems unless properly handled, especially when it contains information that is relevant or considered confidential or privileged.[18] It is easy to imagine a hypothetical scenario where several lawyers work on a draft of a contract, adding notes, comments, mark-up, and generally editing the text and creating various versions of the same document. During this process, it is quite common to insert into the document some relevant information concerning the legal tactic and/or strategy to adopt, the client's bottom-line settlement amount, or even confidential exchanges between the lawyers and their clients. When the final version of the contract is eventually transferred electronically to the adversary's lawyer, the latter might be able to search and access metadata information. Potentially, this could comprise all of the comments and tracked changes if they are incorporated in the original document. Additionally, the use of track changes can allow a user to access the text of another document that the author relied on as a template.

[6] If these circumstances arise, metadata proffers ethical issues both for the sending and the receiving lawyer. However, while the Federal Rules of Civil Procedure (FRCP) offer some indication on how to treat inadvertent disclosures of confidential information in documents exchanged during discovery, no guidance is provided to lawyers who voluntarily exchange documents outside the context of discovery.[19] Nonetheless, metadata

[17] *See* Chu, *supra* note 8, at 8–9; *see also* Tomas J. Garcia & Shane T. Tela, *Jurisdictional Discord in Applying Ethics Guidelines to Inadvertently Transmitted Metadata*, 23 GEO. J. LEGAL ETHICS 585, 588 (2010) (provides examples of the types of crucial information that can be revealed when authors fail to wipe metadata correctly).

[18] *See* Chu, *supra* note 8, at 588–89.

[19] *See* FED. R. CIV. P. 34(a) (2006); FED. R. CIV. P. 26(b)(5)(B). The 2006 revisions to the FRCP acknowledged metadata, although without explicitly mentioning it. Rule 34(a) formed a new category of discoverable material, electronically stored information ("ESI"). It follows that that electronic information, such as metadata, may be discovered

implicates several of the American Bar Association (ABA) Rules of Professional Conduct (Model Rules),[20] which states rely upon in order to draft their own ethical rules of professional conduct.[21] Although the Model Rules do not overtly reference metadata, a number of provisions offer guidance for how a lawyer dealing with metadata should shape her conduct to be compliant with her legal ethics.[22] Ethical implications of metadata are significant as they encroach on the lawyer's duty of diligence, demanding that lawyers must "act with reasonable diligence and promptness in representing a client."[23] Moreover, a lawyer must be devoted and dedicated to the client's interests and must zealously represent those interests.[24]

[7] The sending lawyer,[25] by failing to make certain that the document she electronically transmitted to the opposing counsel did not include relevant, confidential, and privileged information embedded in metadata, may have effectively fallen short in her efforts to preserve client confidence

during discovery. *See* FED. R. CIV. P. 34(a)(1)(A). Commentators have confirmed that although the revised FRCP do not explicitly address metadata mining, there is an assumption that mining is allowed within the context of discovery because of the likely significance of the metadata and because ESI, comprising metadata, is discoverable. *See* King, *supra* note 8, at 811–12; *see also* Chu, *supra* note 8, at 10–11 (discussing how the FRCP revisions contemplate the protection of metadata).

[20] *See* Crystal Thorpe, Note, *Metadata: The Dangers of Metadata Compel Issuing Ethical Duties to "Scrub" and Prohibit the "Mining" of Metadata*, 84 N.D. L. REV. 257, 269–70 (2008).

[21] *See id.* at 270.

[22] *See id.*

[23] MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2018).

[24] *See id.* r. 1.3 cmt. 1.

[25] The position of the receiving lawyer will be analyzed in the next section. *See infra* part II.

and disclosed privileged information.[26] This implicates the sending attorney's duties of confidentiality and competence.[27]

[8] On the one side, pursuant to Model Rule 1.6, there exists a general duty of confidentiality not to reveal information related to the client's representation.[28] Inadvertent disclosures comprise not only the confidential information itself, but also information that could realistically lead to the discovery of the confidential information by a third party. Consequently, on the part of the sending attorney, Rule 1.6 involves a duty to remove metadata from documents connected to client representation in order to preserve confidentiality.

[9] Conversely, pursuant to Model Rule 1.1, lawyers also have a duty to give competent representation to a client, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[29] Traditionally, competence mainly concerned a lawyer's knowledge of the substantive law, along with her experience to adequately represent a client.[30] However, Comment 8 to Model Rule 1.1 goes further. The ABA's Model Rules were modified in 2012 to confirm that a lawyer's duty of competence requires keeping "abreast of changes in the law and its practice," which includes knowing "the benefits and risks and associated with relevant technology."[31] As of this writing, thirty-six

[26] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(c) (AM. BAR ASS'N 2018).

[27] *See id.* r. 1.6 cmt. 18.

[28] *See id.* r. 1.6.

[29] *Id.* r. 1.1.

[30] *See, e.g.*, San Diego Cty. Bar Ass'n, Formal Op. 2012-1 (2012) (discussing which conditions, consistent with the California Rules of Professional Conduct and the State Bar Act, an attorney must meet to represent a client in litigation when that client regularly transmits and stores information digitally, including by e-mail).

[31] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2018). While state ethics opinions had previously addressed various technology issues, the Model

states have amended their rules of ethical conduct to include "technology competence," adopting the ABA's 2012 amendments to Model Rule 1.1.[32] This rule precludes a lawyer in those jurisdictions from pleading ignorance of new technologies or the risks associated with technology,[33] and requires them to have at least "a basic understanding of the technologies they use."[34]

Rules had not, and the 2012 amendments to the Model Rules "reflect[ed] technology's growing importance to the delivery of legal and law-related services." Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 THE PROF'L LAW., no. 4, 2014, at 1, 1.

[32] *See* Robert Ambrogi, *Tech Competence*, LAWSITES, https://www.lawsitesblog.com/tech-competence [https://perma.cdc/7C8L-GXX7]. The specific language used in each state varies, but all are derived from the ABA's 2012 change to include technological competence as part of its Model Rule 1.1, which reads: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." MODEL RULES OF PROF'L CONDUCT r. 1.1. cmt. 8 (AM. BAR ASS'N 2018).

[33]Although the obligation to be aware of the "benefits and risks" of relevant technology under Model Rule 1.1 is a vague one, the Chief Reporter of the ABA Commission on Ethics 20/20 explained that the standard had to be because "a competent lawyer's skillset needs to evolve along with technology itself," and "the specific skills lawyers will need in the decades ahead are difficult to imagine." Perlman, *supra* note 31, at 2.

[34] *See*, *e.g.*, NHBA Ethics Comm., Advisory Op. 2012-13/4 (2013) ("Competent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes."). While attorneys are not required to "develop a mastery of the security features and deficiencies" of every available technology, "[T]he duties of confidentiality and competence . . . do require a basic understanding of the electronic protections afforded by the technology they use in their practice. If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant." Cal. Bar Standing Comm. on Prof'l Resp. & Conduct, Formal Op. 2010-179 (2010). On the limits of "technological competence," *see* a*lso* Crystal Thorpe, *supra* note 20, at 272.

[10] It follows that the combination of the duties of confidentiality and competence necessitate that lawyers be well-informed about the sending and disclosure of metadata, to take reasonable protection measures to maintain the confidentiality of information contained in metadata, and "to safeguard information relating to the representation of a client against . . . inadvertent or unauthorized disclosure . . . ."[35] To this end, several technical tools are available, such as software that allows users to clean metadata from files and software that may be incorporated into email programs to prevent documents from being sent outside the network without first passing through a scrubbing filter.[36] Reliance on these tools, nonetheless, may not be enough as the complexity and intricacy of questions related to the making and handling of metadata continue advancing.

II. RELEVANT ETHICAL RULES AFFECTING THE RECEIVING LAWYER

"It is, as a rule, far more important how men pursue their occupation than what the occupation is which they select."

– Louis Brandeis[37]

[11] The present article focuses, in the non-discovery context, on the ethical obligations of the receiving lawyer for handling metadata, an aspect that has received far less attention than the ethical obligations of the sending lawyer. In doing so, two conceptually distinguished issues come into play:

[35] *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 18 (AM. BAR ASS'N 2018).

[36] *See* Dennis O'Reilly, *Remove Metadata from Office Files, PDFs, and Images*, CNET (May 16, 2014, 4:55 PM), https://www.cnet.com/how-to/remove-metadata-from-office-files-pdfs-and-images/ [https://perma.cc/H7L8-YA64?type=image].

[37] Louis Brandeis, The Opportunity in the Law, Address at the Phillips Brooks House before the Harvard Ethical Society (May 4, 1905) (transcript available in the Louis D. Brandeis School of Law Library).

mining and taking advantage of data inadvertently discovered.[38] There have been numerous opinions and commentators concerning such mining,[39] and we shall briefly analyze the rationale behind the different approaches in order to see which lessons could be derived for the related, yet different, issue of inadvertent discovery of metadata. Despite the fact that the latter issue has not been subject to thorough examination, it is far from a mere theoretical exercise. The paper concludes that mining should be prohibited and that even taking advantage of inadvertent discovery of metadata, without mining, is not ethical.

A. ABA Rules

[12] From the receiving lawyer's perspective, a few ABA rules come into play. Model Rule 8.4 is particularly pertinent as it implicates professional misconduct when the conduct involves "dishonesty, fraud, deceit, or misrepresentation"[40] Some commentators believe that metadata mining falls within this definition of professional misconduct because it amounts to dishonesty or deceit in a case where the receiving lawyer's metadata mining, in an attempt to gain an advantage for their clients, aims to search for information that the sending lawyer(s) inadvertently left embedded in the document.[41]

[38] *See* Lawyers Prof'l Resp. Board, Op. 22, *A Lawyer's Ethical Obligations Regarding Metadata* (2010).

[39] *See*, *e.g.*, Chu, *supra* note 8, at 13 (discussing metadata mining and its ethical implications for lawyers); Katherine W. Dandy, *Metadata: What Lawyers Need To Know*, 41 WESTCHESTER B. J. 7, 9–10 (2016) (discussing different states' approaches to metadata mining); Justin Fong, *Bringing Guns to a Gun Fight: Why the Adversarial System is Best Served by a Policy Compelling Attorneys to Ethically Mine for Metadata*, 7 WASH. U. JURIS. REV. 107, 111 (2014) (advocating that lawyers should be compelled to mine for metadata).

[40] MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

[41] *See* Thorpe, *supra* note 20, at 272–73.

[13] Besides Model Rule 8.4, Model Rule 4.4(b) is "the most closely applicable rule" to the situation involving disclosure of information in metadata,[42] stating that "[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."[43] In other words, Rule 4.4(b), although not expressly citing metadata disclosure and mining, imposes an obligation of notice on the receiving lawyer in the event of an inadvertent disclosure in order to give the sending lawyer the opportunity to take protective measures,[44] while not requiring the receiving lawyer to return the document.[45]

[14] However, Model Rule 4.4(b) raises some questions. First, the Rule deals with the issue of inadvertent disclosure as one of ethics,[46] without addressing whether the information inadvertently disclosed retains or loses its privileged status under the law of evidence.[47] Accordingly, even if the law of evidence finds that the inadvertent disclosure waives the privilege, and civil rules of procedure do not require the lawyer to return that document,[48] the Model Rules specify that the receiving lawyer is still

[42] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006).

[43] MODEL RULES OF PROF'L CONDUCT r. 4.4(b) (AM. BAR ASS'N 2018). It should be borne in mind that if an attorney engages in conduct involving dishonesty or deceit, or engages in conduct prejudicial to the administration of justice, the lawyer is engaging in professional misconduct and may be subject to discipline. *See id.* r. 8.4(c)–(d).

[44] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS'N 2018).

[45] *See id.*

[46] *See id.* 4.4(b).

[47] *See id.* r. 4.4 cmt. 2.

[48] Note that, pursuant to Rule 26(b)(5)(B), "[i]f information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the

subject to discipline if she fails to comply with Model Rule 4.4.[49] Comment 3 to Model Rule 4.4 states that "the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer."[50]

[15] The reference to "professional judgment" further shows how the ABA addresses this situation as one of legal ethics, not of the law of evidence. Indeed, Model Rule 4.4 explicitly provides that "[i]f 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."[51] Nonetheless, a partial inconsistency seems to arise as the question of whether the information accidentally turned over retains or loses its privileged status pursuant to the law of evidence remains a fundamental issue. "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."[52]

[16] Second, the Rule does not address the issue of whether the receiving lawyer has a duty to review and use what she knows, or suspects, is relevant information in order to represent her client competently and diligently, or,

basis for it. After being notified, a party must 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." FED. R. CIV. P. 26(b)(5)(B).

[49] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4 cmt. 2 (AM. BAR ASS'N 2018).

[50] *Id.* r. 4.4 cmt. 3.

[51] *Id.* r. 4.4 cmt. 2.

[52] *Id.*

conversely, should refrain from searching (*i.e.*—mining), reviewing, and using this information. Arguably, the fiduciary obligation to her own client is one of several ethical duties to which the receiving lawyer is subject.[53] However, we should evaluate how to square the lawyer's fiduciary duty and the duty to fairness to the other side that derives from the very nature of professionalism in the practice of law.[54] If that is the case, then it seems reasonable to suggest that, even in circumstances where an inadvertent disclosure waives the attorney-client privilege, ethics rules should not necessarily permit the receiving lawyer to benefit from the use of the document for a number of reasons, including professionalism and morality. Accordingly, the receiving lawyer should delete any document obtained by means of inadvertent disclosure without using the information contained within.

B. Opinions of Bar Ethics Commissions

[17] A number of states have developed ethics opinions dealing with metadata across the country.[55] Some opinions have addressed the ethical

[53] *See*, *e.g.*, Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179, 179–80 (2006) (discussing a lawyer's assumed fiduciary obligations).

[54] *See id.* at 180–83. On professionalism, *see generally* Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES 230 (Robert L. Nelson et al. eds., 1992) (arguing in favor of institutional professionalism). For a critique of deprofessionalization, *see* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73–81 (1980).

[55] *See* David Hrick & Chase Edward Scott, *Metadata: Ethical Obligations of the Witting and Unwitting Recipient*, FINDLAW, https://technology.findlaw.com/electronic-discovery/metadata-ethical-obligations-of-the-witting-and-unwitting.html [https://perma.cc/425F-5FAM]. It is noteworthy that alongside the plethora of bar association ethics opinions on the use of metadata, there is a comprehensive body of law dealing with inadvertent waiver of the attorney-client privilege. *See* W. Bradley Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, 30 CAN. J.L. & JURIS. 443, 455 (2017). This situation can arise, for instance, in the context of the discovery of mistaken inclusion of confidential documents in a shipment of produced documents. *See id.* A minority of jurisdictions treat disclosure

obligations of the sending lawyer, but the recipient's obligations are the subject of greater disagreement.[56] Although the ABA and bar ethics commissions have provided some guidance on this topic, no consensus has emerged, showing how challenging it is to find a solution to novel ethical issues while exemplifying how bar regulators differ over central ethical issues.[57] Indeed, contradictory views have emerged in terms of what is ethically permissible and prohibited among different jurisdictions.[58] Moreover, although these opinions offer some guidance concerning mining, they are often silent as to the problem of the accidental discovery of metadata, occurring when the receiving attorney may not be actively mining for metadata but may still discover some.[59]

[18] Overall, the following main approaches are notable:

a. As of 2001, the New York Bar Association maintains that mining by the receiving attorney constitutes an intolerable attempt to infringe the confidentiality between the sending lawyer and his

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of confidential communications as being per se evidence that the disclosing party failed to use reasonable care to protect them. *See id.* The majority, however, adopt a rule-of-reason analysis and consider the extent of precautions adopted in light of the relevance of the documents at issue. *See id.* As noted, however, "waiver of the privilege is one thing and use of confidential information quite another" and "most authorities do not collapse the duties of the receiving lawyer in this case into the analysis of privilege waiver." *Id.*

[56] *See* Hrick, *supra* note 55.

[57] *Compare* Jessica M. Walker, *What's a Little Metadata Mining Between Colleagues?*, LEGALTECH NEWS (Apr. 21, 2006, 12:00 AM), https://www.law.com/almID/900005451866/ [https://perma.cc/WWV3-ZKL3], *with* ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 06-442 (2006) (holding that lawyers who receive electronic documents are free to look for and use information hidden in metadata, even if the documents were provided by an opposing attorney).

[58] *See supra* text accompanying note 57.

[59] *See* Leiber, *supra* note 15, at 901–02; Ariz. St. Bar Ass'n Comm. on Ethics & Prof'l Resp., Formal Op. 07-03 (2007).

client.[60] This view leads to the conclusion that mining of metadata is ethically impermissible. Even before the ABA tackled the issue of metadata, the bar held that mining for metadata "constitutes an impermissible intrusion on the attorney-client relationship,"[61] emphasizing the "strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship,"[62] and concluding that guarding confidentiality was a reasonable limitation on the "uncontrolled advocacy" of zealous representation.[63] In particular, mining was found to violate the Disciplinary Rule 1-102(a)(4), which prohibits a lawyer from "[e]ngaging in conduct involving dishonesty, fraud, deceit, or misrepresentation"[64] and is identical to Model Rule 8.4(c).[65] More recently, other state bars, including Alabama[66] and Maine,[67] have

[60] *See* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 749 (2001).

[61] *Id.*

[62] *Id.*

[63] *See id.*

[64] *See id*; N.Y. LAW. CODE OF PROF'L RESPONSIBILITY DR 1-102(a)(4) (2002).

[65] *Compare* DR 1-102(a)(4), *with* MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

[66] *See generally* Ala. St. B. Off. of the Gen. Couns., Formal Op. 2007-02 (2007) (holding that "the receiving lawyer also has an obligation to refrain from mining an electronic document" because this conduct would be deceitful or dishonest, "constitut[ing] a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party").

[67] *See generally* Me. Prof'l Ethics Comm'n, Formal Op. 196 (2008) (holding that mining for metadata is unethical because it is dishonest, but also concluded that it is prejudicial to the administration of justice because it "strikes at the foundational principles that protect attorney-client confidences").

addressed the issues along the same line, relying on their states' versions of Model Rule 8.4(c).[68]

However, when it comes to addressing issues related to inadvertent disclosure of metadata, opinions exclusively relying on Model Rule 8.4(c) fail to adequately address the situation involving inadvertent discovery of metadata where a receiving attorney accidentally discovered the metadata and was not engaging in conduct that could be considered dishonest or deceitful.[69] The failure to provide adequate guidance in these opinions results in a lacuna in the protection for confidential information that is inadvertently disclosed in metadata and accidentally discovered.[70]

b. In jurisdictions that have not expressly addressed the issue of metadata, the rules on inadvertent disclosure of information provide a point of reference.[71] In this regard, the following macro jurisdictional categories can be identified: (i) jurisdictions that, based on Model Rule 4.4(b),[72] inflict an obligation on the receiving attorney to notify the sender of the inadvertently disclosed information,[73] while not setting forth an obligation to abstain from reviewing or use the inadvertently disclosed data, nor imposing

[68] *See* Thorpe, *supra* note 20, at 278, 280.

[69] *See* Leiber, *supra* note 15, at 901; *see also* St. B. Ariz. Ethics Comm., Formal Op. 07-03 (2007).

[70] *See* Leiber, *supra* note 15, at 910–11.

[71] These opinions do not provide much guidance to an attorney considering engaging in active mining for metadata. Interpreters are left to gauge whether their jurisdiction is likely to qualify such actions dishonest and deceitful and, as a consequence, in violation of Model Rule 8.4(c) or its equivalent.

[72] *See* Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 783 (2006).

[73] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(b) (AM. BAR ASS'N 2018).

obligations to stop reviewing the document or to return it;[74] (ii) jurisdictions that require the receiving attorney to notify the sender, stop reviewing the document, and follow the sender's instructions on disposition of the document;[75] (iii) jurisdictions where the receiving attorney's response to receiving the information is left to her discretion and assessment;[76] and (iv) jurisdictions adopting a *sui generis* approach, either requiring that the receiving attorney must reject the sender's request to return the document to maximize the zealous representation of her client[77] or leaving the decision of whether to mine up to the individual attorney, as well as identifying factors to be taken into account in this assessment, including reciprocity and professional courtesy.[78]

c. In an effort to reach a middle ground on the subject,[79] Washington D.C. seems to allow metadata mining only in certain circumstances, requiring the receiving attorney to notify the sender and to comply with the sender's instructions "when a receiving lawyer has actual knowledge that the sender inadvertently provided metadata in an electronic document . . . ."[80] This opinion does not address the issue

[74] *See*, *e.g.*, ARIZ. BAR ASS'N, RULES OF PROF'L CONDUCT ER. 4.4(b) (2019); LA. BAR ASS'N, RULES OF PROF'L CONDUCT r. 4.4(b) (2012); N.J. BAR ASS'N, RULES OF PROF'L CONDUCT RPC. 4.4(b) (2016).

[75] S*ee* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440 (2006) (withdrawing Formal Opinion 94-382, which required a receiving attorney to refrain from using inadvertently disclosed materials).

[76] *See* Perlman, *supra* note 72, at 783.

[77] *See* Mass. Bar Ass'n, Formal Op. 99-4 (1999).

[78] *See* Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2007-500 (2007).

[79] *See* Leiber, *supra* note 15, at 905.

[80] D.C. Bar Legal Ethics Comm., Formal Op. 341 (2007).

of whether active mining for metadata violates Model Rule 8.4(c) by involving deceit or dishonesty. However, it raises the question of when a receiving attorney will have actual knowledge that material was sent inadvertently and provides that such knowledge occurs "when a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included."[81] Nonetheless, if it is ambiguous whether metadata incorporates confidential information, where the receiving lawyer does not have actual knowledge that the metadata was inadvertently sent, the receiving lawyer may keep reviewing the metadata.[82]

d. Finally, the ABA holds that, absent a clear ban on metadata mining in the rules of professional conduct, the receiving attorney has a duty to zealously represent her clients.[83] In a 2006 opinion, the ABA relied on Model Rule 4.4(b),[84] holding that mining is not ethically proscribed and would not violate Model Rule 8.4(c), prohibiting deceit or dishonesty, or 8.4(d), prohibiting conduct prejudicial to the administration of justice.[85] Interestingly, the opinion addresses the case of a receiving attorney accidentally discovering the metadata without actively mining for it. However, it laconically concluded that, even if the disclosure of metadata were considered inadvertent, "Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information," merely stating that a receiving lawyer

[81] *Id.*

[82] *See* Leiber, *supra* note 15, at 906.

[83] *See* MODEL RULES OF PROF'L CONDUCT Preamble & Scope ¶ 9 (AM. BAR ASS'N 2018).

[84] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006).

[85] *See id.*

> must promptly notify the sending lawyer upon discovery of inadvertent transmission of metadata.[86]

[19] Given the heterogeneity and fragmentation of jurisdictional approaches, one might argue that the attorney should look at the solutions adopted by the ABA in order to find guidance in these troubled waters. However, the aforementioned solution brought forward by the ABA is perplexing as the topic of dishonesty is totally immaterial for the ABA.[87] This solution contrasts with the approach adopted by many states that apply Model Rule 8.4(c) as a "catch-all" instrument to determine if reviewing embedded data is dishonest,[88] since, often, actions that violate subsection (c) also violate other rules.[89] Conversely, the ABA held that "because Model Rule 4.4(b) addresses inadvertent transmission, the issue of dishonesty [is] irrelevant."[90] At the same time, the solution of the ABA is far from being clear. On one hand, it holds that whether the recipient attorney knows, or should know, that the sending attorney's delivery of a document containing metadata was inadvertently disclosed is a subject beyond the scope of the opinion and rules.[91] On the other hand, it acknowledges that "metadata can sometimes reveal such critical information as 'who knew what when,' or

[86] *Id.*

[87] *See generally* W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J. L. & HUMAN. 1 (2016) (discussing the inconsistent ethical expectations concerning honesty within the legal profession and the ABA).

[88] *See*, *e.g.*, *id.* at 12.

[89] *See* David Hricik, *Mining for Embedded Data: Is It Ethical to Take Intentional Advantage of Other People's Failures?*, 8 N.C. J.L. & TECH. 231, 243 (2007).

[90] *Id.*

[91] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006).

negotiating strategy and positions."[92] What results is a clear catch-22 in ethical obligations: it suggests that it is not dishonest, fraudulent, or deceitful to take deliberate actions to "mine" metadata known to be confidential.[93] Thus, arguably, the ABA is de facto supporting attorneys taking actions that would overtly violate Model Rule 8.4.

[20] Moreover, the ABA seems to suggest that metadata is not always inadvertent, thus "open[ing] the door" to "mining" metadata.[94] It is not clear why an attorney would intentionally send out a document containing confidential metadata. As to how a lawyer is expected to know that a document or its embedded information has been inadvertently sent, Oregon State Bar, Formal Opinion No. 2011-187 (as revised in 2015) offers some guidance, suggesting a non-exhaustive list of factors to be taken into account: whether the document was sent in its native application or was converted to PDF; the nature of the information; how easily the data may be viewed (whether is it readily apparent on the face of the document, or hidden beneath several layers); and the standard of practice between lawyers generally and between the lawyers in a given situation.[95] For example, lawyers who are negotiating the terms of a contract or the terms of a settlement agreement commonly share marked-up drafts ("redline") with track changes readily visible.[96] The Legal Ethics Committee also argued that "[g]iven the sending lawyer's duty to exercise reasonable care in regards to metadata, the receiving lawyer could reasonably conclude that the metadata was intentionally left in."[97] On the other hand, a lawyer that

[92] J. Craig Williams, *The Importance of Deleting Metadata... and How to Do It*, 49 ORANGE CTY. LAW. 48, 48–49 (2007).

[93] *See* Hricik, *supra* note 89, at 247.

[94] *Id.* at 240.

[95] *See* Or. St. Bar, Formal Op. 2011-187 (Revised 2015).

[96] *See id.*

[97] *Id.*

has taken steps towards her duty of reasonable care and adopted "reasonable precautions to prevent the information from coming into the hands of unintended recipients,"[98] perhaps by "utilizing available methods of transforming the document into a nonmalleable form, such as converting it to a PDF or 'scrubbing' the metadata from the document prior to electronic transmittal,"[99] but transmits a document which includes a comment that appears to be made by the lawyer to his client, likely has inadvertently sent that piece of metadata. In that situation, there is a duty to notify the sender of the presence of metadata.[100]

[21] In any case, it seems reasonable that even in the scenario where an attorney is the recipient of a document containing confidential metadata but is unclear whether it occurred inadvertently,[101] an obligation to notify the sending attorney should be imposed. This would be in line with Model Rule 4.4(b), which prescribes the ethical responsibility that arises when one receives information that was inadvertently sent.[102] As a preliminary conclusion, considering the uncertainty around this issue and the different solutions brought forward, this paper contends that the ABA and individual states should hold that the transmission of metadata is either per se or presumptively accidental.

[22] Against this backdrop, it is undeniable that some factors support the option that allows for taking strategic advantage of the information contained in inadvertently disclosed electronic documents, by mining and using it. One might argue that the receiving lawyer, by not taking advantage of the mistakes made by the opposing counsel, has disregarded her fiduciary

[98] *Id.* at 3 n.4.

[99] *Id.* at 3 n.5.

[100] *See* Or. St. Bar, Formal Op. 2011-187 (Revised 2015).

[101] Hricik, *supra* note 6, at 96.

[102] *See id.* at 98.

duty to her own client, undermining the ethics of zealous advocacy.[103] Following this line of reasoning, taking advantage of the opposing counsel's inadvertent disclosure could be construed as an essential feature of the adversarial system in which, by pitting the parties against each other, each party does its best to secure the best deal for her clients, including taking advantage of any mistakes, or lack of knowledge, of the other side. Collegiality and professionalism towards the other lawyers should not outweigh a lawyer's duty to diligently serve a current client because lawyers must place the latter's interests above other potentially conflicting duties. Another argument that plausibly weighs in favor of the recipient's use of the document containing embedded information is that, under certain circumstances, it may include that concealed "smoking gun," often found in metadata,[104] which reveals the truth in the case. Under these circumstances, it could be argued that the supreme goal of truth-seeking would be underscored if the use of the metadata generates a greater likelihood of a truthful outcome than would ordinarily emerge in the course of litigation.

[23] Nonetheless, these arguments are not convincing. After all, the affirmative steps to view embedded metadata go well beyond the double-clicking required to open a file.[105] The deliberate search on which the mining recipient embarks to find metadata is hardly definable as anything other than dishonest.[106] Indeed, relying on an ethical duty of zealous representation to the recipient's client is not satisfactory: the

[103] *Cf.* Shannan E. Higgins, Note, *Ethical Rules of Lawyering: An Analysis of Role-based Reasoning from Zealous Advocacy to Purposivism*, 12 GEO. J. LEGAL ETHICS 639, 651 (1999) (discussing the zealous-advocate model and its relationship to third-party rights).

[104] *Cf.* Zubulake v. UBS Warburg, 217 F.R.D. 309, 311–12, 314–15 (S.D.N.Y. 2003) (illustrating how metadata can be used to find discoverable evidence).

[105] *See* Hricik, *supra* note 89, at 241.

[106] *See id.* at 247 ("The notion that a lawyer should be permitted to look for inadvertently transmitted embedded data and, thereby, intentionally take advantage of the accidental failure of a colleague to understand the inner workings of software is startling.").

majority of states have determined that client confidentiality is more important than the competing ethical obligations on the part of the receiving attorney and that of zealously representing a client.[107] There is a limit to the extent to which a lawyer may go 'all-out' for the client.[108]

[24] Unfortunately, there is no final word on the ethical facets of the inadvertent transmission of metadata.[109] However, despite the ABA's failure to impose such ethical obligations, the receiving attorney should be forbidden from purposely searching out and inspecting metadata received from the sending attorney.

III. MOVING BEYOND DEADLOCK: THE CASE FOR NOT TAKING ADVANTAGE OF OTHER'S MISTAKES

"[G]oing beyond what is legally required to what would be ethically admirable."

—Heidi Li Feldman[110]

[25] More subtle problems emerge where the data is discovered merely on the face of the document, given that not all metadata are invisible and need to be dug out of a document.[111] Indeed, leaving mining and the surrounding concerns aside, we should assess whether a lawyer who accidentally discovers metadata without actively engaging in mining should be ethically allowed to take advantage of this information. This paper

[107] *See* Hricik, *supra* note 89, at 237.

[108] *See id.* at 100.

[109] *See id.* at 247.

[110] Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 902 (1996).

[111] *See* Or. St. Bar, Formal Op. 2011-187 (Revised 2015) (discussing common practice of exchanging "redline," or marked-up, documents between lawyers).

contends that information which "appears on its face to be subject to the attorney-client privilege" or that appears to be confidential in nature, making it clear that it was inadvertently sent, should not be examined.[112] Rather, the receiving attorney should, at a minimum, immediately provide notice to the sending attorney and abide by instructions as to the handling of this inadvertently disclosed confidential information.[113] In other words, the legal system "should not let lawyers intentionally take advantage of other people's failures," and require them to notify the sending attorney upon receipt of such information.[114]

A. Professionalism and Morality

[26] A number of compelling factors favor the destruction or the return of the document to the sending lawyer—as opposed to a "take advantage of the mistake" approach suggested by the zealous advocacy principle.[115] The lawyer who receives inadvertently disclosed information should question whether she is entitled to benefit from the opposing counsel's error. In general, the quandary boils down to this: is it fair and consistent with the tenets of being a lawyer to exploit another's mistake?

[27] From the outset, an argument based on morality would answer in the negative.[116] Drawing connections to substantial law, scholarly literature has

[112] *See* Hricik, *supra* note 6, at 100 (quoting Sampson Fire Sales v. Oaks, 201 F.R.D. 351, 362 (M.D. Pa. 2001)).

[113] *See id.* This, however, does not solve all issues. *See infra* ¶¶ [44]–[45].

[114] *See* Hricik, *supra* note 89, at 247.

[115] *See* Perlman, *supra* note 72, at 798–806.

[116] On morality, *see* Judith Andre, *Role Morality as a Complex Instance of Ordinary Morality*, 28 AM. PHIL. Q. 73, 77 (1991); Arthur Isak Applbaum, *Are Lawyers Liars? The Argument of Redescription*, 4 LEGAL THEORY 63, 82 (1998); Alan Gewirth, *Professional Ethics: The Separatist Thesis*, 96 ETHICS 282, 300 (1986); Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 335 (1994); Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 ETHICS 619, 625 (1981).

pointed out that the law of mistakes as applied by courts has often involved a reasoned assessment of the fairness of the circumstances, thus incorporating common morality principles into analyses of substantive law issues.[117] Framed as such, morality arguably favors the party who has made the mistake.

[28] Another argument supporting the view that the receiving lawyer should not take advantage of the opposing counsel's mistake relates to professionalism, which extends to the collegiality among the members of its bar.[118] Professionalism includes "the full measure of the profession's aspiration and of society's legitimate expectations."[119] The professional

[117] *See* Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1272–74 (1999).

[118] Professionalism has been grounded by Anthony Kronman in the concept of the classical virtue of practical wisdom, consisting in the capacity to view the client's position sympathetically but also with detachment, which obviously requires a significant degree of independence from the client. According to this view, the lawyer is a loyal representative of clients, but she does not necessarily endorse the client's position and remains a public-spirited professional who acts to preserve the integrity of the framework of laws and legal institutions within which the interests of clients may be realized. *See* David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 358–59 (2017); *see also* Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns, in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 42, 45–46 (Deborah L. Rhode ed., 2000) (discussing the obligations of those within the legal-social framework); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 16–17, 32–33 (1988) (discussing how lawyers were pioneers of the idea of professional independence); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1168–69 (2005). Yet, some recent commentators have documented a plethora of societal and structural reasons why the customary conception of professionalism has shrunken, arguing that today's lawyers believe themselves to be permitted, and even required, to seek any advantage for clients that can be obtained through means that do not clearly violate applicable law. *See* Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 651–52 (2016).

[119] Walter E. Craig, *Ethical Responsibilities of the Individual Lawyer*, 17 ARK. L. REV. 288, 290 (1963).

obligations of lawyers are those responsibilities assumed, not on behalf of the client or even the court, but rather on behalf of society as a whole.[120] Thus, professionalism encompasses the obligations of the lawyer to society—more specifically, the fundamental tenets of democratic society that set professionalism apart from morality or ethics.[121] Professionalism directly relates to collegiality, which implicates the mutual respect among colleagues.[122] Arguably, an ethical duty to return the inadvertently disclosed document and to not take advantage of the metadata embedded therein would foster this interest in collegial relationships as well as advance the fiduciary duty to one's client, as "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.'"[123]

[29] Here is the impasse stemming from a conflict between competing values: on one side, the ethics of zealous representation and the ideal goal of truth seeking tip the balance in favor of a rule that would allow the recipient of the document containing metadata to take advantage of it.[124] On

[120] *See* Ben W. Heinemen, Jr. et al., *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARV. L. SCH. CTR. LEGAL PROF. 11–13 (2014), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf [https://perma.cc/YL2Z-4WUD].

[121] *See* Luther W. Youngdahl, Judge, U.S. Dist. Court for the D.C., The Lawyer's Responsibilities, Address at the University of Missouri School of Law Annual Banquet (Apr. 30, 1955), *in* 20 MO. L. REV. 307, 311 (1955) ("[the legal] profession is a branch of the public service rather than an ordinary business vocation . . . . The prime object of the profession should be the service it can render to humanity — reward of financial gain should be a subordinate consideration, and the lawyer with the proper conception of the profession need have no fear of financial reward.").

[122] *See* Andrew R. Herron, Comment, *Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure Is Another's Poison*, 44 U. MIAMI L. REV. 807, 808 (1990).

[123] State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999) (quoting Kirsch v. Duryea, 578 P.2d 935, 939 (Cal. 1978)).

[124] *See* Perlman, *supra* note 72, at 784, 788.

the other, morality, professionalism, and collegiality seem to cut the other way.[125]

[30] To break the deadlock formed by conflicting principles, lawyers should step back and inspect the issue through a wider lens in an effort to discover the fundamental problem being raised. One should bear in mind that in the ethics context, conundrums often entail a conflict between primary values. The real issue is that the lawyer, who is not impartial vis-à-vis her client's interest, is required to make an ethical choice among alternatives balancing both sides' contentions. Given her inherent partisanship, the lawyer is naturally prone to invoke only those arguments that buttress her client's position. In this case, we should not reiterate this mistake because such an approach would result in simply evading the ethical dilemma of what the attorney should do when facing professional duties that are, to a certain extent, conflicting.

B. Framing a Higher Standard

[31] In this vein, one should not be fully convinced by the argument that when the lawyer cannot identify a specific written ethical rule specifying conduct appropriate to a given situation, or where the rules are ambiguous or suggest several courses of conduct, the lawyer should conclude that she is implicitly allowed to pursue whatever action she sees fit to advance her client's interests, thus engaging in partisan lawyering. In this situation, lawyers should not be reluctant to embrace higher standards than those set forth in the ethical written rules, "going beyond what is legally required to what would be ethically admirable."[126] Lawyers in their practice should consider "more than just the pedigree of a norm,"[127] taking into account a

[125] *See id.* at 770, 778.

[126] Feldman, *supra* note 110, at 902.

[127] W. Bradley Wendel, *Legal Ethics as "Political Moralism" or the Morality of Politics*, 93 CORNELL L. REV. 1413, 1431 (2008).

"sense of appropriateness developed in the profession"[128] that recognizes certain moral principles as bearing on the proper resolution of legal disputes.[129]

[32] Indeed, it would be thoughtless and implausible to interpret written ethical rules as being exhaustive, capturing the plethora of factual circumstances in which ethical dilemmas may unfold. Accordingly, lawyers should be aware that these rules do not include the entire universe of ethical obligations they need to satisfy. This argument is supported by the Preamble to the Model Rules, which explicitly states:

> [m]any of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service . . . . The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.[130]

Hence, a lawyer's mission should not rely on every available means to further her client's interests, regardless of any ethical concerns. Such an approach, even when conflicting or vague ethical rules are in place and leaving a broad margin of discretionary judgment, should not be preferred,

[128] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 40 (Harv. U. Press 1978).

[129] *See id.* (describing the way, according to Hart, judges decide cases, but suggesting that it can be applied to lawyers as well).

[130] MODEL RULES OF PROF'L CONDUCT Preamble & Scope ¶¶ 7, 16 (AM. BAR ASS'N 2018).

as it seems to thwart lawyers' ethical pondering on what they should do and how they ought to behave in the particular situation at issue.

[33] The functional attitude towards law must be complemented by some of the interpretations regarding the value of legality developed by several commentators who have stressed how the value of the rule of law is closely associated with the dignity of the subjects of law.[131] Fuller, in particular, dwelt on the concept of "inner morality of law" to show how this incorporates a crucial aspect of the way the legal system operates, *i.e.* by using, rather than subduing and short-circuiting, the responsible agency of ordinary human individuals.[132] This seems to suggest that rule of law and human dignity are strictly intertwined, and dignity appears to emerge as the underpinning foundational value backing a conception of the nature and function of law, as well as the role obligations of legal officials. As eloquently observed by Wendel:

> [G]overning under law should be understood as an institutional process of determining or applying public norms--established in the name of society as a whole--to citizens, and that when lawyers participate in this process, they must do so in a way that respects (1) the agency and capacity for self-control of the citizens to whom they apply,

[131] *See generally* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 210–32 (Oxford U. Press 1995) (discussing the evolution of legal process school, the history of Fuller, and their place in American legal thought); David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, 18 SOC. PHIL & POL'Y 176 (2000) (arguing that natural law theory is applicable not so much to laws themselves as to lawmakers); Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666 (2013) (highlighting historical and theoretical connections between discretion and the Legal Process School).

[132] *See generally* David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998) (comparing and contrasting Fuller's various points of view on lawyers and the legal practice).

> i.e. clients; and (2) the content that was established in the name of society as a whole.[133]

[34] In light of these considerations, this paper is inclined to suggest that, on balance, a rule forbidding the recipient lawyer to take advantage of the metadata embedded in the electronic documents inadvertently disclosed by the opposing lawyer is more in line with the principles that should motivate the practice of law. It is difficult to see how one could inadvertently view metadata other than the circumstance where the sending attorney has left "comments" in the document so that they are outwardly visible to anyone who looks at the document. On the contrary, one may question the ethical soundness of solutions that allow the receiving lawyer to review and use metadata[134] or grant discretion to each attorney to resolve the issue "through the exercise of sensitive and moral judgment guided by the basic principles of the Rules," "determin[ing] for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation."[135]

[35] Accordingly, any time a lawyer receives information that she knows or should know the sender did not intend to send, she should return it and destroy it. In other words, an attorney who seeks to unearth relevant information incorporated in metadata attached to a document provided by counsel for another party, particularly when the attorney knows or should

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[133] Wendel, *supra* note 55, at 461.

[134] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006) (stating that that the Model Rules do not prohibit review or use of metadata); *see also* Md. St. Bar Ass'n, Ethics Op. 2007-09 (2007) (concluding that "there is no ethical violation if the recipient attorney . . . reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata.").

[135] Pa. Bar Ass'n, Ethics Op. 2007-500 (2011) (concluding that the ethical implications related to the mining of metadata should be assessed on a case-by-case basis in light of the following factors: the judgment of the lawyer; the nature of the information received; how and from whom the information was received; and common sense, reciprocity and professional courtesy).

know that the information involved was not intended to be disclosed, acts outside of her ethical requirements, as that conduct is dishonest and designed to prejudice the administration of justice. A lawyer is first "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[136]

[36] Hence, the rules should require, at a minimum, that the receiving attorney should refrain from continuing to review documents where it is obvious that the sender has inadvertently included protected information because this would constitute a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.[137] Of course, it may not be immediately apparent that the document was inadvertently sent. However, as soon as it is discovered, there should not be "hair splitting."

C. Departing from Role-Differentiated Morality

[37] In the present analysis, our approach strives to go beyond the question of how a lawyer can justify doing an act that, if performed outside the context of a professional role, would call for moral condemnation. Such a concept was first systematically framed by Richard Wasserstrom's *Lawyers as Professionals: Some Moral Issues*, which set role-differentiated morality as the core question of legal ethics.[138] We know that professional

[136] MODEL RULES OF PROF'L CONDUCT, Preamble & Scope ¶ 1 (AM. BAR ASS'N 2018).

[137] *See* Ala. St. B. Off. of the Gen. Couns., Formal Op. 2007-02 (2007).

[138] *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3–5 (1975) [hereinafter Wasserstrom 1]; *see also* Richard Wasserstrom, *Roles and Morality*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 25, 26–27 (David Luban ed., 1984) [hereinafter Wasserstrom 2]. *But see* DAVID LUBAN, LAWYERS AND JUSTICE 105, n. 1 (Princeton Univ. Press 1988) (presenting an issue with the concept of role morality). *See generally* ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (Rowman & Littlefield 1980) (discussing the problems of role

roles can be analyzed as sources of a disjointed moral cosmos, where considerations that would otherwise be relevant, if not decisive in practical deliberation, are often set aside.[139] The investigation impinges on the relationship between the requirements of morality that every community's member must respect and the duties that follow from one's adoption of a professional status with distinguishing ends and values.[140] This article argues that, in the legal profession, adoption of a role-differentiated framework and role-differentiated obligations is not incorrect; they do exist and some professionals undoubtedly build on this conceptual framework to find justifications for their otherwise morally unacceptable behaviors. Rather, the real issue is that those role-differentiated obligations operate in a vacuum, lacking concrete association or even discourse with more general moral considerations. Luban correctly noted that "any action performed within a professional role must be given a moral justification all the way down, showing that the relevant institution, such as the legal system, is justified, and so is the specific role (lawyer) within it, the duty that requires the action, and the action itself."[141] As the article focuses on some ethical demands of professional life, one does not argue for a radical moralistic vehemence. Nevertheless, lawyers should not hide behind their role or the adversary system to relieve themselves from moral obligations that they would have if they were not lawyers.[142] Therefore, the lawyer should be

morality); MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION (1980) (outlining the conflicting professional goals under role morality).

[139] *See* Wasserstrom 1, *supra* note 138, at 3–4.

[140] *See*, *e.g.*, Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 333–34 (1994); Andre, *supra* note 116, at 73; Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 ETHICS 619, 619 (1981).

[141] Wendel, *supra* note 55, at 446 (citing LUBAN, *supra* note 138, at 130–33).

[142] *See* David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101, 1117 (2010) ("They need be no more relentlessly focused on morality than non-lawyers are. In one sense, morality *is* relentless, in that it sets out ideals that nobody fully complies with. I have done discreditable things in my life and—without meaning any disrespect to the reader—so have you. Perfect rectitude might actually

identifying social sources for the norms that shape her ethical obligations as a professional, and "a reasoned elaboration" of what they mean, involve, and necessitate, in a specific situation.[143]

IV. PRACTICAL THORNY SCENARIOS

"[T]he perspective of practicing lawyers is shaped by the daily necessity of speaking and acting for others. . . . [W]e do not mean to suggest that that difficulty necessarily clinches the argument for more 'role differentiation.' The answer lies in an assessment whether the one role or the other suits our individual perspective of the kind of lawyer we want to be – to the extent that we are (or should be) permitted to make an individual choice."

— Andrew L. Kaufman[144]

[38] Having set a general theoretical framework of principles, it is now necessary to address some concrete problematic issues that attorneys face in their profession. These fact situations can rarely be answered by relying on a straightforward, noncontroversial solution and force the attorney to

require a kind of saintliness that is not necessarily the all-round best life for a human being. Where morality fits in with art, sports, love, fun, and excitement—not to mention failure, heartbreak, and other losses in a well-lived life—is not wholly obvious, and it is not an issue that legal ethicists typically address. If you write a book on ethics, setting out a moral ideal, it will inevitably appear that it demands saintliness and a relentless focus on morality. But that is an illusion born simply of the fact that it is (after all) an ethics book. Perhaps, then, it is *not* necessary to ask not only what a lawyer must do but what that means a lawyer must be—because the things a lawyer must be are not exhausted by ethics.").

[143] *See* Wendel, *supra* note 55, at 462. Something like Luban's *sensus communis* of decent lawyers in New York City satisfies the sources thesis because it is conventional. The claim is not that lawyers *ought* to avoid exploiting their adversaries' mistakes, but that in fact they do avoid doing so.

[144] ANDREW L. KAUFMAN ET. AL., PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 1123 (Carolina Academic Press 6th ed. 2017).

think through some challenging areas in the practice of law. The challenge presented now is "that the law appears to run out just where the ethical rubber hits the road . . . ."[145] That is, "when it comes to specifying the interpretive attitude that lawyers ought to take with respect to the law applicable to their clients' situation and particularly to the law governing lawyers. To put it differently, what the law permits is *itself* the ethical question that needs to be addressed."[146]

A. Scenario 1: Examining Information as a Matter of Regular Practice

[39] It could happen that a lawyer examines a document as a matter of regular practice. In this situation, it is imperative to identify what ethical implications come into play. Under Model Rule 4.4(b), the sole obligation is to promptly notify the sending lawyer of the fact of purported inadvertent disclosure.[147] The receiving attorney does not have an obligation to stop examining the information or to follow the sender's instructions as to its disposition.[148] But what ethical obligations should guide the receiving attorney's conduct with respect to this situation?

[40] If it is really obvious that the disclosure was inadvertent, the receiving lawyer should wait for a short period before further transmitting the information to her client or anyone else because there could be a prompt motion to a court to claw back the information. Arguably, if the receiving lawyer is found to have immediately transmitted the information further, a court may look upon this in a negative light, regardless of whether there was a violation of the Model Rules.

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[145] Wendel, *supra* note 55, at 456–57.

[146] *Id.* at 457.

[147] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4(b) (AM. BAR ASS'N 2018).

[148] *See* James M. Altman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, 82 N.Y. ST. BAR ASS'N J. 20, 20 (2010).

[41] This seems consistent with the ethical obligations underpinning the practice of law aimed at preserving the function of a lawyer as a trusted and independent advisor who observes a high standard of honesty, integrity, and good faith. Indeed, an attorney does not practice in a societal vacuum, but rather, she is a dynamic actor within a community. As such, an attorney who merely adheres to the letter of the Model Rules, without regard to what is right and wrong from a moral sense, will likely gain a reputation as someone who cannot be trusted, which is never a good thing. This is especially so in a small legal community.

B. Scenario 2: Indicia of Crime or Fraud

[42] One scenario that has been particularly troublesome for lawyers arises when metadata suggests the possibility of crime or fraud. In this case, the recipient must decide whether, in addition to notifying the sender, she should consider contacting the appropriate court or disciplinary authority.

[43] A moment's reflection makes it clear, however, that before reporting anyone to a court, tribunal, government, or law enforcement agency, the receiving lawyer needs to be unequivocally sure of his/her interpretation of the facts. Indubitably, what one perceives as fraud may be otherwise. Thus, it is advisable that lawyers do not "report" anyone without first discussing it with a detached and trusted colleague or the firm's ethics counsel who can view it independently. If it is determined that there is in fact the possibility of fraud or crime, the report should be made without using it as a lever to gain an advantage in that particular proceeding. That could be deemed a violation of Model Rule 3.4(e), which can occasionally be expansively read to cover a threat to report disciplinary violations to gain an advantage in a civil proceeding.[149]

[149] *See* MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2018).

C. Scenario 3: Metadata Reveals Relevant Information (*e.g.* a settlement figure)

[44] Another situation that can be especially challenging concerns the case where the metadata reveals a likely settlement figure or position, or other significant information about the sending party's bottom-line positions regarding aspects of the transaction that are still being negotiated. In this scenario, the ethical difficulty involves whether the receiving attorney can truly put this information out of her mind and whether she has an obligation to use it in favor of her client.

[45] Certainly, one cannot "unring" a bell. Once a settlement figure or other significant information is known and reviewed by the receiving lawyer, one might argue that the receiving lawyer cannot fail to use that information to the benefit of the lawyer's client, as the failure to use the information would likely be a breach of duty to the receiving lawyer's client. This is unfortunate for the sending lawyer who may be faced with a malpractice action by the client. Regardless, there is still an obligation under Model Rule 4.4(b) to notify the sending lawyer.[150]

D. Scenario 4: Inadvertent Disclosure and the Duty to Keep One's Client Informed

[46] One last aspect that needs to be assessed concerns the duty to keep one's client informed, and whether the recipient should discuss with the client the use of an opponent's inadvertently transmitted confidential information in order for the client to make an informed decision.

[47] In general, an attorney should exert her best efforts to ensure that decisions of her client are made only after the client has been informed of important considerations. However, advice of a lawyer to his client need not be limited to merely legal considerations as "[e]ffective counseling necessarily involves a thoroughgoing knowledge of the principles of the law

[150] *See* MODEL RULES OF PROF'L CONDUCT r. 4.4 (AM. BAR ASS'N 2018).

not merely as they appear in the books but as they actually operate in action."[151] It follows that in assisting a client to reach a proper decision, it is frequently appropriate for an attorney to call attention to those aspects, which may lead to a decision that is not simply legally permissible but is also morally just.[152] Particularly in close cases, the lawyer's role ought to be aimed at easing the participation by clients in the legal system.[153] At the same time, however, from the client's perspective, the content of the client's legal entitlements must be interpreted as being necessarily connected to the lawyer's ethical position.[154] It follows that the lawyer's own ethical commitments are derivative of the client's legal entitlements and, as such, impact the content of those entitlements.[155]

[48] Going back to the scenario, if the receiving lawyer is genuinely sure that the disclosure was inadvertent, the information is significant and was actually reviewed, then there is a duty to notify the client as part of the lawyer's obligation to keep a client informed of important developments

[151] Arthur T. Vanderbilt, Chief Just., N.J. Sup. Ct., The Five Functions of the Lawyer: Service to Clients and the Public, Address before the American Law Student Association (Aug. 1953), *in* 40 AM. BAR ASS'N J. 31, 31 (1954).

[152] *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 AM. BAR ASS'N J. 1159, 1161 (1958). ("Vital as is the lawyer's role in adjudication, it should not be thought that it is only as an advocate pleading in open court that he contributes to the administration of the law. The most effective realization of the law's aims often takes place in the attorney's office, where litigation is forestalled by anticipating its outcome, where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.")

[153] *See* Wendel, *supra* note 55, at 464.

[154] *See id.* at 459.

[155] *See id.*

under Model Rule 1.4.[156] The lawyer must counsel the client about the circumstances of the disclosure and not to further disseminate the information without checking with the lawyer first to ensure that there has not been an application made to claw back the information. Accordingly, the lawyer should exercise caution and not immediately disclose the information to the client. Nothing is so important in a civil case that it cannot wait one to three days before the receiving lawyer discloses.

V. FRAGMENTS OF ANSWERS

[49] Moving from these examples, it appears clear that while we can detect some clear cut cases, there is a vast gray area in which the outcome may depend on different lawyers' interpretive attitudes vis-à-vis the existing law and facts. As we are navigating a sea of doubts in the law governing lawyers, indeterminacy portends an endless regress that would undercut the recourse for law to resolve normative divergence about what rights and duties citizens ought to have. Does this not suggest that the foundation of the limitation on lawyers' behavior in the representation of clients cannot be entrenched exclusively in the content of the law governing lawyers but rather must be traced to some extra-legal value or purpose,[157] appealing, using Luban's eloquent words, to a *sensus communis* of at least one segment of the practicing bar?[158] According to Dworkin, judging is a moral act, and a judge should be concerned with reaching decisions that align with principles of justice, not merely social sources of law.[159] Can we apply this to lawyers? Are they not caretakers of the legal profession, tasked with servicing the justice system and advancing its public interest mission? What is the content of this source that should shape the community's legal practice? It seems clear that such reasoning is prone to charges of circularity

[156] *See* MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(3) (AM. BAR ASS'N 2018).

[157] *See* Wendel, *supra* note 55, at 457.

[158] *See* D.C. Bar Ass'n, Formal Op. 341 (2007); Wendel, *supra* note 55, at 459 (discussing Luban's passionate reaction to metadata and scrivener's error cases).

[159] *See* RONALD DWORKIN, LAW'S EMPIRE 19 (Harvard Univ. Press 1986).

or incoherence.[160] An analysis of the hypothetical situations shows that solutions can be found, although often the discretion left to the lawyer and her personal assessment of facts and legal norms is considerable.[161] The rights and duties of lawyers may vary contingently on whether lawyers construe the law broadly or narrowly, holistically, formalistically, or purposively.[162]

[50] Finding an answer, or fragments of answers, to these conundrums likely requires rooting the duties and rights of lawyers on considerations connected to the ideal of the rule of law.[163] Law systematically attempts to establish justification or type of reasons for one's action.[164] However, 'legally permitted' is a concept that does not always coincide with 'morally permitted,' as the literature on legal positivism has shown.[165] Rather, it refers to the fact that the legal institutions of a 'society as a whole,' with the participation and contribution of the community's legal practice, have reached, at a minimum, a conditional resolution of the question of what

[160] *See* Brian Leiter, Symposium, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165, 175 (2004) (referring to Dworkin's tendency to "run together the claim that 'such-and-such is a valid law in this jurisdiction' with claims about which party ought to prevail in some particular dispute" as "the most persistently annoying feature of his work."). *See generally* Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, 1–6 (U. Mich. L. Sch. Pub. L. & Legal Theory Working Paper Series, Working Paper No. 77, 2007) (explaining the key issues around the Hart-Dworkin debate).

[161] *See* Leiter, *supra* note 160, at 176.

[162] *See* Wendel, *supra* note 55, at 457.

[163] *See id.* at 444.

[164] *See id.*

[165] *See, e.g.*, John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 199 (2001). *See generally* Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE 'CONCEPT OF LAW' 411, 413 (Jules Coleman ed., 2001) (considering the benefits in the separability of legal judgment and moral judgment).

must or may be done in a particular situation.[166] The desirability of this quite abstract concept of legal ethics is grounded in the evidence that the political community benefits from settling conflicts through procedures that take into account and leverage competing views, balancing them in the name of the greater societal good and thus shaping reasons that may be offered by community members (including lawyers) as a justifying rationalization of their actions impacting other citizens. These reasons cannot be trumped by the lawyers' representation of their client, and necessarily function as a counterbalance, preventing them from undermining the rule of law with their conduct.[167]

[51] In wrestling with these thorny and complicated dilemmas, this paper attempts to draw the line between what distinguishes the ethical lawyer from the less-than-ethical lawyer in a scenario where the practice of law only exists in a peril-paved, high-tech landscape. The opinions expressed in these reflections are only personal: bar associations may have different interpretations and individual lawyers certainly will have different standards of professional judgment. Unsurprisingly, ethical issues are extremely challenging to unravel and, in some instances, searching for a succinct 'golden rule' solution raises more questions than answers, especially in this era of technological revolutions. Perhaps the golden rule is that there are no golden rules. However, as these and similar issues continue to be explored, there is fertile ground for further research on legal ethics in an effort to contribute to resolving current challenges.

[166] *See* Wendel, *supra* note 55, at 443–45.

[167] *See id.* at 444.