

MOVING BEYOND ZEAL IN THE RULEMAKING  
PROCESS: A REPLY TO PROFESSOR MONROE  
FREEDMAN

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INTRODUCTION

I am honored that Professor Freedman has taken the time to comment on my recent article on inadvertently disclosed privileged documents. Professor Freedman has helped to shape the modern field of legal ethics in numerous ways, such as through his powerful arguments in favor of zealous advocacy.<sup>1</sup>

In his Response to my article, Professor Freedman once again identifies the many reasons for pursuing a client's cause with zeal, and he explains how those reasons apply to the difficult problem of misdirected privileged documents.<sup>2</sup> He concludes that, unless clients specify otherwise after getting advice from counsel, lawyers should always take advantage of an opponent's inadvertent disclosures.<sup>3</sup>

In this Reply, I contend that Professor Freedman's proposed rule places too much emphasis on zealous advocacy. The problem is that Professor Freedman assumes that, if lawyers should act zealously in the event of ambiguous ethics rules, we should also want rulemakers to focus heavily on zeal when crafting the rule regarding misdirected documents. In fact, even if we assume that lawyers should resolve any ambiguities in the rules in favor of zeal, we should still want rulemakers to examine a broader range

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<sup>1</sup> See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004).

<sup>2</sup> Monroe H. Freedman, *Erroneous Disclosure of Damaging Information: A Response to Professor Andrew Perlman*, 14 GEO. MASON L. REV. 179 (2006) [hereinafter Freedman, *Erroneous Disclosure*]. He also discussed this issue in an earlier article and reached a similar conclusion. Monroe Freedman, *The Errant Fax*, LEGAL TIMES, Jan. 23, 1995, at 26 [hereinafter Freedman, *Errant Fax*].

<sup>3</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 181-83. Professor Freedman does not object to a lawyer advising a client to return a document for moral or strategic reasons, but he does believe that the lawyer should take advantage of the document if that is the client's ultimate decision. *Id.*

of public policy considerations when crafting the rules themselves.<sup>4</sup> Because Professor Freedman overlooks this distinction, he does not fully acknowledge several values other than zealous advocacy that we should consider when developing a rule on misdirected documents.<sup>5</sup> Those other values suggest that the rule should require lawyers to return inadvertent disclosures, but only when senders discover their mistakes before recipients have reviewed the relevant documents.<sup>6</sup>

## I. THE ROLE OF ZEALOUS ADVOCACY

One of Professor Freedman's primary criticisms is that I have "erroneously attributed to [him] and [his] co-author, Abbe Smith, a 'monistic' concern with zealous advocacy, to the exclusion of other values."<sup>7</sup> In fact, my article states that Professor Freedman recognizes that "other values, such as morality, are relevant to deciding the appropriate content of the rule[s]."<sup>8</sup> My contention was merely that Professor Freedman relies heavily, though not exclusively, on zealous advocacy.<sup>9</sup>

Notably, Professor Freedman's Response offers further support for my original contention. Almost all of the reasons that Professor Freedman cites in support of his view on inadvertent disclosures—the duty of confidentiality, the duty to communicate all material information to the client, client autonomy, and the obligation of undivided loyalty—are closely related to zealous advocacy.<sup>10</sup> With respect to confidentiality, Professor Freedman's

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<sup>4</sup> See Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 785-91 (2006) (discussing the distinction between normative and positive theories of ethics and noting how existing commentary does not recognize the distinction).

<sup>5</sup> See *id.* at 796-813 (describing these values and their relationship to the misdirected documents issue). As I pointed out in my original article, there are two separate issues that arise when documents are misdirected: (1) whether the disclosure constitutes a waiver of privilege and (2) whether the recipient has an obligation to return the inadvertently disclosed document. My article and this Reply deal only with the latter issue.

<sup>6</sup> *Id.* at 813-16.

<sup>7</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 182.

<sup>8</sup> Perlman, *supra* note 4, at 789. I am not alone in believing that Professor Freedman's arguments focus heavily on the role of zealous advocacy. See, e.g., W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 368 n.18 (2004) (asserting that Professor Freedman believes that zeal is the "central principle of professional responsibility"); Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J. L. & POL'Y 83, 89 (2003) (assuming Professor Freedman's position to be that "zeal and confidentiality trump most other rules, principles, or values").

<sup>9</sup> Perlman, *supra* note 4, at 789.

<sup>10</sup> Professor Freedman identifies the following values that should influence a lawyer's obligations: the lawyer's fiduciary duty to her client, including the obligation of undivided loyalty; the lawyer's duty of client confidentiality; the lawyer's duty to honestly communicate all mate-

book, *Understanding Lawyers' Ethics*, explains that “[c]ompetent representation requires” the trust that strong confidentiality rules provide.<sup>11</sup> Similarly, he acknowledges that zealous advocacy is “closely related to the concept of client autonomy.”<sup>12</sup> Finally, the obligation of undivided loyalty is just another way of saying that a lawyer should be a zealous advocate. In the end, these values are either products of zealous advocacy or justifications for it.

Of course, Professor Freedman also cites the value of truth seeking.<sup>13</sup> But in keeping with Professor Freedman’s heavy emphasis on zeal, he contends in his book that although truth “is an important premise of the adversary system . . . , it is neither the only premise nor the vital one.”<sup>14</sup>

Ultimately, Professor Freedman lists a number of values in his Response other than zealous advocacy, yet all but one of them are very closely related to zealous advocacy, and the other (truth) is “not the vital” value.<sup>15</sup> I do not question Professor Freedman’s contention that he has concerns other than zealous advocacy, but he places such an emphasis on zeal and its close cousins—autonomy, undivided loyalty, and confidentiality—that he only rarely questions the pursuit of zealous representation.

Finally, Professor Freedman’s Response includes a telling comment in this regard. He explains that “[f]ar from being the only value [that he and Professor Abbe Smith] recognize, zeal is characterized [in their book] as pervading all the others.”<sup>16</sup> But if zeal really pervades “all the other” values, I do not see why my original contention about the role of zealous advocacy in Professor Freedman’s work is “erroneously attributed” to him.<sup>17</sup>

## II. THE ROLE OF OTHER VALUES

The basic argument in my article does not actually turn on my characterization of Professor Freedman’s emphasis on zeal. My primary conceptual contention is that a single value (like zealous advocacy) may be useful

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rial information to the client, and the duty to do so honestly; respect for the client’s autonomy; and the disclosed information’s contribution to the search for truth.

Freedman, *Erroneous Disclosure*, *supra* note 2, at 181. He relies on a similar set of values in his earlier article on the subject. Freedman, *Errant Fax*, *supra* note 2.

<sup>11</sup> FREEDMAN & SMITH, *supra* note 1, at 129.

<sup>12</sup> *Id.* at 71.

<sup>13</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 181.

<sup>14</sup> FREEDMAN & SMITH, *supra* note 1, at 137.

<sup>15</sup> *Id.*

<sup>16</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 182 n.20.

<sup>17</sup> In fact, even Professor Freedman’s co-author, Abbe Smith, assumes Professor Freedman’s position to be that “zeal and confidentiality trump most other rules, principles, or values.” Smith, *supra* note 8, at 89.

to lawyers when deciding how to behave in the absence of a clear rule, but rulemakers should rely on a wider range of values when crafting the rules themselves.<sup>18</sup>

For example, even if we assume that zeal is the appropriate way for a lawyer to resolve ambiguities about the scope of the duty of confidentiality,<sup>19</sup> we should want rulemakers to rely on much more than zeal when modifying the rule to address those ambiguities. When writing or modifying a rule, we would want drafters to consider not only zealous advocacy and its attendant values, but also justice, truth,<sup>20</sup> efficiency, professionalism, consumer protection, confidence in the justice system, and consistency with analogous legal doctrines.<sup>21</sup>

This analysis suggests the basic problem with Professor Freedman's argument: even if he is right that, in the face of an ambiguous rule, zealous advocacy requires a lawyer to take advantage of an adversary's inadvertent disclosure (when the client so specifies after consultation with counsel), that conclusion does not settle the question of whether we should actually adopt a rule dictating such a result.<sup>22</sup> That question is in an important sense antecedent to any issue of what zealous advocacy requires and answering it

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<sup>18</sup> For more on this distinction, see Perlman, *supra* note 4, at 785-791.

<sup>19</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

<sup>20</sup> One of the reasons that Professor Freedman cites in support of a recipient-favorable rule is that, by allowing lawyers to read the misdirected privileged document, we are more likely to uncover the truth. Freedman, *Errant Fax*, *supra* note 2. In my article, I suggest that it is not entirely clear what implications the truth value has in this debate:

[T]here is a serious question as to whether the additional information [provided by an inadvertent disclosure] really would improve the accuracy of the outcome. In most cases, each side has certain adverse information that it would prefer the adversary not to have. Lawyers play the discovery game and seek to protect that information within the bounds of the law. It is reasonable to believe that trials rarely reflect all of the information that each side has about the case. If privileged information is disclosed from one side and not the other, accuracy is not necessarily improved. In fact, the disclosure of privileged information from one side—and only one side—has as much of a chance of distorting the facts as it does of revealing the truth. In short, it is far from clear that the recipient's retention of a privileged document promotes either truth or justice.

Perlman, *supra* note 4, at 799 (footnote omitted).

<sup>21</sup> For a fuller explanation of these values, see Perlman, *supra* note 4, at 791-96.

<sup>22</sup> By focusing on a narrower range of concerns, Professor Freedman does a better job of articulating how lawyers should act when the rules are unclear than he does of identifying the appropriate content of a rule on misdirected documents. In fact, in his earlier article on the subject, Professor Freedman explicitly acknowledged that his position on misdirected documents turned at least to some degree on the absence of a clear rule. Freedman, *Errant Fax*, *supra* note 2. Similarly, in his Response, Professor Freedman contends that, because lawyers should pursue "every right to which [clients] are lawfully entitled," lawyers should take advantage of misdirected documents. Freedman, *Erroneous Disclosure*, *supra* note 2, at 180. That contention implicitly assumes that no rule exists that prohibits the use of misdirected documents. The goal of my article was to determine whether such a rule should, in fact, exist. Perlman, *supra* note 4, at 769-72.

adequately requires taking into account a variety of moral and institutional values.

### III. BALANCING THE VALUES IN THE CONTEXT OF A RULE

The ultimate question, then, is how a rule on inadvertent disclosures should balance the myriad—and often conflicting—values that are at stake.

Any proposal should certainly recognize the value of zeal, and my proposal is no exception. It states that if a lawyer reads the misdirected document before the sender discovers the mistake, the receiving lawyer should be allowed to take full advantage of the inadvertent disclosure.<sup>23</sup> Moreover, the proposal contains a particularly zeal-oriented provision: the recipient of a misdirected document should not have to notify the sender about the error.<sup>24</sup>

At the same time, the proposal also recognizes that other values should override zeal under certain circumstances. For example, if the sender of a privileged document immediately realizes her mistake and notifies the recipient of the error before the recipient has read or seen the document, the rule should require the recipient to return the document unread.<sup>25</sup> Values such as justice, consistency with other law, consumer protection, and professionalism all support this conclusion, despite zealous advocacy's prescription to the contrary.<sup>26</sup>

Professor Freedman frames the debate about misdirected documents as a choice between zealous advocacy, on the one hand, and selfish avoidance of malpractice suits on the other.<sup>27</sup> In reality, the debate implicates many other values, making it necessary to develop a more nuanced and contextual approach. My proposal reflects these complexities by suggesting that a lawyer's obligations should vary depending on the particular circumstances in which the inadvertent disclosure occurs.

### IV. DOCTRINAL DETAILS

Professor Freedman takes issue with a couple of drafting details in my proposed rule. First, because my proposed Rule 4.4(b)(2) allows lawyers to read a document until its privileged status is actually known and because

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<sup>23</sup> Perlman, *supra* note 4, at 814.

<sup>24</sup> *Id.* In nearly every jurisdiction, recipients of misdirected documents have to notify senders of their errors. *Id.* at 809 n.207 and accompanying text.

<sup>25</sup> *Id.* at 814.

<sup>26</sup> *Id.* at 796-806.

<sup>27</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 179-80.

lawyers will typically not know that a document is privileged without reading all of it, he contends that most misdirected documents will be read in their entirety.<sup>28</sup>

I am not convinced that lawyers will have to read an entire document to know that it is privileged, even under the American Bar Association's rather narrow definition of "knowledge."<sup>29</sup> If the document is lengthy, its privileged nature would likely become quite clear before the lawyer reads all of it.<sup>30</sup> More importantly, a sender will frequently realize a mistake before the inadvertent recipient has read the document. For example, electronic documents are often exchanged in large volumes, especially during discovery, making it unlikely that the recipient will review all of the documents immediately upon receipt. In that case, the sender of a misdirected document will have a reasonable opportunity to discover the mistake and notify the recipient of the error before the recipient has reviewed the document in question. When this occurs (and I believe it occurs with more frequency than Professor Freedman acknowledges),<sup>31</sup> it will be obvious that the receiving lawyer "knows" of the misdirected document's privileged status.

Finally, assuming many documents are read in their entirety, we should not be terribly concerned. We should want lawyers to be certain that a document was misdirected before they stop reading it. If lawyers consequently read many documents in their entirety, so be it.

Professor Freedman's second objection is that, because it would be very easy to violate my proposed rule without detection, only particularly ethical lawyers will refrain from reading (or continuing to read) a knowingly privileged document.<sup>32</sup> As a result, Professor Freedman believes that only "good guys (and their clients) will lose out."<sup>33</sup>

This objection proves too much, because it calls into question a number of important rules and laws. For example, although lawyers are prohibited from putting on knowingly perjured testimony,<sup>34</sup> it is difficult to know when a lawyer has violated the rule. Indeed, many disciplinary matters under the perjury rules contain unusual and uncommon factual scenarios, such as a lawyer speaking to a client without realizing that a court microphone is

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<sup>28</sup> *Id.* at 185.

<sup>29</sup> FREEDMAN & SMITH, *supra* note 1, at 185-88.

<sup>30</sup> Arguably, in this circumstance, a lawyer might still feel compelled to read the whole document in order to determine whether the document is subject to the crime-fraud exception to the attorney client privilege.

<sup>31</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 183 n.24.

<sup>32</sup> *Id.* at 183.

<sup>33</sup> *Id.*

<sup>34</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2002).

recording the conversation.<sup>35</sup> Moreover, many laws are adopted and enforced, despite the difficulty of identifying and prosecuting violators. The tax code is a nice example. Evidence suggests that many people and companies engage in tax evasion without detection,<sup>36</sup> but just because violations are difficult to detect does not mean that the tax code is a bad idea or not worth having.

Finally, I am not convinced that violations of my proposed rule would be as difficult to uncover as Professor Freedman assumes.<sup>37</sup> Given the increasing use of electronic documents,<sup>38</sup> it is often possible to determine the date and time when someone examined a particular document. If the sending lawyer instructs the recipient not to open a recently misdirected electronic document, technology makes it possible to determine whether the recipient subsequently ignored the instruction.

#### CONCLUSION

Ultimately, Professor Freedman does not dispute that disciplinary rules should reflect a wide range of values. What I hope that my article has done is to catalogue more clearly what those values are and how those values should be balanced, not only in the context of inadvertently disclosed privileged documents, but with regard to other ethical questions that implicate conflicting values.

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<sup>35</sup> *E.g.*, *In re Attorney Discipline Matter*, 98 F.3d 1082 (8th Cir. 1996).

<sup>36</sup> *See, e.g.*, Tax Year 2001 Federal Tax Gap, [http://www.irs.gov/pub/irsnews/tax\\_gap\\_figures.pdf](http://www.irs.gov/pub/irsnews/tax_gap_figures.pdf).

<sup>37</sup> Freedman, *Erroneous Disclosure*, *supra* note 2, at 183.

<sup>38</sup> Perlman, *supra* note 4, at 772-75.