

WAIVING THE PRIVILEGE IN A STORM OF DATA: AN ARGUMENT FOR UNIFORMITY AND RATIONALITY IN DEALING WITH THE INADVERTENT PRODUCTION OF PRIVILEGED MATERIALS IN THE AGE OF ELECTRONICALLY STORED INFORMATION

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I. INTRODUCTION

[1] At the point where one of the most venerable principles of common law and the reality of modern information management collide, even the most diligent attorneys may become victims of the resulting fallout. The attorney-client privilege² is a bedrock principle of the common law,

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² The attorney-client privilege attaches to a communication only if:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the

serving several important purposes. The privilege ensures that a client seeking legal advice will be able to fully disclose the facts of her situation to her attorney without fear of her confidences being used to her disadvantage.³ Similarly, the client's confidence in the confidentiality of her communications ensures that her attorney will be equipped with all the pertinent facts necessary to enable zealous representation and an effective search for the truth.⁴ Yet the attorney's responsibility to protect and preserve that privilege is at great risk when confronted with the flood of information contained on even small computer networks. As the volume of information subject to discovery increases, the burden of reviewing that information to segregate privileged communications also increases. Unfortunately, absent a stipulation by the parties or court order to the contrary, the timeframe within which to complete discovery remains limited. At some point, as a result of limited time and resources, or the

presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). This article is concerned with the very last element: waiver; specifically, in the context of inadvertent disclosure in the course of discovery. In addition, I will discuss waiver principles in connection with attorney-client privileged information only. This is done with recognition that there are many other types of privilege, such as the executive privilege, doctor-patient privilege, trade secret privilege, etc., and that each may have its unique jurisprudence. *See, e.g.*, Roberta M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465, 482 n.84 (identifying various statutory privileges, including the marital privilege, physician-patient privilege, priest-penitent privilege and counselor-client privilege). However, "the privilege at issue appears not to affect whether inadvertent disclosure constitutes a waiver." John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law*, 159 A.L.R. FED. 153. § 2a (2005). *See also Transamerica Computer Co. v. Int'l Bus. Mach.*, 573 F.2d 646, 648 n.1 (distinguishing between the attorney-client privilege and work product doctrine "is unimportant . . . where the third person to whom the disclosure was made . . . was [an] adversary in litigation").

³ Jennifer A. Hardgrove, Note, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643, 646 (1998).

⁴ *Id.*

sheer volume alone, privileged information will be disclosed inadvertently.⁵

[2] The currently pending proposed amendments to the Federal Rules of Civil Procedure recognize this risk and incorporate procedural protections for what many are increasingly recognizing as the inevitable inadvertent disclosure of privileged information.⁶ However, in many jurisdictions this protection is ephemeral. The applicable substantive law, narrowly circumscribing the privilege in favor of the search for truth that is the purpose of our legal system, does not recognize an inadvertent disclosure exception to the traditional principle that disclosure of privileged information to a third party waives the privilege.⁷ In this article, I will explore briefly the attorney-client privilege and the law regarding waiver of that privilege, and examine the risks those principles create for lawyers working in a world where even a routine production of documents in response to discovery may capture hundreds of thousands, or even millions, of individual communications. I will also examine the procedural and ethical rules that attempt to address the problem, and identify the shortcomings of each. Finally, I will recommend a uniform treatment of inadvertent waiver issues, as well as a complementary modification to the rules of ethics.

II. INFORMATION OVERLOAD

[3] Just how much information is out there? Researchers at the School for Information Management and Systems of the University of California at

⁵ “Inadvertent,” by definition, means “unintentional.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 586 (10th ed. 1999). This article is concerned with the purely inadvertent disclosure, rather than “an intentional or purposeful disclosure.” (*Int’l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 446 (D. Mass. 1988)). Some courts, however, view any disclosure, inadvertent or not, as voluntary.

⁶ SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Agenda E-18 (hereinafter Judicial Conference Report), at 27 (Sept. 2005), <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> (“The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought”). See also Harding, *supra* note 2, at 466 n.3 (collecting cases “raising the issue of the waiver consequence of inadvertently produced privileged documents”).

⁷ See John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – State Law*, 51 A.L.R. 5th 603 (2004).

Berkeley (SIMS) have undertaken to answer that question. The results are staggering, requiring the use of descriptive terms foreign to even the “advanced” personal computer user. In 2002, people created five exabytes of new information, ninety-two percent of which was stored on magnetic media, and the bulk of that was on hard disks.⁸ How big is an “exabyte?” One exabyte is equal to 1,000,000,000,000,000,000, or 10^{18} bytes.⁹ Five exabytes is “equivalent in size to the information contained in half a million new libraries the size of the Library of Congress print collections.”¹⁰ In fact, according to these researchers, five exabytes is twenty-five times all the printed information in the world.¹¹

[4] Numbers such as these are virtually beyond comprehension. It is likely that the vast majority of the information being generated will never be the subject of any form of discovery, certainly not in any individual lawsuit. Nevertheless, even on a scale that litigants deal with everyday, the volume of available information is incredible, and increasing at an incredible rate.¹² For example, a single CD-ROM can hold approximately 650 megabytes (MB) of information, or the amount of information contained in over sixteen feet of shelved books.¹³ A single DVD can hold 4.3 gigabytes (GB), more than six times the content of a CD. An average laptop computer, with a 40GB hard drive, could house enough information to fill a small library!¹⁴ Consider also the transformation of communication from print and oral methods to electronic. The U.S. Postal Service is expected to deliver 212 billion pieces of mail in 2006.¹⁵ In comparison, computer users sent approximately 31 billion e-mail

⁸ Peter Lyman and Hal R. Varian, *How Much Information? 2003*, <http://www.sims.berkeley.edu/how-much-info-2003/execsum.htm> (last visited on April 21, 2006).

⁹ *Id.* Exec. Summary, tbl.1.1.1.

¹⁰ *Id.* Exec. Summary, pt.I.

¹¹ *Id.*

¹² See Judicial Conference Report, *supra* note 6, at 22 (“Electronically stored information is characterized by exponentially greater volume than hard-copy documents”).

¹³ Lyman and Varian, *supra* note 8, Exec. Summary, tbl.1.1.1 (estimating that 100MB is equivalent to one meter of shelved books).

¹⁴ *Id.* Exec. Summary, pt.III, D.

¹⁵ United States Postal Service Key Facts, Postal Facts 2006, <http://www.usps.com/communications/organization/postalfacts.htm> (last visited April 21, 2006).

messages every day in 2002, “a figure which [was] expected to double by 2006.”¹⁶

[5] While not all of the electronic information being generated is business data likely to be subject to discovery in litigation, the volume of business information potentially subject to discovery is stunning, and becomes more so with each passing year.¹⁷ Moreover, most of that information is stored electronically – between seventy and ninety-five percent,¹⁸ and “as much as fifty percent of information generated by companies never gets printed” on paper.¹⁹ This information explosion is reflected in the amount of information being generated by the average business employee in the United States. According to the researchers at SIMS, on a world-wide basis the average person generates almost 800MB of information each year.²⁰ However, fifty percent of the information generated world-wide that is stored on magnetic media (which, as noted above, accounts for ninety-two percent of all information generated) is created in the United States.²¹ Thus, the average person in the United States generated over three gigabytes of information in 2002 alone.²²

¹⁶ Lyman and Varian, *supra* note 8, Exec. Summary, pt.IV, C. *See also* David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1 n.72 and accompanying text (asserting that “[o]ver three billion business e-mails . . . are sent each day in the United States, most of which are archived”); Judicial Conference Report, *supra* note 6, at 23 (“large organizations[] . . . receive 250 to 300 million e-mail messages monthly”).

¹⁷ Judicial Conference Report, *supra* note 6, at 22-23 (“examples of such volume include the capacity of large organizations’ computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text”).

¹⁸ Laura Catherine Daniel, Note, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 663 (2005).

¹⁹ *Id.* at 663-64.

²⁰ Lyman and Varian, *supra* note 8.

²¹ *Id.*

²² According to the U.S. Census Bureau, there were 281,421,906 people living in the United States as of April 1, 2000. U.S. Census Bureau, United States Census 2000, <http://www.census.gov/main/www/cen2000.html> (last visited Mar. 31, 2006). As noted, ninety-two percent of the five exabytes of information generated in 2002 existed on magnetic media, and fifty percent of that information was created in the United States (Lyman and Varian, *supra* note 8). According to the SIMS researchers, three gigabytes of information would be equivalent to three pick-up trucks filled with books. *Id.*

[6] Put in perspective then, attorneys in the United States should expect that nearly every person having relevant knowledge of the issues in any given lawsuit will have generated a significant amount of discoverable information, and the majority of that information will be located on computer systems rather than in file cabinets. As a result, the volume of information that attorneys must review in the course of discovery is increasing exponentially, while the statutory and rule-based time frames for accomplishing that review are not. The inevitable result will be the inadvertent production of privileged information.

III. TRADITIONAL WAIVER CONCEPTS

[7] To fully appreciate the impact of the ever-increasing volume of discoverable information, one must first revisit the governing law concerning waiver of the attorney-client privilege. The attorney-client privilege “dates back to the 16th century and is believed to be the oldest of the confidential privileges known to the common law.”²³ Its importance in encouraging “full and frank communication between attorneys and their clients,”²⁴ however, is “inconsistent with the general duty to disclose and may impede the truth-seeking function” of the justice system.²⁵ As a result, the privilege is narrowly circumscribed and may be waived under certain circumstances.²⁶

[8] Of particular interest here is the inadvertent disclosure of privileged communications in the course of discovery.²⁷ Most federal and state

²³ Alexander C. Black, Annotation, *What Persons or Entities May Assert or Waive Corporation’s Attorney-Client Privilege – Modern Cases*, 28 A.L.R. 5th 1, § 2 (1995). See also Hardgrove, *supra* note 3, at 645 (dating the attorney-client privilege to “the reign of Elizabeth I”). Cf. Harding, *supra* note 2, at n.84 (“The attorney-client privilege has its roots in Roman Law”).

²⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

²⁵ Hardgrove, *supra* note 3, at 643.

²⁶ *Id.* at 651-52.

²⁷ A threshold issue in any such case is whether the disclosure was, in fact, inadvertent. This is a question of fact that must be decided on a case-by-case basis, but, in the circumstances under consideration here, disclosure in the course of discovery as part of the production of a large volume of predominantly electronically-stored information, the inadvertence of the disclosure is not likely to be a significant issue. See Judicial Conference Report, *supra* note 6, at 27 (“The volume of the information and the forms in which it is stored may make privilege determinations more difficult and privilege review

courts generally follow one of three approaches to the problem, although some state courts follow a fourth.²⁸

A. STRICT LIABILITY

[9] The simplest approach to dealing with the inadvertent waiver of privileged information is the strict liability or *per se* approach.²⁹ Under this approach “all inadvertent disclosures that arise as a result of negligence constitute a waiver.”³⁰ The rationale behind the strict liability approach is two-fold. First, since the purpose of the attorney-client privilege is to protect *confidential* communications, once a communication has been disclosed to a third party it is, by definition, no longer confidential.³¹ In other words, after the confidential information has been disclosed, “the bell has already rung, and the court cannot . . . unring it”³² Second, because the existence of the privilege depends in part on the parties’ effort to maintain the confidence, some courts are reluctant to grant “greater protection to those who assert the privilege than their own

correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur.”)

²⁸ See generally Hundley, *supra* note 7.

²⁹ Jason C. Seewer, *Pressure on Corporate America: The Appropriateness of a Per Se Rule for Waiver of the Corporate Attorney-Client Privilege*, 50 WAYNE L. REV. 1041, 1044 (2004).

³⁰ Anne G. Bruckner-Harvey, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 BAYLOR L. REV. 385, 388 (1994).

³¹ Hardgrove, *supra* note 3, at 649 (“The requirement that the communication be ‘confidential’ is strictly applied in that the existence of the attorney-client relationship does not by itself raise a presumption of confidentiality. This element requires that confidentiality be intended by the attorney and client, and the precautions taken by the parties to ensure confidentiality may be considered as bearing on intent.”).

³² *Harmony Gold U.S.A. Inc. v. FASA Corp.*, 169 F.R.D. 113, 118 (N.D. Ill. 1996) (quoting *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179, 183 (N.D. Cal. 1990)). In *Harmony Gold*, the court adopted the strict liability approach, but noted that the same conclusion would have resulted had it applied the multi-factor test applied by the court in *Bud Antle*. See also *Carter v. Gibbs*, 909 F.2d 1450, 1450 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990) (denying motion requesting return of inadvertently disclosed work product because “granting the motion would do no more than seal the bag from which the cat has already escaped”).

precautions warrant.”³³ Thus under the *per se* approach any disclosure, voluntary or otherwise, waives the privilege.

[10] Perhaps the most often cited case applying the strict liability approach is *In re: Sealed Case*, in which the court relied on the second rationale for the *per se* rule – that parties should not be protected from their own negligence.³⁴ In that case, a government contractor was under investigation by a grand jury for tax evasion and fraud. During the course of the investigation, the grand jury issued a subpoena for documents related to certain adjustments made to the company’s books. The company withheld from the production six documents it claimed were exempt from disclosure as privileged attorney-client communications.³⁵ The district court granted the government’s motion to compel production of the documents, but the company continued to refuse and was held in contempt.³⁶ While the contempt order was on appeal, the government learned that one of the documents had been disclosed to a different government agency during a routine audit of travel expenses, and contended that any privilege had been waived as a result of that disclosure.³⁷ The company, however, contended that the disclosure had been “‘a bureaucratic error.’”³⁸ Noting that the district court had determined that the disclosure was voluntary, the D.C. Circuit wrote that it did not matter “whether the waiver is labeled ‘voluntary’ or

³³ *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (“Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived.”). See also *Int’l Digital Sys. Corp. v. Digital Equip. Corp.* 120 F.R.D. 445, 450 (quoting *In re Standard Fin. Mgmt. Corp.* 77 B.R. 324, 330 (1987) (“inadvertence is, after all, merely a euphemism for negligence, and, certainly . . . one is expected to pay a price for one’s negligence”)) (omission in original).

³⁴ *In re Sealed Case*, 877 F.2d 976 (1989). See also Buckner-Harvey, *supra* note 30, at 389. For examples of sources citing *In re Sealed Case* see, e.g., Daniel, *supra* note 18 at 674-675; Hardgrove, *supra* note 3, at 657, n.107; Harding, *supra* note 2 at 472 n.21; Hundly, *supra* note 2, at §§ 3a, 8, 16(b)-(c); Gloria A. Kristopek, Note, *To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel*, 33 VAL. U. L. REV. 643, 654 n.57 (1999); Amy M. Fulmer Stevenson, Comment, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 CAP. U. L. REV. 347, 360 n.91 (1997).

³⁵ *In re Sealed Case*, 877 F.2d at 977.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 980.

‘inadvertent.’”³⁹ The court then held that a party cannot rely on its own negligence to avoid a finding of waiver:

The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost “even if the disclosure is inadvertent” To hold, as we do, that an inadvertent disclosure will waive the privilege imposes a self-governing restraint on the freedom with which organizations such as corporations, unions, and the like label documents related to communications with counsel as privileged In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels. Short of court-compelled disclosure, or other equally extraordinary circumstances, we will not distinguish between various degrees of “voluntariness” in waivers of the attorney-client privilege.⁴⁰

[11] In *International Digital Systems Corporation v. Digital Equipment Corporation*,⁴¹ the court relied on the first rationale for the strict liability rule – that disclosure destroys the confidentiality of the formerly privileged communication. In that case, the plaintiff reviewed 500,000 documents in response to discovery, including two separate reviews to identify privileged communications.⁴² Nevertheless, the plaintiff inadvertently produced twenty privileged documents to the defendant and subsequently sought an order to compel their return.⁴³ Although the court critiqued the privilege review process in detail, ultimately concluding that the “Post-It” notes that were used to identify the privileged materials were either never affixed to the subject documents, mistakenly removed, or simply overlooked, it stated emphatically that it was not relying on any deficiencies in the review process in concluding that the privilege had been waived.⁴⁴ As the court explained:

³⁹ *Id.*

⁴⁰ *Id.* (quoting *In re Grand-Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984).

⁴¹ *Int’l Digital Sys. Corp.*, 120 F.R.D. at 445.

⁴² *Id.* at 446-447.

⁴³ *Id.* at 446.

⁴⁴ *Id.* at 448-449.

I see little benefit to doing a painstaking evaluation of the precautions taken by plaintiff's counsel when it is noted that the whole basis for the privilege is to maintain the *confidentiality* of the document. It cannot be doubted that the confidentiality of the document has been destroyed by the 'inadvertent' disclosure no less than if the disclosure had been purposeful; it equally cannot be doubted that the confidentiality of the communication can never be restored, regardless of whether the disclosure was 'inadvertent' or purposeful. In other words, regardless of how painstaking the precautions, there is no order I can enter which erases from defendant's counsel's knowledge what has been disclosed. There is no order which can remedy what has occurred, regardless of whether or not the precautions were sufficient.⁴⁵

[12] The beauty of the strict liability approach is its simplicity – all that needs be determined is the fact of disclosure. All else is irrelevant to the inquiry. The *per se* rule is also the approach that best serves the underlying purpose of discovery, full disclosure in the search for the truth, and provides the greatest incentive “for attorneys to take due care with their client's documents.”⁴⁶ From the producing party's perspective, however, the strict liability approach is obviously the most restrictive of the privilege, and some courts view it as “too harsh in light of the vast volume of documents disclosed in modern litigation.”⁴⁷

B. INTENT-REQUIRED

[13] The opposite extreme of the *per se* approach is the view that privilege can only intentionally be waived. Under the rationale that a waiver, by definition, involves the intentional relinquishment of a known right, a minority of courts have held that “there must have been some

⁴⁵ *Id.* at 449 (emphasis in original).

⁴⁶ Daniel, *supra* note 18, at 675.

⁴⁷ *Fed. Deposit Ins. Corp. v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 481 (E.D. Va. 1991). *See also* Hardgrove, *supra* note 3, at 658 (arguing that the strict liability approach is inflexible, will “foster and condone sharp practice,” and “ignores the purpose behind the privilege – encouraging full disclosure with an attorney – for the sake of punishing accidental and technical disclosures”).

intent by the party involved to make the disclosure before there can be a waiver.”⁴⁸ Because the privilege belongs to the client and not the attorney, the inadvertent disclosure by the attorney cannot possibly be imputed to the client who did not know of, and therefore could not have authorized, the disclosure.⁴⁹

[14] The intent-required approach was adopted by the court in *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*.⁵⁰ The defendant in that case had produced in discovery two copies of a privileged letter, one redacted and one original, and sought an order requiring the return of the unredacted version.⁵¹ The court found there could be “no contention that the document's disclosure was in any way willful, or resulted from anything other than oversight and mistake on the part of defendant's counsel.”⁵² Acknowledging that there were cases in other jurisdictions that had applied the strict liability approach, the court held the disadvantages of that approach outweighed its benefits:

This waiver approach has the virtues of simplicity and ease of application. Weighing against those virtues – and they are the only virtues that I can perceive – is the likelihood that this approach will foster and condone sharp practice, distrust, and animosity among lawyers – none of which does anything to accomplish justice fairly and expeditiously. In addition, such approach encourages, in the

⁴⁸ Hundley, *supra* note 2, at § 4a.

⁴⁹ *Id.* Some have identified Dean Wigmore as a staunch advocate of the strict liability rule, based on his criticism of the intent-required approach on the grounds that a “privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.” 8 JOHN HENRY WIGMORE, EVIDENCE, § 2327 (1961). Interestingly, but perhaps not surprisingly, given the rampant inconsistency in the jurisprudence, Wigmore can also be cited in favor of the intent-required approach, as with his comment that communications “made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.” *Id.* at § 2292.

⁵⁰ *Transp. Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187, 1188 (N.D. Ohio 1996).

⁵¹ *Id.* at 1187.

⁵² *Id.*

party to whom inadvertent disclosure is made, in caution where care should be taken.⁵³

The court then adopted the position taken by the American Bar Association (ABA) Committee on Ethics and Professional Responsibility in its now withdrawn Formal Opinion 92-368, which required the recipient of an inadvertently produced privileged communication to “refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them.”⁵⁴

C. MULTI-FACTOR ANALYSIS

[15] Between these two extreme positions lies the majority rule, which requires a case-by-case, multi-factor analysis to determine if an inadvertent disclosure waives the privilege.⁵⁵ This approach attempts to strike a balance between protecting the client who intended that her communications remain confidential, and “not reliev[ing] those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.”⁵⁶ The court will consider several factors in determining whether an inadvertent disclosure should waive the privilege: (1) the reasonableness of the precautions taken by the party to prevent disclosure; (2) any delay between the disclosure and the attempt to rectify the error; (3) the scope of discovery; (4) the extent of the inadvertent disclosure, including the relative volume of privileged information disclosed compared to the total volume of information produced; and (5) any overriding issues of fairness, including whether the receiving party has relied on the information produced.⁵⁷

⁵³ *Id.* at 1187-88.

⁵⁴ *Id.* at 1188 (quoting ABA Comm. on Ethics and Prof'l Responsibility, Form Op. 368 (1992) (“Inadvertent Disclosure of Confidential Materials”)).

⁵⁵ Daniel, *supra* note 18, at 679-80. *See also*, Hundley, *supra* note 2, at § 5.

⁵⁶ Stevenson, *supra* note 34, at 362 (quoting *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993)).

⁵⁷ *See* Hundley, *supra*, note 2, at § 5. Some courts applying the multi-factor test purport to apply a four-factor test, excluding the scope of discovery as a factor. *See, e.g., Atronic Int'l GMBH v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160, 164 (E.D.N.Y. 2005) (balancing ““(1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure issue; (3) the length of time taken by the

[16] Perhaps the first case involving the production of a large number of documents to recognize the need to consider more factors than simply the fact of disclosure and the producing party's intent was *Transamerica Computer v. International Business Machines*.⁵⁸ In that case, the plaintiff sought to compel production of certain allegedly privileged materials⁵⁹ that the defendant, International Business Machines (IBM), had inadvertently produced in a prior antitrust lawsuit.⁶⁰ Acknowledging the case law on both the strict liability and intent-required tests, the court examined in detail the circumstances under which the disclosure had been made and held that, under those circumstances, any applicable privilege had not been waived.⁶¹

[17] Specifically, the court found that (1) IBM had been ordered to complete its production of approximately 17 million pages of documents in only three months (scope of production)⁶²; (2) that "IBM mounted a

producing party to rectify the disclosure; and (4) the overarching issue of fairness"). However, in many cases, such as *Atronic*, in which the disclosures were made as part of mandatory disclosures under FED. R. CIV. P. 26(a)(1)(B), the scope of discovery is not an issue. It is also apparent that some courts confuse the "scope" of discovery with the volume of information produced compared to the number of privileged documents. *See, e.g., Monarch Cement Co. v. Lone Star Indus.*, 132 F.R.D. 558, 560 (D. Kan. 1990) ("The scope of discovery undertaken in this case also leads us to conclude that a finding of waiver would be inappropriate. More than 9,000 pages of documents were produced, and the documents in question were only eight pages contained in one of 118 personnel files produced.") The fact that courts articulate and apply the five standards with considerable variation further argues for a definitive standard.

⁵⁸ *Transamerica Computer v. Int'l Bus. Machines Corp.*, 573 F.2d 646 (9th Cir. 1978).

⁵⁹ The Ninth Circuit assumed for purposes of its analysis that the documents in question were privileged and addressed only the issue of waiver. It noted that, having determined that there was no waiver, the district court would have to determine whether each of the documents in question was actually privileged. *Id.* at 647 n.2.

⁶⁰ *Id.* at 646-47.

⁶¹ The court relied, at least in part, on the principle "that a party does not waive the attorney-client privilege for documents which he is compelled to produce." *Id.* at 651. Based on its review of the circumstances, the court held that IBM had effectively been compelled to produce the subject documents. *Id.* at 651-52. In addition, the court found it significant that the trial judge in the prior litigation had entered an order specifically holding that IBM had not waived its privilege with respect to any inadvertently produced documents. *Id.* at 649-50. Nonetheless, the court also noted that its "conclusion that IBM did not waive its claim to its privilege . . . [was] based on [its] independent analysis of the circumstances surrounding IBM's inadvertent production." *Id.* at 652.

⁶² *Id.* at 648.

herculean [sic] effort to review and produce the materials,” including a review of “each and every one of the 17 million pages” (reasonableness of precautions)⁶³; (3) that IBM realized shortly after the screening process began that “privileged documents were evading detection by its reviewers” and undertook remedial action, which included a special review of any documents selected by the plaintiff for production to identify any privileged materials and withhold them from the final production (delay in identifying and attempting to rectify the error)⁶⁴; and (4) that “a relatively small number, 1138 (approximately 5800 pages), of supposedly privileged documents were inadvertently produced” to the plaintiff (extent of disclosure).⁶⁵ Thus, although it did not articulate them individually as have courts in more recent decisions, the *Transamerica* court considered all five of the factors that subsequent courts have considered in applying the multi-factor test.⁶⁶

⁶³ *Id.*

⁶⁴ *Id.* at 649-50. The element of delay is one that has generated significant variation in the case law. Compare *Bud Antle, Inc. v. Grow-Tech Inc.*, 131 F.R.D. 179, 183 (N.D. Cal. 1990) (finding that “[w]hile plaintiffs acted to recover [the document] as soon as they found it had been inadvertently produced, this was not until *six weeks* after production”) (emphasis in original), with *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp.2d 1168, 1171-1176 (D. Nev. 2005) (finding no waiver of privilege for a document that had been produced in Rule 26 disclosures where the disclosure was not discovered until nearly one year later). Most cases hold that the relevant time period for evaluating the producing party’s diligence begins once the party discovers, or reasonably should have discovered, the disclosure, rather than at the time of the disclosure itself. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 577 (D. Kan. 1997) (“[t]he relevant time for rectifying any error begins when a party discovered or with reasonable diligence should have discovered the inadvertent disclosure”) (citing *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 133 F.R.D. 171, 172 (1989)); *Aramony v. United Way of America*, 969 F. Supp. 226, 237 (S.D.N.Y. 1997) (“The period after the producing party realizes that privileged information has been disclosed is the relevant period for measuring whether the privilege has been waived”) (citing *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125, 1995 WL 117871, at *2 (S.D.N.Y. Mar. 20, 1995) (citing *Mfrs. & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 400 (N.Y. App. Div. 1987)).

⁶⁵ *Transamerica Computer Co.*, 573 F.2d at 648-50.

⁶⁶ The application of the fifth factor, overriding interests of fairness, includes its recognition that IBM was operating under a very tight schedule in circumstances that amounted to a compelled production of documents. *Id.* at 651.

[18] A more recent case specifically considering each of the five factors is *United States v. Keystone Sanitation Company*.⁶⁷ There one group of defendants in a Superfund action, the “Generator Defendants,” sought the billing records of the attorneys for another group of defendants, the “Keystone Defendants,” to show that the latter had been disposing of assets to avoid paying their share of any ultimate liability.⁶⁸ The Generator Defendants contended that any privilege that had attached to the records had been waived when the Keystone Defendants produced two e-mail messages from their attorneys on the same subject matter.⁶⁹ The Keystone Defendants, in turn, contended that the e-mail messages had been inadvertently produced, and that the privilege should not, therefore, be deemed waived.⁷⁰

[19] Applying the multi-factor analysis, the court held first that the Keystone Defendants failed to take reasonable precautions to prevent the disclosure in light of the fact that the court had imposed no short deadlines for the production, and had not been petitioned for additional time for review.⁷¹ The court then found that the relative number of documents produced was small (two documents from a large production), which favored the Keystone Defendants, but that the extent of the disclosure was complete in that the e-mail messages disclosed “precisely the type of information sought from the billing and time statements,” which would favor the Generator Defendants.⁷² Next, the court acknowledged that there was no significant delay between the document production and the Keystone Defendants’ attempt to rectify the disclosure, a factor that would have supported upholding the privilege.⁷³ Finally, the court held that the overriding issue of fairness “weighs squarely in favor of waiver” because, “[t]o preclude discovery as to whether principal potentially responsible parties are or were engaged in the deliberate dissipation of assets for the purpose of avoiding a share of liability . . . runs counter to the interests of justice.”⁷⁴

⁶⁷ *United States v. Keystone Sanitation Co.*, 885 F. Supp. 672 (M.D. Pa. 1994).

⁶⁸ *Id.* at 675.

⁶⁹ *Id.*

⁷⁰ *Id.* at 676.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *United States*, supra note 67, at 676.

⁷⁴ *Id.*

[20] The multi-factor analysis, though fact-specific and therefore susceptible to inconsistent results,⁷⁵ is the only test that recognizes and attempts to account for the tension between the confidentiality of a client's communications to her attorney and the truth-seeking purposes of liberal discovery.⁷⁶

D. SIGNIFICANT PART TEST

[21] Some state courts apply a fourth analysis, based on Cal. Evid. Code § 912(a), adopted in 1965, which provides that the privilege is waived if a significant portion has been disclosed with the consent of the holder:

Except as otherwise provided in this section, the right of any person to claim a privilege [under various statutory provisions, including the "lawyer-client privilege"] is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.⁷⁷

A number of state courts have applied a "significant part" analysis to an inadvertent disclosure with varying results.⁷⁸

⁷⁵ See Bruckner-Harvey, *supra* note 30, at 390.

⁷⁶ Hardgrove, *supra* note 3, at 659 ("This discretionary test attempts to strike a balance between the competing interests of encouraging complete disclosure of facts to attorneys and requiring that the confidences involved in privileged communication be carefully guarded").

⁷⁷ CAL. EVID. CODE § 912(a) (West 2005).

⁷⁸ Hundley, *supra* note 2, at § 6(a). Although many federal courts consider the extent of the disclosure in the multi-factor analysis, "few of the federal courts have adopted the 'significant part' reasoning in the sense that California arguably has." However, at least one federal court appears to have adopted a "significant part" analysis based on the proposed Fed. R. Evid. 5-11, which was later rejected by Congress. *See id.* (citing *Champion Int'l Corp. v. Int'l Paper Co.*, 486 F. Supp. 1328 (N.D. Ga. 1980)).

E. THE CONSEQUENCES OF WAIVER

[22] Also important to consider is the scope of waiver potentially effected by an inadvertent disclosure. A waiver of privilege as a result of the inadvertent disclosure of one document may extend vertically, meaning that the privilege is waived as to the entire world, and horizontally, meaning that the waiver may extend to additional documents and information.⁷⁹ Although a detailed analysis of this topic is beyond the scope of this article, it is important for present purposes to recognize that there is a great deal of variation in both the standards applied and the results achieved.

[23] Generally speaking, courts will apply one of three standards: subject matter waiver, limited waiver, or no waiver.⁸⁰ Courts applying subject matter waiver hold that the privilege is waived not only for the specific communication that was disclosed, but for all documents and communications on the same subject matter.⁸¹ Courts applying the limited waiver standard will hold that the privilege is waived only for the specific communication that was disclosed.⁸² Some courts will find that there is no waiver at all when the privileged documents are disclosed inadvertently.⁸³ Unfortunately the standards are applied inconsistently, depending on the

⁷⁹ Hardgrove, *supra* note 3, at 661.

⁸⁰ Hundley, *supra* note 2, at §§ 7-10.

⁸¹ See, e.g., *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995) (“a waiver premised on inadvertent disclosure will be deemed to encompass ‘all other such communications on the same subject.’”) (quoting *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981)). See also Hardgrove, *supra* note 3, at 662 (noting that subject matter waiver may be interpreted broadly or narrowly, depending on the circumstances).

⁸² See, e.g., *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 120 (D.N.J. 2002) (holding that “[t]he general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious that a party is attempting to gain an advantage or make offensive or unfair use of the disclosure”) (quoting *Parkway Gallery Furniture v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 52 (M.D.N.C. 1987)).

⁸³ See, e.g., *Maldonado v. Admin. Office of the Courts-Prob. Div.*, 225 F.R.D. 120, 129-32 (D.N.J. 2004) (applying multi-factor analysis to find no waiver even where disclosure was complete, the privileged information having appeared in an amended complaint, because the producing party “took reasonable precautions to avoid disclosure of the [privileged] letter”).

circumstances. For example, courts will construe the scope of the “subject matter” more narrowly or broadly depending on a variety of factors.⁸⁴ As a result, it is perhaps more profitable to consider the factors that courts will consider than the standards themselves.

[24] Among the factors that courts have relied upon in determining the scope of waiver are the following: (1) potential prejudice to the privilege-holder’s adversary; (2) the extent to which the privilege-holder has selectively disclosed information for strategic purposes; (3) the extent to which the privilege-holder has cooperated with, or frustrated, the discovery process; (4) whether the disclosure was intentional or inadvertent; and (5) the care with which the privilege-holder managed its confidential communications.⁸⁵ Not surprisingly, some of these factors are the same as those applied to determine whether the privilege has been waived at all under the multi-factor analysis, and with the same results: increased culpability on the part of the privilege-holder generally will result in an increased scope of waiver.⁸⁶ Thus, the dilemma remains for the attorney charged with production of the increasingly large volumes of electronically-stored information.

F. A LACK OF GUIDANCE

[25] As suggested above, the standards applied by the courts in determining whether there has been a waiver when privileged communications are inadvertently disclosed, and, if so, the extent of the waiver, are inconsistent and inconsistently applied – both at the federal and state levels. A number of analyses have been undertaken attempting to identify the approach adopted by the various federal and state courts,

⁸⁴ Hardgrove, *supra* note 3, at 661-62. *See also* Hundley, *supra* note 2, at § 8 n.54 (noting that “courts from virtually all of the circuits” have applied all three of the scope of waiver standards, “suggesting that, although the courts often speak in terms of an absolute rule, the circumstances of the particular case often determine the result that will be reached”).

⁸⁵ Hardgrove, *supra* note 3, at 662.

⁸⁶ *Compare* Hundley, *supra* note 2, at § 7 (“in general it is apparent that courts do not like applying subject matter waiver where the initial disclosure has been a mistake”) *with* Hardgrove, *supra* note 3, at 674-75 (arguing that courts apply the various standards inconsistently and arbitrarily).

not surprisingly with somewhat inconsistent results.⁸⁷ The following charts are based on the analysis performed by Hundley in *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law*⁸⁸ and *Waiver of Evidentiary Privilege by Inadvertent Disclosure – State Law*⁸⁹ and include courts that have adopted the referenced approach either expressly or by implication:

⁸⁷ Compare Hundley, *supra* note 2, and Hundley, *supra* note 7, with Harding *supra*, note 2.

⁸⁸ Hundley, *supra* note 2.

⁸⁹ Hundley, *supra* note 2.

FEDERAL COURTS BY CIRCUIT

Strict Liability	Intent-Required	Multi-Factor
First	First	First
Second	Second	Second
Third	Third	Third
Fourth	Fourth	Fourth
Fifth	Fifth	Fifth
Sixth		Sixth
Seventh	Seventh	Seventh
Eighth		Eighth
		Ninth
Tenth	Tenth	Tenth
	Eleventh	Eleventh
D.C.	D.C.	D.C.
Federal	Federal	Federal

STATE COURTS

Strict Liability	Intent-Required	Multi-Factor	Significant Part
California	California	California	California
Connecticut		Connecticut	
		Delaware	Delaware
Florida			
Georgia			
Illinois	Illinois	Illinois	
		Indiana	
Kansas		Kansas	
Michigan			
	Missouri		
		Montana	
Nebraska	Nebraska		
		New Mexico	
New Jersey	New Jersey		
New York	New York	New York	New York
North Carolina			
		North Dakota	
Ohio	Ohio		
Oklahoma			
Oregon		Oregon	
		Pennsylvania	
	South Carolina		
South Dakota			
Texas		Texas	Texas
Vermont			
Virginia		Virginia	Virginia
Washington			

As is readily evident, litigants are often at a loss to predict with any degree of certainty the standard that will be applied to an inadvertent disclosure of privileged information.

[26] For example, courts in the Second Circuit have applied all three standards in cases involving disclosure of attorney-client information. *In re Horowitz* involved a federal grand jury subpoena *duces tecum* issued for the contents of three file cabinets in the possession of an accountant.⁹⁰ The owners of the documents moved to quash the subpoena on the grounds that, among other things, certain of the documents were privileged attorney-client communications.⁹¹ The court concluded, however, that any privilege that had attached to the documents had been waived when the owners gave their accountant unrestricted access to the documents for purposes unrelated to obtaining legal advice.⁹²

[27] In contrast, the court in *Connecticut Mut. Life Ins. Co. v. Shields*⁹³ applied the intent-required test. *Connecticut Mutual* was an action by certain bond holders against the bond underwriter for misrepresentation.⁹⁴ In a motion to compel answers to certain questions posed at the deposition, the defendant contended that some of the questions called for privileged information, while the plaintiffs argued that any privilege had been waived because the defendant had disclosed certain letters that contained the same information sought in the deposition. The court, however, held that “to support a finding of waiver, there must be evidence that [the defendant] intended to waive” the privilege.⁹⁵ Because the letters had been inadvertently disclosed, there was no waiver.⁹⁶

[28] Finally, in *SEC v. Cassano*,⁹⁷ the court applied the multi-factor test to find a waiver. During the course of discovery, the SEC made available to

⁹⁰ *In re Horowitz* 482 F.2d 72, 72-75 (2nd Cir.), cert. denied, 414 U.S. 867 (1973).

⁹¹ *Id.* at 75.

⁹² *Id.* at 80-82 (“[i]t is not asking too much to insist that if a client wishes to preserve the privilege . . . , he must take some affirmative action to preserve confidentiality”).

⁹³ *Connecticut Mut. Life Ins. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955).

⁹⁴ *Id.* at 450.

⁹⁵ *Id.* at 451.

⁹⁶ *Id.*

⁹⁷ *SEC v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999).

the defendants between 50 and 52 boxes of documents for inspection.⁹⁸ Early in the review, attorneys for the defendants discovered a 100 page memorandum prepared by SEC staff attorneys.⁹⁹ The defendants requested that a copy be made immediately, prior to the copying and production of any other documents selected during the review, and an SEC attorney agreed without first reviewing or even identifying the document.¹⁰⁰ After confirming that the document did not appear on the privilege log, counsel for the defendants distributed the document to his colleagues and clients. Twelve days later, the SEC realized that the document had been produced and moved for its return.¹⁰¹ The court held that the privilege had been waived because the SEC failed to take adequate steps to protect the document, including failing to ensure that it was not privileged when the defendants requested specifically that it be copied.¹⁰² Moreover, although the SEC moved promptly to recover the document after discovering it had been produced, the defendants had already widely distributed the document, and fairness dictated that the court not disregard SEC's carelessness.¹⁰³

IV. A PROBLEM UNRESOLVED

[29] Inadvertent disclosure of privileged information is not a new issue, and the particular problems associated with electronically-stored information have been recognized and addressed – to the extent they can be – in procedural rules, ethics rules and discovery standards. None, however, resolve the underlying conflict with the substantive law.

A. THE FEDERAL RULES

[30] The Judicial Conference Committee on Rules of Practice and Procedure (Judicial Conference) approved a number of changes to the Federal Rules of Civil Procedure “aimed at discovery of electronically stored information.”¹⁰⁴ Recognizing the increasing likelihood that

⁹⁸ *Id.* at 84.

⁹⁹ *Id.* at 83-84.

¹⁰⁰ *Id.* at 84-85.

¹⁰¹ *Id.* at 85.

¹⁰² *Id.* at 85-86.

¹⁰³ *SEC, supra* note 97, at 86.

¹⁰⁴ Judicial Conference Report, *supra* note 6, at 22.

privileged information will be inadvertently disclosed as discovery of electronically stored information becomes more common, the Committee approved amendments to Rules 16 and 26 in an effort to deal with the problem:

The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought. The volume of the information and the forms in which it is stored may make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur. Because the failure to screen out even one privileged item may result in an argument that there has been a waiver as to all other privileged materials related to the same subject matter, early attention to this problem is more important as electronic discovery becomes more common.¹⁰⁵

Specifically, “[u]nder the proposed amendments to Rules 26(f) and 16, if the parties are able to reach an agreement to adopt protocols for asserting privilege and work-product protection claims that will facilitate discovery that is faster and at lower cost, they may ask the court to include such arrangements in a case-management or other order.”¹⁰⁶

[31] In addition, the Committee also approved an amendment to Rule 26(b)(5) to create “a procedure for asserting privilege after production that is parallel to the similar proposals for Rules 16 and 26(f).”¹⁰⁷ Because “inadvertent production of privileged or protected material is a substantial risk,” the “proposed amendment to Rule 26(b)(5) clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production.”¹⁰⁸ The new procedure requires the party that has inadvertently produced privileged information to notify the

¹⁰⁵ *Id.* at 27.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 29.

¹⁰⁸ *Id.*

receiving party of its privilege claim as well as the basis for it.¹⁰⁹ Upon receiving notice, the receiving party will be required to “return, sequester, or destroy the information, and may not use it or disclose it to third parties until the claim is resolved.”¹¹⁰ Moreover, if the receiving party has already disclosed the information to a third party, it will be required to take reasonable steps to get it back.¹¹¹ The rule will also give the receiving party the option of submitting the allegedly privileged materials to the court to determine if the information was, in fact, privileged, and if so, whether the privilege had been waived.¹¹²

[32] In approving the amendments, the Committee cautions repeatedly that the new rules will not protect a party from the substantive law regarding waiver if it conflicts with the approved procedures.¹¹³ Thus, the “proposed amendment [to Rule 26(b)(5)] does not address the substantive questions whether privilege or work product protection has been waived or forfeited.”¹¹⁴ In fact, the Committee revised the proposed amendments to Rule 26(b)(5) twice to avoid any apparent conflict with substantive waiver law. First, the Committee rejected a prior version of the amendment that required the producing party to notify the receiving party within a reasonable time because of its potential conflict with substantive waiver law.¹¹⁵ Second, the version of the rule published for

¹⁰⁹ *Id.*

¹¹⁰ Judicial Conference Report, *supra* note 6, at 29.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See, e.g., id.* (stating that the proposed rules do “not attempt to change the rules that determine whether production waives the privilege or protection asserted”). Indeed, the Committee takes pains to make clear that it did not intend to “trigger the special statutory process for adopting rules that modify privilege.” *Id.* at 29-30.

¹¹⁴ Judicial Conference Report, *supra* note 6, at Rules App. C-54.

¹¹⁵ *Id.* at C-55 (“Under the law of many jurisdictions, whether a party asserted a privilege claim within a reasonable time is important to determining whether there is a waiver; focusing on a reasonable time might carry implications inconsistent with the Committee’s intent to avoid the substantive law of privilege and privilege waiver.”) This revision apparently contributed to four Committee members voting against the amendment to Rule 26(b)(5) because of their fear that “the new procedure could be used to disrupt litigation, particularly if the claim of privilege or work-product was made late in the case.” Judicial Conference Report, *supra* note 6, at 30. The majority, however, “did not share the concern that parties would deliberately delay a claim of privilege or work product because to do so might waive the protection under the applicable substantive law.” *Id.* at 29-30.

public comment referred to situations in which information had been produced “without intending to waive a claim of privilege.”¹¹⁶ That provision was removed “because many courts include intent in the factors that determine whether production waives privilege.”¹¹⁷ Thus, while the amended rules, if adopted, will embody a well-constructed procedure for resolving claims of inadvertent production, they do nothing to protect the privilege in jurisdictions where the substantive law would result in waiver.

B. THE AMERICAN BAR ASSOCIATION PUBLICATIONS

[33] The American Bar Association (ABA) also has recently published or revised a number of documents in part to address the problem of inadvertent disclosure, including the Model Rules of Professional Conduct (Model Rules), Civil Discovery Standards, and Formal Opinions of the Standing Committee on Ethics and Professional Responsibility.

1. THE MODEL RULES OF PROFESSIONAL CONDUCT AND FORMAL ETHICS OPINIONS

[34] Prior to 2003 the ABA, through its Formal Opinion 92-368, required that attorney recipients of inadvertently disclosed privileged or otherwise confidential information “refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.”¹¹⁸ On October 1, 2005, the ABA Standing Committee on Ethics and Professional Responsibility retreated from that position because the former opinion conflicted with the amended Rule 4.4 of the Model Rules.¹¹⁹ The new ABA Formal Opinion 05-437 only requires the recipient to “promptly notify the sender in order to permit the sender to take protective measures.”¹²⁰ Whether a waiver results from the inadvertent disclosure is “a matter of law beyond the scope” of the ABA ethics opinions.¹²¹

¹¹⁶ Judicial Conference Report, *supra* note 6, at Rules App. C-60.

¹¹⁷ *Id.*

¹¹⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005) (“Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368” (November 10, 1992)).

¹¹⁹ *Id.* at 1.

¹²⁰ *Id.*

¹²¹ *Id.* at 2 (quoting Model Rules of Prof'l Conduct R.4.4, cmt. 2 (2002)).

[35] The action that spurred this retreat occurred in February 2002 when the ABA amended Model Rule 4.4 to add Rule 4.4(b) which states, “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”¹²² Comment 2 to Rule 4.4 explains:

Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. *Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.*¹²³

[36] Thus, not only does the ABA acknowledge the inefficacy of the Model Rules in overcoming a finding of waiver under the substantive law, the ABA has actually retreated from imposing on attorneys ethical obligations that would, in some cases, exceed the responsibilities imposed by the substantive law. The end result is that, even in jurisdictions where waiver is not automatic upon disclosure, the receiving attorney is no longer under an ethical duty to refrain from reading the privileged information pending a resolution of the waiver issue. Thus, there would truly be no way to “seal the bag” because the cat will already have escaped.¹²⁴

¹²² Model Rules of Prof’l Conduct R. 4.4(b) (2002).

¹²³ *Id.* at 4.4(b)(2) (emphasis added).

¹²⁴ *Carter v. Gibbs*, 909 F.2d 1450, 1450 (Fed. Cir. 1990).

2. CIVIL DISCOVERY STANDARDS

[37] In 1999 the ABA adopted its *Civil Discovery Standards*.¹²⁵ The standards were revised in 2004 to incorporate “changes relating to electronic discovery.”¹²⁶ Among other things, the ABA added standards for “Inadvertent Disclosure of Privileged Information,”¹²⁷ and “Attorney-Client Privilege and Attorney Work Product,”¹²⁸ in an attempt to provide guidance to litigants and courts on how best to handle the problem of inevitable inadvertent disclosure. According to Standard 28, “parties should consider stipulating in advance that the inadvertent disclosure of privileged information ordinarily should not be deemed a waiver of that information or any information that may be derived from it.”¹²⁹ In essence, the ABA has advocated that parties stipulate to a somewhat ambiguous form of the intent-required approach, in that inadvertent disclosure would not “ordinarily” result in waiver. Unfortunately, the commentary does not provide any guidance as to what would be out of the ordinary. More importantly, however, is the recognition in the commentary that the “law among various jurisdictions differs on the effect of an inadvertent production of privileged communications.”¹³⁰

[38] This point is brought home even more clearly in Standard 32, which suggests that parties stipulate to the methods of extracting and reviewing electronic information to ostensibly avoid waiver of privileged information.¹³¹ Combining both “claw back” and “quick peek” options,¹³² the standard also expressly recognizes that the parties to such a stipulation “should consider the potential impact that it may have on the producing

¹²⁵ *Civil Discovery Standards*, 1999 A.B.A. SEC. LITIG., available at <http://www.abanet.org/litigation/discoverystandards/> (2004).

¹²⁶ *Id.* at 56.

¹²⁷ *Id.*

¹²⁸ *Id.* at 56.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Civil Discovery Standards*, *supra* note 125, at 71.

¹³² A “claw back” agreement would allow the producing party to demand the return of an inadvertently produced privileged document without waiver of the privilege. Under a “quick peek” agreement, on the other hand, the receiving party would be allowed to inspect the documents of the producing party to identify those that it would like to have produced, which the producing party would then review for privilege. *See Daniel, supra* note 18.

party's ability to maintain privilege or work-product protection attaching to any such data if subsequently demanded by non-parties."¹³³ Indeed, the commentary goes on to admit that "there is no assurance that a stipulated order providing that inadvertent production does not effect a waiver will be effective against a claim of waiver by a third party."¹³⁴ In other words, absent a change to the substantive law, the ABA standards are, in many jurisdictions, aspirational only.

V. A PLEA FOR GUIDANCE: CONCLUSIONS AND RECOMMENDATIONS

[39] Inadvertent disclosure of privileged information is inevitable, particularly in light of the ever-increasing volumes of information that will be exchanging hands as discovery of electronically stored information becomes commonplace. Yet, despite efforts by the Judicial Conference to provide a uniform and rational procedure for dealing with inadvertent disclosure, litigants are left to guess at the standard that will be applied in any particular case and often even in a single jurisdiction. Worse, the ABA's retreat from the ethical duty that would have at least required attorneys to refrain from reading and disseminating an inadvertently produced privileged communication until a court decides the waiver issue will ultimately undermine the producing party's position in those jurisdictions in which the extent of the disclosure is a factor. To restore the balance between facilitating full disclosure and protecting the communications between a client and her attorney, while recognizing the reality of modern discovery of electronically stored information and ensuring accountability and responsibility in the attorneys involved in the process, I recommend (1) a uniform standard to be applied by state and federal courts in the event of an inadvertent disclosure of privileged information, and (2) a modification to Model Rule 4.4(b) to ensure that court's decisions are based on the conduct of the privilege owner rather than third parties.

[40] State and federal courts should adopt the multi-factor standard when evaluating whether an inadvertent disclosure results in a waiver of the privilege. Although the multi-factor test has been criticized on the

¹³³ *Civil Discovery Standards*, *supra* note 125, at 72.

¹³⁴ *Id.* at 74.

grounds that it is likely to lead to inconsistent results,¹³⁵ it is the only test that can be rationally applied given the realities of modern discovery of electronically-stored information. The strict liability test ignores the reality of the coming flood of data in modern discovery. Even the most diligent attorneys will be unable to ensure with certainty that privileged information will not be disclosed to third parties. To sanction the privilege-holder even after the most thorough and painstaking effort to preserve her privilege is to unduly minimize the importance of, and create a chilling effect on, confidential communications in the attorney-client relationship. While the *per se* approach has been lauded for creating a “strong incentive for careful document management during the course of discovery,”¹³⁶ the draconian results that will ensue from the inevitable inadvertent disclosures associated with discovery of electronically-stored information, even with the most meticulous review processes, create a strong argument for the multi-factor analysis.¹³⁷

[41] Likewise, the intent-required approach places absolutely no responsibility on the privilege-holder or her attorney to protect the confidentiality of their communications and thus tips the scale too far in the other direction. Litigants and their attorneys *should* be held accountable for making reasonable efforts to protect the confidentiality of their communications. To hold otherwise would unduly minimize the importance of full disclosure in our modern, discovery-driven system of litigation.

[42] Therefore, only the multi-factor analysis allows a court to consider the facts and circumstances of each case, including the privilege-holder’s diligence in protecting her own interests, before determining whether an inadvertent disclosure results in a waiver.¹³⁸ However, the multi-factor

¹³⁵ Bruckner-Harvey, *supra* note 30, at 390.

¹³⁶ Hardgrove, *supra* note 3, at 657-58.

¹³⁷ See also Hundley, *supra* note 2, at § 5 (noting that the “results [of the multi-factor analysis] tend to be more case- and fact-specific than the strict liability or a rigid adherence to the intent required approach; nonetheless, these courts’ method of analysis has emerged as a clearly defined matter of law”).

¹³⁸ At least one commentator has suggested that the “time factor,” which considers the diligence of the producing party in seeking to rectify its error, should be eliminated from the multi-factor test. See Harding, *supra*, note 2, at 486-88. Harding argues that (1) objections to the introduction of privileged evidence would occur at trial, and, as a result,

test alone will not resolve the present problem because attorneys are currently not ethically obligated to respect a potential privilege until its status is judicially determined. Therefore, Model Rule 4.4(b) should be revised to impose on recipients of such information a duty not to interfere with or undermine the judicial determination.

[43] Specifically, Model Rule 4.4(b) should require that an attorney that receives potentially privileged information that she knows, or reasonably should know, was inadvertently disclosed, refrain from reviewing the information or disclosing it to anyone, including her client, pending a judicial determination of the status of the privilege. This will ensure that the court reviewing the circumstances of the disclosure will base its decision on the actions of the producing party rather than on the actions of the receiving party, consistent with the long-standing principle that only the owner can waive the privilege.

[44] A uniform standard for determining the status of inadvertently disclosed privileged information in light of the conduct of the producing party, and an ethical rule placing more responsibility on the receiving attorney consistent with the importance of attorney-client communications, will best balance the interests of each as they face the coming onslaught of information in the electronic age of litigation.

there is no need to consider the issue before then; (2) the non-producing party will probably already have reviewed the document in question, which is the primary concern of the time element; and (3) “if the non-waiver presumption can be rebutted, it is because of an inadequacy in the manner in which the attorney produced the document(s) in the first place and not for how long the document(s) remained in the non-producing party’s possession.” *Id.* at 488. Each of these arguments fails scrutiny. First, there is no reason to wait and resolve the status of a privilege until trial. Indeed, any delay furthers the potential for unwarranted dissemination of the potentially privileged information, potentially undermining the privilege-holder’s interest in the confidential communication. Second, as noted *infra*, I believe that attorneys *should* be ethically bound to refrain from reviewing inadvertently disclosed information until the status of the privileged is judicially determined. To cynically assume that the receiving party would read the privileged information places far too little trust in, and accountability on, the attorney in question. Finally, the non-waiver presumption can, indeed, be rebutted by a lack of diligence in seeking to recover the disclosed information. Delay indicates a lack of concern for the confidential information, or strategic decision-making, either of which undermines the party’s stated interest in maintaining the privilege.