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NEW INSIGHTS ON WAIVER AND THE INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS: ATTORNEY RESPONSIBILITY AS THE GOVERNING PRECEPT

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The specter of inadvertently disclosing the confidences of a client hangs over every attorney. With the growth of complex litigation, inadvertent disclosure[1] of privileged materials is an increasingly common problem, particularly in cases involving the production of large amounts of material.[2] One can easily imagine how, in the course of a massive document production, privileged materials escape the attention of the producing side and are inadvertently disclosed.

Such disclosure raises a number of issues. One issue is whether the disclosure waives the attorney-client privilege,[3] which in turn involves

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1. "Inadvertent disclosure" has been defined as "the unintentional revelation of the contents of a document otherwise subject to the attorney-client privilege." Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598, 598 n.5 (1983). "Inadvertent disclosure" should be distinguished from involuntary disclosure that results from theft or illegal eavesdropping, *see generally* Natalie A. Kanellis, Comment, *Applicability of the Attorney-Client Privilege to Communications Intercepted by Third Parties*, 69 IOWA L. REV. 263 (1983) (describing the circumstances under which the attorney-client privilege should attach to communications discovered by a third party), or intentional actions of disgruntled employees, *see In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863 (D. Minn. 1979) (stating that documents given to an adversary by a client's employee do not automatically lose privileged status). The difference between an inadvertent disclosure and and involuntary disclosure is that the former is caused by actions of the client or its attorney acting as its agent while the latter is caused by an outside force. *See* Note, *supra*, at 612-14.

Instances where a party voluntarily discloses information and later regrets it are also distinguishable. *See* Note, *supra*, at 604-05. One commentator gives the example of a party who intentionally reveals privileged information during settlement discussions as a negotiating tactic. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1633 (1986). The party may not be able to later claim the privilege, if a settlement is not reached, on the grounds that he is sorry he revealed the information. *Id.* Different considerations are raised by these different forms of disclosure. This Article is limited to an analysis of implications of an inadvertent waiver.

2. A rough guide to the increasing number of inadvertent disclosures is the increase in reported cases addressing the issue. A computer search covering all jurisdictions found that through 1979, only 14 opinions discusssed the topic. From 1980 to August 1994, 171 opinions addressed the topic. Search of LEXIS, Genfed Library, Mega file (Aug. 1994). Practitioners have attempted to minimize the effects of inadvertent disclosures by including in their discovery request responses language reserving their rights to claim privilege on inadvertently disclosed materials. *See, e.g.*, W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 774 (W.D. Okla. 1976).

Some courts have ruled that the reservation of rights is unenforceable. *See, e.g.*, *id.* at 775 ("The purported reservation contained in [defendant's] Response was in effect a legal nullity. One cannot produce documents and later assert a privilege which ceases to exist because of the production."). A better view is that the disclaimers alone should not be a litmus test of waiver, but should be considered as one factor in judging whether an attorney took reasonable precautions to avoid disclosure.

3. The following is a standard working definition of the attorney-client privilege that will be used throughout this Article:

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whether the attorney intended to waive the privilege, and whether the attorney had authority from the client to make such a waiver. A second issue deals with the remedies available to the client if there is a waiver. A third issue concerns the conflict between the courts' rules concerning an inadvertent disclosure and the professional bar's ethical rules of professional responsibility.

To put this conflict into perspective, consider the following model: Companies *A* and *B* are involved in a large contract dispute that has resulted in a lawsuit. *B*'s attorney serves a document request upon *A*'s Attorney for all documents related to the transaction. Within the 10,000 documents *A*'s attorneys produce are ten privileged documents containing legal advice from *A*'s former attorneys to *A*. Immediately after realizing the error, *A*'s attorneys request that the documents be returned. *B*'s attorneys refuse the demand. *A*'s attorneys then go to court for a protective order. Depending upon the jurisdiction, this inadvertent disclosure may or may not be treated as a waiver of the attorney-client privilege.[4] Additionally, the disclosure and the opposing counsel's refusal to return the document may violate the ethical obligations of both attorneys.[5]

> (1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (John T. McNaughton rev., 1961) (emphasis omitted).

4. *Compare* Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991) (stating that inadvertent disclosure of documents is insufficient to constitute a waiver of the attorney-client privilege) *with* International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988) (holding that the attorney-client privilege is automatically waived with inadvertent production) *and* Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (stating that once a privileged document is produced, the attorney-client privilege is automatically waived).

5. See *infra* part II for a discussion of the attorney's ethical duty of confidentiality. In addition to the ethical duty of confidentiality, a competing ethical duty may exist in *Model Rule* 1.3 which requires an attorney to act with "reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1994 ed.) [hereinafter MODEL RULES]. The comment to Rule 1.3 notes that the rule requires an attorney to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* Rule 1.3 cmt. At least one court has suggested that an attorney is bound by professional obligations to use information that is inadvertently disclosed for the client's benefit. *See* Aerojet-General Corp. v. Transport Indem. Ins., 22 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 1993).

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Only by examining the goals served by the attorney-client privilege and the ethical rules on confidentiality can one decide whether inadvertent disclosure waives the attorney-client privilege. Commentators agree that the purpose of both the attorney-client privilege and the ethical rules regarding confidentiality is to encourage frank communication between the client and his attorney.[6] Such openness, in turn, "promote[s] broader public interest[ ] in the observance of law and administration of justice."[7]

Many cases and commentators have focused solely on answering the narrow question of whether there has been a waiver of the attorney-client privilege when privileged documents are inadvertently disclosed.[8] Accordingly, their analyses have not considered all of the broader policy goals implicated by the inquiry. Many commentators are primarily concerned with how to limit waiver of the attorney-client privilege.[9] For example, at least one commentator has stressed issues of fairness,[10] while another has analogized the question to a determination of property rights.[11] Too little attention, however, has been given to the question of fostering attorney responsibility to maintain confidentiality and the results of the inadvertent disclosure in terms of attorney culpability.

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6. *See infra* notes 121-29 and accompanying text.

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

8. *See* George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 640-46 (1986); James M. Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511, 512-22 (1985); Scott L. Lanin, *Survey of New York Practice: Developments in the Law*, 62 ST. JOHN'S L. REV. 751, 752-59 (1988); Wesley M. Ayres, Comment, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 PAC. L.J. 59, 70-80 (1986); Kanellis, *supra* note 1, at 276-77; Note, *supra* note 1, at 623-24.

9. Unlike the courts, which traditionally have had antagonism toward the attorney-client privilege, and have therefore given expansive interpretation to waiver, *see, e.g.*, Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (holding that a corporation waived any protection of the attorney-client privilege by turning over documents to the Securities and Exchange Commission), most commentators have asserted that the privilege's benefits outweigh its costs, that waiver be more limited, and have advocated adoption of various tests. *See, e.g.*, Davidson & Voth, *supra* note 8, at 645-46 (recommending a subjective intent test); Grippando, *supra* note 8, at 527 (advocating a conduct analysis approach); 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, 485 (1993) (advocating a variation of the subjective intent test which creates a rebuttable presumption against waiver); Marcus, *supra* note 1, at 1654 (suggesting a fairness approach); Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 543 (1990) (arguing for a conduct standard which emphasizes prevention of inadvertent disclosure).

10. *See* Marcus, *supra* note 1, at 1654.

11. *See* Meese, *supra* note 9, at 543.

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This Article suggests that fostering the development of attorney responsibility should be the central goal in addressing the issues raised by the inadvertent disclosure. Deciding the waiver issue by concentrating on attorney responsibility will help prevent inadvertent disclosures (and resultant waivers) by impressing upon the attorney the need to take care to avoid them. When disclosures inadvertently occur, the amount of precautions the attorney took (albeit unsuccessfully) should determine whether the privilege is waived. Placing the onus of precautions against inadvertent disclosure on the attorney is not only beneficial to the client, but also aids the profession, and the overall administration of justice. These systemic goals underlie the doctrines of privilege and waiver.

American courts use three different tests to evaluate whether inadvertent disclosure waives the attorney-client privilege. All three tests use intent as the basis of a waiver, but each uses a different measurement of intent. The traditional test focuses solely on the act of disclosure, deeming it representative of the client's intent to waive his privilege.[12] The subjective intent test is premised on the client's actual desire to waive the privilege; it therefore holds that an inadvertent disclosure never amounts to a waiver.[13] The reasonable precautions test measures intent to waive by the precautions taken to prevent inadvertent disclosure.[14]

This Article focuses on the attorney's legal and ethical responsibilities to the client and analyzes the three tests of waiver the courts use in terms of their impact on promoting attorney responsibility. Part One describes the current caselaw governing inadvertent disclosure. It also describes the American Bar Association's (ABA) first formal ethical opinion on inadvertently disclosed information that appears to advocate a variation of the subjective intent test by creating a presumption against waiver that must be overcome by the receiving attorney.[15] The opinion takes this position by stressing the forwarding attorney's property rights in the documents.[16]

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12. *See, e.g.*, *W.R. Grace*, 446 F. Supp. at 775.

13. *See* Shriver v. Baskin-Robbins Ice Cream Co., 145 F.R.D. 112, 115 (D. Colo. 1992); *Georgetown Manor*, 753 F. Supp. at 938; Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982); Pitard v. Stillwater Transfer & Storage Co., 589 So. 2d 1127, 1128-29 (La. Ct. App. 1991).

14. *See* Lois Sportswear, U.S.A., Inc., v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (describing a five-factor analysis).

15. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992), *reprinted in* LAWYER'S MANUAL ON PROFESSIONAL CONDUCT: MANUAL (ABA/BNA) at 1001:155 [hereinafter ABA].

16. *See id.* at 1001:159 (referring to an inadvertent mailing as creating a constructive bailment or a bailment implied by law).

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Part Two discusses the attorney-client privilege and its analytic counterpart, the ethical duty of maintaining confidentiality, identifies the goals of each and the tension that has developed between them, and how they may be reconciled. Part Three analyzes each test from an attorney-responsibility perspective and concludes that the reasonable-precautions test best serves the client's interests, and therefore has systemic benefits, by properly forcing the attorney to bear the risks of inadvertent disclosure. It reconciles the ABA opinion with this conclusion by making two suggestions. First, to the extent that one views the ABA opinion as adopting the subjective intent test, the opinion should be limited to its facts—the instance of a single, errant disclosure, rather than applying it to the far more common occurrence of the inadvertent disclosures taking place within a complex litigation with massive document productions. Second, the Article demonstrates that the ABA opinion, with its emphasis on property rights, in fact, endorses a reasonable precautions test.

I. THE CURRENT WAIVER TESTS

Before turning to the three different tests used in deciding whether an inadvertent disclosure of privileged materials waives the attorney-client privilege, two preliminary subjects require attention: (1) attorney authority to waive, and (2) intent to waive.

A. *Authority to Waive the Privilege*

The first step in deciding the question of waiver is the determination of who has the authority to waive the privilege. While the attorney-client privilege rests solely with the client,[17] only a minority of cases

17. *See, e.g.*, ALA. CODE § 12-21-161 (1975) ("No attorney . . . shall be competent or compelled to testify in any court in this state for or against the client as to any matter or thing, knowledge of which may have been acquired from the client, or as to advice or counsel to the client given by virtue of the relation as attorney . . . *unless called to testify by the client* . . . .") (emphasis added); CAL. EVID. CODE § 954 (West Supp. 1994) ("*[T]he client*, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . .") (emphasis added); IDAHO CODE § 9-203 (1947) ("An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."); KAN. STAT. ANN. § 60-426 (1994) ("[C]ommunications found by the judge to have been between lawyer and his or her client in the course of that relationship and in professional confidence, are privileged, *and a client has a privilege* . . . to prevent his or her lawyer from disclosing it.") (emphasis added); MONT. CODE ANN. § 26-1-803 (1993) ("An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given to the client in the course of professional employment."); N.Y. CIV. PRAC. L. & R. 4503 (McKinney 1993) ("Unless the client waives the

hold that waiver may only be accomplished by the client.[18] The majority use the concept of implied authority to find waiver when there is something less than the classic situation of a client intentionally divulging confidences to a third-party.[19] An attorney, designated by the client as his agent to comply with a document production request, is deemed to have implicit authority to waive the client's privilege.[20]

B. *The Intent to Waive*

Intent is the cornerstone of the waiver issue under all of the current tests. Under a purist view, waiver is deemed the " 'intentional relinquishment . . . of a known right,' " that only the client may exercise.[21] Many courts are less rigid, however, and hold that intent, as well as authority to waive, may be implicit.[22] The common thread among all of the waiver tests is that it is the *client's* intent that governs. Even cases adopting the concept of implicit authority that allows the attorney to waive the privilege, still speak of waiver as representing a manifesta-

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privilege, an attorney . . . shall not disclose, or be allowed to disclose such communication . . . ."). Resting the privilege with the client is a shift from early common law days where the privilege rested with the attorney. *See* WIGMORE, *supra* note 3, § 2290.

The *Model Rules of Professional Conduct* also make confidentiality a client's right. MODEL RULES, *supra* note 5, Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client *unless the client consents after consultation*. . . .") (emphasis added). The same approach was taken by the *Model Code of Professional Responsibility*, the predecessor to the *Model Rules*. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1986) ("A lawyer may reveal . . . [c]onfidences or secrets *with the consent of the client or clients affected*, but only after a full disclosure to them.") (emphasis added).

18. *See Mendenhall*, 531 F. Supp. at 955. Courts adopting the subjective intent test to address the issue of inadvertent disclosure take a purist view of waiver as the intentional relinquishment or abandonment of a known right, and roundly criticize the attempts to gloss over this fundamental requirement. *Id.*

19. *See* ICI Americas Inc. v. Wanamaker, No. 88-1346, 1989 U.S. Dist. LEXIS 4057, at *7-*8 (E.D. Pa. Apr. 18, 1989); *Permian*, 665 F.2d at 1219-21 (reasoning that the privilege could not be waived for one opponent and then subsequently invoked against another opponent); Goldsborough v. Eagle Crest Partners, Ltd., 838 P.2d 1069, 1073 (Or. 1992); *cf.* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (requiring competent and intelligent waiver by accused to waive right to counsel).

20. *Goldsborough*, 838 P.2d at 1073. This adoption is rarely explicit—most cases do not lay out the analytical groundwork of expressing that the attorney is the client's agent. *See* Manufacturer & Traders Trust Co. v. Servotronics, 522 N.Y.S.2d 999, 1004 (App. Div. 1987). *See generally* Davidson & Voth, *supra* note 8, at 645-46 (discussing the application of agency theory to attorney-client privilege); Note, *supra* note 1, at 604 n.27 (stating that "when an attorney negotiates or litigates on behalf of a client, the courts will probably conclude that the client has impliedly authorized the attorney to waive his privilege").

21. *Mendenhall*, 531 F. Supp. at 955 (quoting *Johnson*, 304 U.S. at 464).

22. *See, e.g.*, United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954).

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tion of the *client's* intent; no court has gone so far as to measure waiver by the attorney's intent.[23]

The differing views on measuring the client's intent have spurred the development of four schools of thought on the issue of inadvertently disclosed documents. The four tests represent a spectrum ranging from one absolute view embodied by the traditional test that a party's intent to waive is established by the fact of disclosure[24] to the polar view embraced by the subjective intent test that a party's intent to waive must be explicit, thereby eliminating waiver through inadvertency.[25] The reasonable precautions test stands in the center of the spectrum, judging waiver by the circumstances surrounding the disclosure.[26] Closely aligned to the subjective intent test is the ABA view that creates a presumption against waiver.[27]

1. The Traditional Test

The traditional test of inadvertent disclosure rests on Dean Wigmore's view, as adopted by many courts, that the attorney-client privilege suppresses the truth.[28] These courts counter the privilege's perceived costs in shielding relevant evidence by giving waiver an expansive definition.[29] In such courts, the client's intent to disclose privileged materials and to waive the privilege is found simply by the disclosure itself.[30] Thus, while the traditional test ostensibly acknowledges that intent is the basis of waiver, intent is established solely by the act of disclosure. This approach is similar to the principle of strict

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23. *See, e.g., Goldsborough*, 838 P.2d at 1073. As some commentators have pointed out, attempting to measure intent in an inadvertent disclosure situation is a legal fiction since by definition, no specific intent by the client to disclose exists in the inadvertent situation. *See* Marcus, *supra* note 1, at 1607 ("[I]ntention[ ] is not a useful guide because truly intentional waivers are extremely rare."); *Developments in the Law—Privileged Communication: VII. Implied Waiver*, 98 HARV. L. REV. 1629, 1664 (1985) ("[A]nalysis of the privilege-holder's intent is unhelpful . . . .").

24. *See, e.g., Kelsey-Hayes*, 15 F.R.D. at 465.

25. *See, e.g., Mendenhall*, 531 F. Supp. at 955.

26. *See, e.g., Lois Sportswear*, 104 F.R.D. at 105.

27. *See* ABA, *supra* note 15, at 1001:155.

28. WIGMORE, *supra* note 3, § 2291, at 557 (explaining that the attorney-client privilege is an exception to the duty to disclose, and thus an obstacle in discovering the truth). For cases utilizing the traditional inadvertent waiver test, see Wichita Land & Cattle Co. v. American Fed. Bank, 148 F.R.D. 456, 457 (D.D.C. 1992); International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988); *W.R. Grace*, 446 F. Supp. at 775; Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970).

29. *See, e.g., W.R. Grace*, 446 F. Supp. at 775; *Underwater Storage*, 314 F. Supp. at 549.

30. *See, e.g., W.R. Grace*, 446 F. Supp. at 775; *Underwater Storage*, 314 F. Supp. at 549.

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liability used in tort and criminal offenses where the act is the decisive factor in deciding culpability.[31]

Two rationales support the traditional test's measure of the act as the bright-line test of the client's intent. The first rationale is that the client has the ability to protect the confidentiality of privileged materials and that, therefore, any disclosure is a manifestation of the client's lack of intent to keep the confidential status of the materials.[32] The second rationale is that once the confidence is revealed, there is nothing left to protect and therefore, the privilege is waived.[33]

The seminal traditional test case is *United States v. Kelsey-Hayes Wheel Co.*,[34] which involved an anti-trust action.[35] The plaintiff sought to have one of the defendants admit the genuineness of 1000 documents the plaintiff had culled during an examination of the defendant's files.[36] The defendant objected to this request as to twenty-nine documents inadvertently included in the files given to the plaintiff, which it claimed were communications between attorney and client.[37] Rejecting the defendant's contention, the court reasoned that the attorney-client privilege only covers communications "as to which there is an intention of confidentiality."[38] The court noted that the defendant's own act of turning over privileged documents caused the plaintiff to view its

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31. *See, e.g.*, United States v. Park, 421 U.S. 658, 668 (1975) (ruling that no mens rea was needed for a finding of guilt under a strict liability statute); Commonwealth v. Miller, 432 N.E.2d 463, 465 (Mass. 1982) (holding that the act of statutory rape was sufficient for a finding of guilt; no mens rea was required); State v. Stepniewski, 314 N.W.2d 98, 104 (Wis. 1982) (holding that no mens rea was needed under state unfair trade practices law).

32. *See W.R. Grace*, 446 F. Supp. at 775; *Underwater Storage*, 314 F. Supp. at 549.

33. *See, e.g.*, Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 209 (N.D. Ind. 1990); *W.R. Grace*, 446 F. Supp. at 775; *Underwater Storage*, 314 F. Supp. at 549; *Kelsey-Hayes*, 15 F.R.D. at 464-65.

This rationale has been expressed in a variety of metaphors, the most popular being the "bird cage" theory of confidentiality—"[W]hen a secret is out it is out for all time and cannot be caught again like a bird and put back in its cage." State v. Bloom, 193 N.Y. 1, 10 (N.Y. 1908). Other common characterizations also refer to the horse being out of the barn, Ray v. Cutter Lab., 746 F. Supp. 86, 88 (M.D. Fla. 1990) (quoting Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982)), or the rabbit being out of the hat. Marcus, *supra* note 1, at 1635.

34. 15 F.R.D. 461 (E.D. Mich. 1954).

35. *See id.* at 462. Interestingly, there is no clear consensus as to which waiver theory the case represents. *Kelsey-Hayes* has been categorized as the "seminal case" on the strict liability traditional approach, *see* Davidson & Voth, *supra* note 8, at 641, and as representing an early example of the conduct, or reasonable precautions, approach, *see* Meese, *supra* note 9, at 523; Ayres, *supra* note 8, at 79. This Article views the proper categorization of *Kelsey-Hayes* as a traditional or strict responsibility case. *See infra* note 40 and accompanying text.

36. *Kelsey-Hayes*, 15 F.R.D. at 464.

37. *Id.*

38. *Id.*

confidential communications.[39] The inadvertent nature of the disclosure was irrelevant to the court, which ruled that the fact of disclosure manifested the intent to disclose, because the defendant took no particular care to protect the privileged status of the documents.[40] Moreover, relying on the traditional test's second rationale, the court reasoned that there was no longer any need for the privilege because the plaintiff now knew the contents of the secret communication.[41] To enforce the privilege, would, according to the court, "amount to no more than mechanical obedience to a formula."[42]

2. The Subjective Intent Test

The subjective intent test is premised on a literal definition of waiver as the " 'intentional relinquishment . . . of a known right.' "[43] Courts embracing this test hold that inadvertent disclosure of privileged matters can never operate as a waiver since the client's specific intent to waive

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39. *Id.*

40. *Id.* at 465. It is this mention of the lack of precautions taken that has made some commentators view the case as representing a reasonable precaution standard. *See, e.g.*, Meese, *supra* note 9, at 524. However the court's citation to Wigmore, *Kelsey-Hayes*, 15 F.R.D. at 464, who without doubt is the leading advocate of the strict liability approach, makes it clear that the case does not represent a reasonable precautions test.

41. *Kelsey-Hayes*, 15 F.R.D. at 464-65.

42. *Id.* at 465.

43. *Mendenhall*, 531 F. Supp. at 955 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The *Mendenhall* court based its definition of waiver on the *Johnson* court's definition of waiver, even though *Johnson* involved the waiver of a constitutional right. *Johnson*, 304 U.S. at 459, 464. According to the *Mendenhall* court, "[T]he same concept applies to waivers generally." *Mendenhall*, 531 F. Supp. at 955 n.9 (citing BLACK'S LAW DICTIONARY 1417 (5th ed. 1979)).

This linchpin to the subjective intent test has not been without detractors who argue that waiver of an evidentiary privilege should be judged by a different standard than waiver of a constitutional right because in the former situation, the waiver need not be knowingly made. *See* Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646, 650 (9th Cir. 1978) (stating that although there may be a difference between waiver of evidentiary privileges and constitutional rights, defendant did not waive attorney-client privilege when compelled to produce documents); Kanter v. Superior Court, 253 Cal. Rptr. 810, 814 (Ct. App. 1988) ("Although the privilege is a statutory creation and should be protected and nurtured, it is not as sacred as a constitutional right, which should require a knowing and intelligent waiver before it is lost."). Recently, the United States Supreme Court in Illinois v. Rodriguez, 497 U.S. 177, 183 (1990), implied that the *Johnson* definition of waiver is limited to waiver of criminal trial rights. What effect this decision has on the subjective intent test remains to be seen.

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must be established.[44] This test is the opposite of the traditional test, which finds intent solely from the fact of disclosure.[45]

The leading subjective intent case is *Mendenhall v. Barber-Greene Co.*[46] Plaintiff's counsel inadvertently allowed opposing counsel to review all client files relating to a pending patent infringement case.[47] Four privileged communications were within the files.[48] When defense counsel later requested copies of the communications, plaintiff's counsel refused on attorney-client privilege grounds.[49] Defendants' counsel sought to compel production.[50]

In denying the defendants' motion to produce, the court held that "mere inadvertent production does not waive the privilege,"[51] adopting the United States Supreme Court's standard in *Johnson v. Zerbst* that waiver is premised on an " 'intentional relinquishment or abandonment of a known right.' "[52] The court reasoned that inadvertent production is antithetical to knowing waiver.[53]

The majority of courts have rejected the subjective intent test on the grounds that it is too inflexible.[54] Some courts have criticized the test's insistence that waiver must be express since the client's self-interest in preserving the privilege may color whether intent to waive exists.[55] It

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44. *See* Shriver v. Baskin-Robbins Ice Cream Co., 145 F.R.D. 112, 115 (D. Colo. 1992); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Mendenhall*, 531 F. Supp. at 954-55; Pitard v. Stillwater Transfer & Storage Co., 589 So. 2d 1127, 1128-29 (La. Ct. App. 1991).

45. *See, e.g., Underwater Storage*, 314 F. Supp. at 549 (stating that the court would not look behind the objective fact of production to determine whether the party intended to have the letter examined).

46. 531 F. Supp. at 951.

47. *Id.* at 952 n.2.

48. *Id.* at 952.

49. *Id.* at 952 n.2.

50. *Id.* at 952.

51. *Id.* at 954.

52. *Id.* at 955.

53. *Id.*

54. *See* Note, *supra* note 1, at 606 n.31. Many courts have expressly rejected the subjective intent test. *See, e.g., Kanter*, 253 Cal. Rptr. at 814; Dalen v. Ozite Corp., 594 N.E.2d 1365, 1371-72 (Ill. App. Ct. 1992). Other courts implicitly reject the subjective intent test by adopting one of the other tests of waiver. *See, e.g.*, SEC v. O'Brien, No. 91-145, 1992 U.S. Dist. LEXIS 18146, at *2-*3 (D.D.C. Aug. 26, 1992); *In re* Grand Jury Investigation, 142 F.R.D. 276, 279 (M.D.N.C. 1992); Advanced Medical, Inc. v. Arden Medical Sys., Inc., No. 87-3059, 1988 U.S. Dist. LEXIS 7297, at *5 (E.D. Pa. July 18, 1988); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

55. *See* Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1332 (N.D. Ga. 1980); *Kanter*, 253 Cal. Rptr. at 817 ("Under the subjective approach, a waiver would almost never be found. From a practical standpoint, the privilege holder could claim the privilege at any time, even long after the party knew that the opposing side had received

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would be the rare client who, in opposing a motion to produce, or in support of a motion for a protective order, states that he intended to disclose the documents and waive the privilege.[56] In effect, adopting a subjective intent approach gives blanket protection to clients and will rarely result in finding waiver based on inadvertent disclosure.[57] According to one court, the test can cause instability in a judicial proceeding since a party may not know whether the document produced will later be allowed into evidence.[58]

Commentators generally are more receptive to the subjective intent test than the courts.[59] Some agree with the *Mendenhall* court's reasoning that waiver must be intentional.[60] Others maintain that the subjective intent standard is the most cost-effective, noting that the crucial consideration should not be of the producing party's state of mind at the time of production, which by definition does not include specific intent to disclose, but of his state of mind at the time he is alerted to the production.[61] Finally, some commentators, in advocating adoption of the subjective intent test, note that some harm does result from a ban on the use of inadvertently revealed information because relevant information is suppressed, but that this harm is outweighed by the privilege's benefit.[62]

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privileged documents."); *see also* Ayres, *supra* note 8, at 81-82 ("[T]he self-interest of the client would raise significant questions concerning the reliability of a client's statement that the privilege was not intended to be waived."); WIGMORE, *supra* note 3, § 2327, at 636 ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.").

56. *See Kanter*, 253 Cal. Rptr. at 817.

57. *See id.*

58. *See id.* (stating that "the privilege holder could claim the privilege at any time"); *see also* Marcus, *supra* note 1, at 1636 ("[I]f unintended delivery of privileged material could always be taken back . . . there could be continual uncertainty about whether privilege would actually be asserted as to items produced in discovery, a prospect that could disrupt trial preparation."). Of course, stability alone is not a sufficient rationale for adopting a particular waiver test. Were it so, the traditional test would be the test of choice since it is so easy to apply—if documents are disclosed, the privilege is waived. *See W.R. Grace*, 446 F. Supp. at 775 (defining the traditional test); *supra* text accompanying notes 28-31.

59. *See, e.g.*, Meese, *supra* note 9, at 536; Ayres, *supra* note 8, at 80-81.

60. Ayres, *supra* note 8, at 80.

61. Meese, *supra* note 9, at 531. Characterizing the privilege as a type of property right, *id.*, the author's analysis appears to be adopted almost fully by the ABA's formal opinion on inadvertent disclosure. *See infra* text accompanying notes 209-12; ABA, *supra* note 15.

62. *See* Marcus, *supra* note 1, at 1616-17; Meese, *supra* note 9, at 535.

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3. The Reasonable Precautions Test

The reasonable precautions test was conceived as a modern day answer to the strict Wigmore-based traditional test.[63] Recognizing that in sophisticated multi-party litigation with enormous document productions, documents do get inadvertently disclosed, the test measures intent by examining the disclosing party's conduct and the circumstances surrounding the disclosure to determine whether intent to waive exists.[64] In doing so, the reasonable precautions test replaces bright-line approaches, such as those used in the traditional test[65] which measures intent by the fact of disclosure, or in the subjective intent test[66] which requires that the client's actual intent to waive be established.[67] This totality-of-circumstances approach has evolved into a five-factor analysis as first set forth in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*[68]

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63. *See* Note, *supra* note 1, at 616-18 (asserting that a reasonable precautions test is a better test of client's intent to maintain confidentiality than stricter tests such as the traditional approach).

64. *See id.* at 619-23 (describing features common to document production which can help courts decide whether reasonable precautions have been taken).

65. *See supra* text accompanying notes 28-31.

66. *See supra* text accompanying notes 43-44.

67. The reasonable precautions test may be seen as the natural outgrowth of the earlier traditional cases that used the lack of precautions as a means of bolstering their rationale that the client could have taken the steps needed to preserve confidentiality. *See generally Kelsey-Hayes*, 15 F.R.D. at 465 (denying privilege existed where client had failed to take adequate precautions to keep documents confidential); *Underwater Storage*, 314 F. Supp. at 549 (stating that no attorney-client privilege existed as to letter inadvertently disclosed by attorney). This rationale may be the case in singular erroneous disclosure, but is unrealistic in cases where thousands, sometimes millions, of documents are produced. *See, e.g., Transamerica*, 573 F.2d at 648 (describing difficulties in screening for privileged documents, when party is compelled to produce approximately 17 million pages).

68. 104 F.R.D. 103 (S.D.N.Y. 1985). Earlier cases rejected the traditional test in favor of a test that evaluated the precautions taken to avoid disclosure, *see, e.g.*, National Helium Corp. v. United States, 219 Ct. Cl. 612, 614 (1979) (finding only question as to whether the privilege attached was whether the procedure followed by the party claiming the privilege was so lax, careless or inadequate that the party must be objectively considered as indifferent to disclosure to adverse party); Data Sys., Inc. v. Philips Business Sys., Inc., No. 78 Civ.-6015-CSH, at *6 (S.D.N.Y. Jan. 8, 1981) (LEXIS, Genfed Library, DIST File) (rejecting an objective intent test and noting that party claiming privilege took every precaution possible to secure privileged documents); however, the *Lois Sportswear* court was the first to articulate the five factor approach. *See* Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 330-31 (N.D. Cal. 1985).

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(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in light of the extent of document production[69]

In considering this factor, the courts look at the mechanics of the overall document production and how the accidental disclosure occurred.[70] This factor requires that the party producing documents devise a screening mechanism to cull privileged material.[71] The complexity of the screening procedure will depend on the number and nature of the documents to be produced.[72] The courts are also concerned with the staffing of the screening procedure, with most courts requiring that the persons reviewing the material have some legal expertise for the courts to find that the procedure was reasonable.[73]

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69. *Lois Sportswear*, 104 F.R.D. at 105.

70. *See, e.g., In re Grand Jury Investigation*, 142 F.R.D. at 279-80.

71. *See id.*; Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991).

72. *See Marine Midland*, 138 F.R.D. at 483. The courts consider the amount of documents to be produced and the time frame of the production in weighing the adequacy of a screening mechanism. *See id.* For example, the court in *Marine Midland* held that using only two lawyers for one day to review tens of thousands of documents was inadequate. *See id.* In contrast, another court held that the producing party acted reasonably in reviewing 300,000 documents over a two-month period under a multi-layer screening procedure staffed by attorneys and paralegals that resulted in the inadvertent disclosure of 18 documents. *See In re Grand Jury Investigation*, 142 F.R.D. at 279-80.

Transamerica describes perhaps one of the most onerous document productions ever undertaken. In a previous related action, the district court had ordered defendant, IBM, to produce more than 17 million pages of documents within a three-month period. *Transamerica*, 573 F.2d at 648. In attempting to meet this deadline, IBM devised an elaborate screening mechanism to pull out privileged documents. *See id.* The screening procedure involved a page-by-page initial review of each of the 17 million pages of documents by junior attorneys, followed by a tagging process for potentially privileged documents, followed by a another review of the tagged items by more senior attorneys, followed by an intricate duplication process for partially privileged material. *Id.* at 649. Despite what the circuit court deemed a "herculean effort," *id.* at 648, 1138 privileged documents were inadvertently disclosed. *Id.* at 650. The plaintiff sought to compel production of the documents, arguing that IBM's previous inadvertent disclosure waived the privileged status of the documents. *Id.* at 647. The lower court denied plaintiff's motion to compel production of the documents. *Id.* In a novel approach to the waiver issue, the circuit court avoided deciding whether an inadvertent disclosure waived the privilege by holding that the disclosure was compelled by the lower court's onerous discovery schedule, and that since the disclosure was not voluntary, it could not amount to a waiver. *Id.* at 651. No later court has used the *Transamerica* court's theory of compelled disclosure.

73. *See, e.g., In re Grand Jury Investigation*, 142 F.R.D. at 279 (holding screening reasonable when conducted by outside senior and junior attorneys together with a paralegal); Chrysler Capital Corp. v. Bankers Trust Co., No. 91 Civ. 5090, 1992 U.S. Dist. LEXIS 3176, at *6 (S.D.N.Y. Mar. 17, 1992) (holding that screening was reasonable when conducted by two attorneys and a paralegal); Manufacturers & Traders Trust Co. v. Servotronics, Inc., 522

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(2) The number of inadvertent disclosures[74]

The courts consider the total number of documents produced compared to the number of privileged documents inadvertently released.[75] The reasonableness of the precautions taken is determined in light of the total document production burden.[76]

(3) The extent of the disclosure[77]

The reasonable precautions test considers the extent of the disclosure.[78] Courts treat instances where an adversary has learned the contents of a document differently from instances where an adversary merely learns of its existence.[79] As one court noted,

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N.Y.S.2d 999, 1005 (N.Y. App. Div. 1987) ("[I]f a screener could not reasonably be expected to differentiate between privileged and non-privileged documents, the reasonable precaution test would not be met. This could occur if counsel delegated the screening function to a paralegal or to someone with no legal training.").

74. *Lois Sportswear*, 104 F.R.D. at 105.

75. *See, e.g.*, Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 51 (M.D. N.C. 1987).

76. *Compare Kanter*, 253 Cal. Rptr. at 819 (holding that 160 privileged documents released out of 1600 was unreasonable); Liggett Group Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207-08 (M.D.N.C. 1986) (releasing several documents out of one box of documents deemed unreasonable) *and* Eigenheim Bank v. Halpern, 598 F. Supp. 988, 991 (S.D.N.Y. 1984) (disclosing of 1 out of 30 documents deemed unreasonable) *with In re* Atlantic Fin. Fed. Sec. Litig., No. 89-645, 1992 U.S. Dist. LEXIS 2619, at *21 (E.D. Pa. Mar. 3, 1992) (releasing 4 privileged pages out of 50,000 deemed reasonable); *Chrysler Capital*, 1992 U.S. Dist. LEXIS 2176, at *5 (releasing one small-print document contained in six boxes deemed reasonable); *In re Grand Jury Investigation*, 142 F.R.D. at 280 (releasing 18 documents out of 300,000 held reasonable); *Lois Sportswear*, 104 F.R.D. at 5 (releasing 22 documents out of 16,000 reviewed deemed reasonable); Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1984) (releasing 1 document out of 75,000 deemed reasonable).

77. *Lois Sportswear*, 104 F.R.D. at 105.

78. *See id.*

79. *Compare* Stavanger Prince K/S v. M/V Joseph Patrick Eckstein, No. 92-0983, 1993 U.S. Dist. LEXIS 1610, at *5-*7 (E.D. La. Feb. 10, 1993) (stating that information in a privileged letter known to one adverse party should in fairness be known to all adverse parties); *Marine Midland*, 138 F.R.D. at 483 (finding waivers where the documents' entire contents are known); *Kanter*, 253 Cal. Rptr. at 820 (noting that plaintiff had actually incorporated the privileged document into his trial strategy) *with In re Grand Jury Investigation*, 142 F.R.D. at 281 (finding that since documents did not reach the grand jury, confidentiality could be restored and privilege invoked); Chubb Integrated Sys. Ltd. v. National Bank of Wash., 103 F.R.D. 52, 63 (D.D.C. 1984) (stating that the mere fact that the adverse party had an opportunity to open a file drawer cannot constitute a disclosure of privileged information); Ranney-Brown Distrib., Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3, 6 (S.D. Ohio 1977) (finding no waivers where disclosure was limited to glancing at documents or merely designating them for copying).

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> A limited disclosure resulting from glancing at an open file drawer or designating documents for copying may not justify a finding of waiver when the party does not know the essence of the document's contents. However, when disclosure is complete, a court order cannot restore confidentiality and, at best, can only attempt to restrain further erosion.[80]

Thus, when the inadvertent disclosure reveals all, the courts have a greater tendency to find waiver.[81]

(4) Promptness of response[82]

A party's prompt attempt to reclaim or block the use of inadvertently disclosed materials is critical in ascertaining the intent to waive under the reasonable precautions test.[83] Response time is the interval between knowledge of the breach in confidentiality and the request for relief, normally in the form of a motion for a protective order.[84] Courts are more reluctant to find a waiver of the attorney client privilege when the attorney moves promptly for relief,[85] than when attorneys know that the adversary is in possession of privileged documents and do nothing for an extended period.[86] The promptness of the response is inversely related to the level of reliance the adversary may claim it has in the disputed materials. While the courts generally consider reliance in the final, overall fairness factor,[87] it is necessarily tied into the promptness factor.

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80. *Parkway Gallery*, 116 F.R.D. at 51-52 (citations omitted).

81. *See, e.g.*, Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 209 (N.D. Ind. 1990); *Marine Midland*, 138 F.R.D. at 483; *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), *cert. denied sub nom.*, Sea-Land Serv., Inc. v. United States, 444 U.S. 915 (1979).

82. *Lois Sportswear*, 104 F.R.D. at 105.

83. *See, e.g., Manufacturers & Traders*, 522 N.Y.S.2d at 1005.

84. *See id.*

85. *See, e.g.*, Magnavox Co. v. Bally Midway Mfg. Co., No. 83 C 2357, at 4 (N.D. Ill. Nov. 5, 1984) (LEXIS, Genfed Library, DIST File) (noting the promptness of the objection); *Manufacturers & Traders*, 522 N.Y.S.2d at 1005 (noting that a protective order was sought two business days after the inadvertent disclosure was discovered).

86. *See, e.g., In re* Conticommodity Servs., Inc., No. 644, 1988 U.S. Dist. LEXIS 10358, at *4 (N.D. Ill. Sept. 9, 1988) (two month delay); *Kanter*, 253 Cal. Rptr. at 820 (15-month delay); *cf. In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d at 674-75 (using traditional test of waiver but noting the party's 15-month delay in seeking relief).

87. *Kanter*, 253 Cal. Rptr. at 820.

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(5) Overall fairness[88]

Overall fairness is a final catch-all factor the courts use in determining whether a party took reasonable precautions.[89] This factor looks mainly to see if there are any special circumstances that justify preserving the privilege, or vice versa, justify finding a waiver.[90] A recipient's reliance on the privileged materials is considered a special circumstance.[91] Thus, if the adversary has used the privileged documents as a cornerstone of its litigation or discovery strategy, the courts are less likely to uphold the privilege, particularly if the producing attorney had the opportunity to object to such use.[92]

Some commentators have criticized the five-factor analysis on the grounds that it does not provide guidance in setting a standard of reasonable care and that a case-by-case approach produces unpredictable results.[93] Another criticism is that the test favors large firm practices that have the means to create elaborate screening procedures to the detriment of the solo practitioner.[94] Notwithstanding these criticisms, the judiciary is using the reasonable precautions test in growing numbers.[95] Many commentators, however, recognize the benefits of the case-by-case approach.[96]

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88. *Lois Sportswear*, 104 F.R.D. at 105.

89. *Parkway Gallery*, 116 F.R.D. at 50; *Lois Sportswear*, 104 F.R.D. at 105; *Kanter*, 253 Cal. Rptr. at 818, 820; *Manufacturers & Traders*, 522 N.Y.S.2d at 1004.

90. *See, e.g., Parkway Gallery*, 116 F.R.D. at 52.

91. *See, e.g., Manufacturers & Traders*, 522 N.Y.S.2d at 1005.

92. *See, e.g., Grand Jury Investigation of Ocean Transp.*, 604 F.2d at 675. One commentator has suggested that reliance is an inappropriate criterion because the recipient is in a much better position than the sender to know whether a document was inadvertently produced and that notification to the producing party will preclude reliance. Meese, *supra* note 9, at 535. This analysis does not place the proper emphasis on attorney responsibility. Situations exist where a party may intentionally reveal privileged materials as part of a litigation or settlement strategy. *See* Marcus, *supra* note 1, at 1633. The receiving party should not bear the responsibility of ensuring that his or her adversary meant to make the disclosures. Moreover, instances exist where it is not clear that a document is privileged. *See, e.g.*, International Business Mach. Corp. v. Comdisco, Inc., No. 91-C-07-199, 1992 Del. Super. LEXIS 255, at *1-*3 (Del. Super. Ct. June 22, 1992). One can easily see how there may be reliance made upon a document which is later discovered to be privileged.

93. *See* Harding, *supra* note 9, at 502-03; Lanin, *supra* note 8, at 756-59; Meese, *supra* note 9, at 538-42; Ayres, *supra* note 8, at 79-80.

94. *See* Lanin, *supra* note 8, at 758; A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227-29 (1985); Marcus, *supra* note 1, at 1608-13.

95. *See* Meese, *supra* note 9, at 523-24; Harding, *supra* note 9, at 473-74; Ayres, *supra* note 8, at 79.

96. *See, e.g.*, Grippando, *supra* note 8, at 524-25; Note, *supra* note 1, at 619-24.

4. ABA Formal Opinion 92-368

In response to a situation that arose in a complex asbestos litigation, when a temporary secretary mistakenly sent a copy of the defendants' jury selection strategy to plaintiff's counsel, the ABA issued its first formal opinion on the issue of inadvertent disclosure.[97] The opinion begins with a blanket statement that

> [a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.[98]

The opinion relies on two areas of law in support of its conclusion that inadvertently produced materials should be returned: attorney-client privilege and bailment.[99] As to the first area of law, the opinion notes that the majority of cases concerning waiver of the attorney-client privilege hold that mere inadvertence is insufficient to waive the privilege.[100] In so doing, the opinion dismisses the Wigmorian rule[101] that any disclosure should be deemed a waiver.[102] What is less clear is whether the opinion more closely aligns itself with the subjective intent test or with the reasonable precautions test.[103] While the opinion may be read as adopting the subjective intent test,[104] it also appears to be endorsing a reasonable precautions standard.[105] For instance, the opinion makes only passing reference to what it labels as a "minority" rule established by the *Mendenhall* court.[106] Had it been the ABA's intent to adopt a pure subjective intent test, it would not have relegated the seminal case to a mere footnote. Additionally, it cites with approval cases employing the reasonable precautions test.[107]

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97. *See* Cornelia H. Tuite, *Missent Information Pits Ethics Against Evidence*, CHI. DAILY L. BULL., Apr. 2, 1993, at 6.
98. ABA, *supra* note 15, at 1001:156.
99. *Id.* at 1001:155-60.
100. *Id.* at 1001:158.
101. WIGMORE, *supra* note 3, § 2325, at 632.
102. *See* ABA, *supra* note 15, at 1001:158-59.
103. *See* Tuite, *supra* note 97, at 6.
104. *Id.*
105. *See* ABA, *supra* note 15, at 1001:158-59.
106. *Id.* at 1001:158 n.3.
107. *Id.* at 1001:158.

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Property law is the second basis upon which the ABA rested its conclusion that clearly erroneous transmittals should be returned.[108] According to the ABA opinion, the recipient is the constructive bailee of the sender's property, here the document and the ideas contained within it,[109] and therefore has a legal duty to return the document or be faced with a conversion claim against it.[110] The ABA opinion notes that there is "no rule of universal application" as the right of the bailee to use the bailed property,[111] but acknowledges that one test to determine allowable usage by the bailee is whether "the consent of the owner to the use may be fairly presumed."[112] According to the ABA, in the situation before it, the sending attorney could have only consented to the return of the missent document.[113] The ABA opinion thus appears to create a presumption against waiver that the receiving party must rebut.[114] Here too, however, the opinion may be read as supporting a reasonable precautions test because that is the standard typically employed in other areas of property law involving confidential communications.[115]

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108. *Id.* at 1001:159. Bailment has been defined as "the rightful possession of goods by one who is not the owner." 9 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1030 (3d ed. 1957). There is usually an express or implied contract noting that the property will be returned or accounted for when the purpose of the bailment has been accomplished. 8 AM. JUR. 2D *Bailments* § 2 (1980). The bailee's right to use bailed property is governed by the circumstances surrounding the bailment and the nature of the transfer of the property. *Id.* § 207. Again the question becomes how the recipient should know that the materials he received were clearly not meant for him. *Id.* In the situation that the ABA was addressing, it would be clear to any reasonable person that the secretary erred. However, this is not always the case. *See supra* note 92.

109. Whether one may consider the information and ideas contained in a privileged document as property, separate and apart from the physical page on which they are contained, raises interesting issues. A detailed examination of these issues is beyond the scope of this Article.

110. ABA, *supra* note 15, at 1001:159.

111. *Id.* at 1001:159-60.

112. *Id.* at 1001:160 (quoting 8 AM. JUR. 2D *Bailments* § 207 (1980) (emphasis omitted)).

113. *Id.*

114. The opinion also notes that good sense and reciprocity are reasons for returning a missent document. *Id.* at 1001:161. It discounted the competing ethical obligation of zealous representation by stating that limitations exist on the extent to which a lawyer may go "all out" for the client. *Id.* at 1001:157. For example, it noted that a lawyer may not view files or notes that an adversary leaves out during a break in a deposition, or that an adversary inadvertently leaves after a closing. *Id.* at 1001:160-61.

115. *See, e.g., infra* notes 224-27 and accompanying text.

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II. THE LEGAL AND THE ETHICAL RESPONSES TO CONFIDENTIALITY: THE ATTORNEY-CLIENT PRIVILEGE AND THE ETHICAL DUTY TO MAINTAIN CLIENT CONFIDENCES

Most courts and commentators have deemed that a client's ability to engage in unfettered consultation with his attorney is so beneficial to society that it overrides any specific concerns that shielding information hinders the truth-seeking function of our adversarial system.[116] Attor-

116. *See, e.g.*, Meese, *supra* note 9, at 535. As the United States Supreme Court stated in Trammel v. United States, 445 U.S. 40, 51 (1980), "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *See also* Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826) (stating that the attorney-client privilege is "indispensable for the purposes of private justice"); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1062 (1978) ("[T]he issue concerning the attorney-client privilege is not whether it should exist, but precisely what its terms should be."); Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After* Upjohn?, 81 MICH. L. REV. 665, 666 n.5 (1983) (stating that almost no one seriously advocates abolishing the privilege).

Courts and commentators have set out a number of theories behind the attorney-client privilege, with a cost-benefit analysis as most prevalent. *See* Meese, *supra* note 9, at 515-18; *Developments in the Law—Privileged Communications: III. Attorney-Client Privilege*, 98 HARV. L. REV. 1501, 1501-04 (1985) [hereinafter *Attorney-Client Privilege*]. This cost-benefit analysis weighs the costs of protecting from view materials that may have bearing on the truth of the controversy against the less tangible societal benefits, such as inducing clients to consult freely with their attorneys to determine the legality of proposed acts, and to help a client through the mire of the legal system once he is involved in litigation. *See id.* at 1502-03. According to a cost-benefit analysis, the privilege hinders the truth-seeking function of litigation by shielding evidence. *See* MARVIN E. FRANKEL, PARTISAN JUSTICE 64-65 (1980); Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 65 (1982). However, as the courts and commentators have pointed out, without the privilege the communication would not have been made in the first place, so there is no net cost. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("Application of the attorney-client privilege . . . puts the adversary in no worse position than if the communications had never taken place."); Meese, *supra* note 9, at 518-19. Commentators have stressed the benefits of encouraging unfettered discussions between lawyer and client. *See, e.g.*, David A. Nelson, Comment, *Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?*, 86 NW. U. L. REV. 368, 384 (1992) (stating that the confidential forum provided by the attorney-client privilege allows the attorney to provide sound legal advice). The privilege, in encouraging the client to be honest with his attorney, promotes the ability of the lawyer to give the client fully informed legal advice. *See id.* If the client does not discuss matters with such frankness, the ability of the attorney to offer legal advice is impaired. *See* Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 352 (1981). Another benefit of the privilege is that it encourages compliance with the law. *See* Davidson & Voth, *supra* note 8, at 638 ("The attorney to whom confidences are freely expressed has a greater opportunity to learn of and counsel against potentially unlawful conduct.").

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ney and client communications are protected by two sets of rules. The courts and legislatures have defined the attorney-client privilege, which protects the client's confidential materials from forced disclosure within a legal proceeding.[117] The ABA has promulgated the *Model Rules of*

A strict utilitarian analysis notes only systemic benefits, rather than considering the benefits that may occur in a particular litigation. *Attorney-Client Privilege*, *supra*, at 1505-06. Non-utilitarian theories of the purposes of the attorney-client privilege stress the client's personal autonomy and privacy rights. *See, e.g.*, Alschuler, *supra*, at 350-52. *See generally Attorney-Client Privilege*, *supra*, at 1501-04 (examining the history and rationales for the utilitarian and non-utilitarian approaches). Non-utilitarians hold the disclosure of privileged communications as intrinsically wrong notwithstanding any specific truth-seeking benefits the disclosure may produce in the underlying litigation. *Id.*

A "full" utilitarian analysis would take into account non-utilitarian benefits in the cost-benefit analysis, such as the client's right to know the law and to have an attorney act as his representative. *See id.* at 1504.

117. WIGMORE, *supra* note 3, § 2292, at 558-59. For citations to typical statutes, see *supra* note 17. The attorney-client privilege has been called the "oldest of the privileges for confidential communications known to the common law." *See Upjohn*, 449 U.S. at 389. The common law origins of the attorney-client privilege appear to be in the late sixteenth century. *Developments in the Law—Privileged Communications: I. Introduction, The History of Evidentiary Privileges in American Law*, 98 HARV. L. REV. 1454, 1456 (1985). Historians have posited at least two justifications for the initial adoption of the privilege. The first possibility is that it developed as an extension of the right against self-incrimination. *Attorney-Client Privilege*, *supra* note 116, at 1501-02 (quoting 3 W. BLACKSTONE, COMMENTARIES * 370 (" '[N]o counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence.' ")). A second theory behind the initial adoption of the privilege is that it protected the lawyer whose oath of loyalty to his client would be breached if he were forced to divulge his client's confidences. *See* WIGMORE, *supra* note 3, § 2290, at 543. One commentator has noted that both of these initial justifications are non-utilitarian. *See Attorney-Client Privilege*, *supra* note 116, at 1502.

Distinct from the attorney-client privilege is the work-product doctrine. The landmark case of Hickman v. Taylor, 329 U.S. 495 (1947), created an exception to the otherwise broad federal discovery rules to protect an attorney's work-product. Under the work-product doctrine, information gathered by an attorney in preparation for litigation is protected from discovery requests, unless the opposing counsel demonstrates a need for its disclosure. *Id.* at 512. In addition to *Hickman*, federal courts abide by the work product rule articulated in the *Federal Rules of Civil Procedure*, which protects against disclosure of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3).

The work product doctrine reflects a policy that attorneys should be free to investigate all aspects of his client's case and devise strategy and tactics without the fear that such information can be obtained by opposing counsel through discovery. *See Hickman*, 329 U.S. at 512-13. A split of authority exists as to whether the work-product doctrine should be treated the same as the attorney-client privilege for waiver purposes. *See* Chubb Integrated Sys. Ltd. v. National Bank of Wash., 103 F.R.D. 52, 63 (D.D.C. 1984) ("There is a difference of opinion . . . on whether the concept of [implied waiver] applies only to attorney-client communications, or to

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Professional Conduct that impose ethical obligations on attorneys to maintain their clients' confidences.[118] Both mechanisms encourage

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work-product as well."). A number of courts have held that waiver of work-product immunity requires more than the disclosure of confidential information; the disclosure must be "inconsistent with the adversary system." *See, e.g., id.*; Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 328 (N.D. Calif. 1985).

118. *See* MODEL RULES, *supra* note 5, Rule 1.6. Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

Originally, the ABA's Canons of Ethics, as enacted in 1928, required the lawyer to preserve a client's confidences. *See* HERSCHEL W. ARANT, CASES AND OTHER MATERIALS ON THE AMERICAN BAR AND ITS ETHICS app. at 647 n.1, 658 (1933). However, it offered no definition of "confidences." *See id.* app. at 658. The *Code of Professional Responsibility* extends the protection of attorney-client communications beyond those communications protected by the attorney-client privilege. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT DR 4-101 (1986) [hereinafter MODEL CODE]. Abandoning the "confidences" used in the Canons of Ethics, the *Model Code* instead protects not only information protected by the attorney-client privilege, but also secrets, which are defined as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *See id.*

In 1977, the ABA appointed a commission to recommend changes to the Code. Robert W. Meserve, *Introduction* to ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 4 (2d ed. 1992). Chaired by attorney Robert Kutak, it became known as the Kutak Commission. Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1105 n.81 (1985). The Commission proposed that attorneys be compelled to disclose confidences to prevent death or serious bodily harm, to protect the court and parties from false evidence, and to prevent unfair advantage by a client through fraud. *Id.* These proposals were soundly rejected by the ABA membership. *Id.* Instead, the ABA adopted the *Model Rules* Rule 1.6, its most extensive rule of confidentiality yet formulated. *See* MODEL RULES, *supra* note 5, Rule 1.6 (stating under which particular circumstances confidential information may be revealed). Rule 1.6(b) does not compel disclosure in the circumstances articulated by the Kutak Commission. *See id. See generally* Subin, *supra*, at 1090 (advocating that the attorney-client privilege and the ethical rules be reconciled and problems should be resolved by applying a standard set of principles). Instead, it limits the attorney's ability to disclose client confidences without the client's consent to the following instances:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES, *supra* note 5, Rule 1.6(b).

Rule 1.6 does not require disclosure under these circumstances; the attorney has the option to disclose or not. *See id.* In contrast, under the *Model Code*, an attorney may reveal:

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frank communication, but have differences which create tension between them, particularly in the area of inadvertent disclosure.

A. *Similarities*

Rule 1.6 of the ABA *Model Rule of Professional Conduct* states that, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents."[119] The attorney-client privilege similarly prohibits forced disclosure of privileged matters.[120]

The similarity between the attorney's ethical obligation of confidentiality and the attorney-client privilege is the goal of ensuring that the client is free to safely share confidences with his attorney.[121] Both imply the need for attorneys to be able to give sound advice based on full knowledge of the circumstances.[122] The Supreme Court in *Upjohn Co. v. United States*,[123] a landmark case on the attorney-client privilege,[124] recognized the parallel justifications between the attorney-

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(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

MODEL CODE, *supra*, DR 4-101 (footnotes omitted).

The judicially created crime-fraud exception is another exemption to the rule of confidentiality. *See In re* Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). A client who confers with his attorney with the intent to further a crime or fraud may not have his communications with his attorney protected. *See* United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988); *In re Grand Jury Investigation*, 842 F.2d at 1226.

119. MODEL RULES, *supra* note 5, Rule 1.6(a).

120. See *supra* note 3 for a standard working definition of the attorney-client privilege.

121. *See Upjohn*, 449 U.S. at 389; *supra* note 116; MODEL RULES, *supra* note 5, Rule 1.6 cmt. [2].

122. *See Upjohn*, 449 U.S. at 389; MODEL RULES, *supra* note 5, Rule 1.6 cmt. [3].

123. 449 U.S. at 383.

124. In *Upjohn*, general counsel of Upjohn Pharmaceutical conducted an in-house investigation of questionable payments made by Upjohn subsidiaries to foreign government officials. *Id.* at 386. The investigation included a confidential and detailed questionnaire distributed to several officials in Upjohn to ascertain the legal implications of the payments and follow-up interviews of some officials. *Id.* at 386-87. After Upjohn voluntarily informed the Securities and Exchange Commission and the Internal Revenue Service (I.R.S.) of the possible existence of such payments, the I.R.S. issued a summons demanding production of the questionnaire, memoranda, and notes of the follow-up interviews. *Id.* at 387-88. Upjohn declined, and both the United States District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals concluded that the summons should be enforced, although for

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client privilege and the ethical duty of confidentiality.[125] The opinion concerned the scope of the attorney-client privilege in the corporate setting.[126] In addition to stating unequivocally that the attorney-client privilege serves systemic goals of promoting the fair and just observance and administration of law,[127] the court commented on the ethical obligations imposed by the ABA.[128] It noted that the " 'ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.' "[129]

B. *Differences*

Notwithstanding the similarities between the attorney-client privilege and the ethical obligation to maintain confidentiality, significant differences exist between the two. The prohibition against disclosure contained in *Model Rule* 1.6 is broader than the protection provided by the attorney-client privilege. Rule 1.6 extends protection to *all* information relating to a client's representation whatever its source, including non-confidential matters, while the attorney-client privilege covers only a client's communications made in confidence for the purpose of

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different reasons. *Id.* at 388. On grant of certiorari, the Supreme Court held that such information was protected by the attorney-client privilege. *Id.* at 386. In his opinion, Justice Rehnquist articulated the dual rationale for the attorney-client privilege:

> [The] purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. at 389.

The holding in *Upjohn* and its implications have been closely examined. *See, e.g.*, Marcus, *supra* note 1, at 1620-22; Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 291-95 (1983); John E. Sexton, *A Post-*Upjohn *Consideration of Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 456-73 (1982); Michael L. Waldman, *Beyond* Upjohn: *The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 487-500 (1987); Marshall Williams, *The Scope of the Corporate Attorney-Client Privilege in View of Reason and Experience*, 25 HOW. L.J. 425, 450-57 (1982).

125. *See Upjohn*, 449 U.S. at 391.

126. *See id.* at 389-90.

127. *Id.* at 389.

128. *Id.* at 391.

129. *Id.* (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980)).

obtaining legal advice.[130] Thus, an attorney's ethical obligations would prohibit him from revealing any information he knew about or had obtained from a person before he was retained, while the attorney-client privilege extends only to information gathered in confidence for the purposes of representation. Another distinguishing feature is that, unlike the attorney-client privilege which applies only in judicial or other proceedings,[131] the rule of confidentiality applies in situations "other than those where evidence is sought from the lawyer through compulsion of law."[132]

In addition to the specific differences noted above, both differ in their philosophical underpinnings. Because the attorney-client privilege may operate as an information suppressor, many courts have held that it must be narrowly construed,[133] and that it is easily waived.[134] Dean

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130. *Compare* WIGMORE, *supra* note 3, § 2292, at 554 (stating that communications to legal advisor made in confidence to obtain legal advice is privileged under the attorney client privilege) *with* MODEL RULES, *supra* note 5, Rule 1.6 cmt. [5] ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

Thus under the *Model Rules*, *all* information relating to the representation is deemed covered by the duty of confidentiality, without regard to whether it was gained in the professional relationship. *Id.* Also, Rule 1.6 requires confidentiality of information relating to representation, even if it was acquired before or after the professional relationship existed. *See id.*

The comments to *Model Code* EC 4-4 reflect the broader reach of ethical responsibilities compared to the attorney-client privilege: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1986). In short, much information which is ethically protected will not be privileged, but nearly all information protected under the privilege will also be ethically protected. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 17 (3d ed. 1992).

131. MODEL RULES, *supra* note 5, Rule 1.6 cmt. [5].

132. *Id.*

133. *See, e.g.*, Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 257 (N.D. Ill. 1981) ("A court must balance the possibility that the privilege indirectly promotes free and honest communication with the policy of liberal discovery to enhance the search for truth. For these reasons, the privilege must be strictly construed."); Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981) (stating that because the privilege covers materials which would otherwise be discoverable, the privilege should be narrowly construed); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547 (D.D.C. 1970) (stating that the privilege has such an effect on the full disclosure of the truth that it should be narrowly construed).

The courts' narrow construction of the attorney-client privilege reflects the American legal system's philosophy of broad discovery. The *Federal Rules of Civil Procedure* embody the philosophy of broad discovery. The *Federal Rules* were adopted in 1938 pursuant to congressional grant of power to the Supreme Court to promulgate rules of civil procedure. *See* Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1994)). The original

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Rules and subsequent amendments were designed to encourage the availability of information that was to be disclosed prior to trial. CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001-2002, at 13-22 (1994); *see* FED. R. CIV. P. 26-37 advisory committee's notes. Congress' goal in enacting the Rules was to facilitate " 'an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons.' " Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?*, 42 AM. U. L. REV. 1465, 1490 (1993) (quoting ARTHUR T. VANDERBILT, CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 10 (1952)).

The changes to the *Federal Rules of Civil Procedure* that went into effect on December 1, 1993, exemplify judicial and legislative concern for broad discovery. *See* FED. R. CIV. P. 26 advisory committee's note. The 1970 amendment to Rule 26 provided for broad discovery by stating that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." WRIGHT ET AL., *supra*, at 21. The Advisory Committee note to Rule 26 state that under the *Federal Rules*, "court[s] must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case." FED. R. CIV. P. 26 advisory committee's note to the 1983 Amendment. Before and after the Rule 26 amendments, courts have liberally construed Rule 26 in order to provide both parties with information essential to proper litigation on all the facts. *See* Hickman v. Taylor, 329 U.S. 495, 506-07 (1947); Young v. Lukens Steel Co., No. 92-6490, 1994 U.S. Dist. LEXIS 1462, at *3 (E.D. Pa. Feb. 10, 1994); Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 55 (D.N.J. 1985); Mitsui & Co. v. Puerto Rico Water Resources Auth., 79 F.R.D. 72, 80 (D.P.R. 1978); Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 352-53 (S.D.N.Y. 1973); Patton v. Southern Bell Tel. & Tel. Co., 38 F.R.D. 428, 429 (N.D. Ga. 1965). One court stated that "[t]he basic philosophy of the present federal procedure is that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged." Donovan v. Prestamos Presto Puerto Rico, Inc., 91 F.R.D. 222, 223 (D.P.R. 1981).

With the 1993 Amendments, liberal discovery is not only encouraged, it is mandated. *See* FED. R. CIV. P. 26 advisory committee's note to 1993 Amendment. Rule 26 now provides for automatic disclosure of certain information even before a discovery request is made. FED. R. CIV. P. 26. The Rule provides:

> (a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER
>
> (1) *Initial Disclosures.* Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:
>
> (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.

FED. R. CIV. P. 26.

Justice Scalia's dissent from the Court's approval of the amended rules was based, in part, on what he saw as the "intolerable strain upon lawyers' ethical duty to represent their clients and

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Wigmore noted that the privilege's "benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth."[135]

In contrast to the narrow view of privilege adopted by some courts, the ABA takes a much more expansive approach to the duty to maintain confidentiality.[136] An ABA's formal opinion has noted that the rules governing a lawyer's professional conduct, "reflect a far more positive view toward the importance of maintaining the confidentiality of attorney-client communications" than does the attorney-client privilege.[137] Thus, despite the complementary nature of the two bodies of law,[138] the development of separate legal devices addressing client confidences has created the potential for conflict between the attorney-client privilege and the ethical duties of an attorney to maintain confidences.[139]

This conflict is especially apparent in the area of inadvertent disclosures, particularly in light of the ABA's only formal opinion on the topic which may be construed as calling for a blanket rule requiring inadvertently disclosed materials to be returned.[140] Therefore, an attorney may be put in a situation where he has violated an ABA rule

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not to assist the opposing side" that is caused by mandating automatic discovery. Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 507, 511 (1993) (Scalia, J., dissenting). A similar concern may be raised by requiring that the recipient of inadvertently disclosed privileged materials return them. *See infra* note 142 and accompanying text.

134. *See, e.g.*, Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981) (" '[i]nadvertence' of disclosure does not as a matter of law prevent the occurrence of waiver' "); Advanced Medical, Inc. v. Arden Medical Sys., Inc., No. 87-3059, 1988 U.S. Dist. LEXIS 7297, at *5 (E.D. Pa. July 18, 1988) ("Inadvertent disclosure of an otherwise privileged document does not as a matter of law preclude a finding of waiver."); *Underwater Storage*, 314 F. Supp. at 549 ("Once the document was produced for inspection, it entered the public domain.").

Not all courts are resistant to upholding the attorney-client privilege and to minimizing the waiver doctrine. Courts embracing the subjective intent test view the privilege as supreme. *See, e.g.*, Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982).

135. WIGMORE, *supra* note 3, § 2291, at 554; *see also Teachers Ins.*, 521 F. Supp. at 641 ("[T]he privilege covers materials which otherwise would be discoverable. . . ."); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (stating that the privilege can result in the suppression of evidence).

136. *See supra* notes 118, 130 and accompanying text.

137. ABA, *supra* note 15, at 1001:159.

138. *See id.* at 1001:158.

139. See *supra* notes 117, 118 and accompanying text for a discussion of the privilege rule and ethical duty to maintain confidentiality; and *supra* note 5 for a discussion of the related ethical obligation to zealously represent one's client, which is implicated in the inadvertent disclosure arena.

140. *See* ABA, *supra* note 15, at 1001:155.

in abiding by caselaw that allows him to keep the material.[141] In contrast, an attorney who returns inadvertently sent material that he was legally entitled to retain, he may risk a malpractice claim, even though he has abided by the professional rules of ethics.[142]

Analyzing the waiver issue by concentrating on the goals sought to be obtained by both the attorney-client privilege and the ethical rules of conduct will help resolve this dilemma. As this Article discusses, enhancing attorney responsibility should be the governing precept in deciding waiver since it best serves the underlying goals of promoting client confidence in the legal system and the fair administration of justice. Viewing the waiver question from the vantage of attorney responsibility, the reasonable precautions test is the most appropriate test of waiver since it encourages professionalism. This, in turn, protects client confidences and allows the attorney to conform his conduct to meet ethical obligations.

III. ANALYSIS OF THE TESTS IN LIGHT OF ATTORNEY RESPONSIBILITY

Using attorney responsibility as a tool in deciding waiver issues is in full compliance with both utilitarian and non-utilitarian analyses of the attorney-client privilege.[143] The systemic benefits that utilitarians weigh include the "observance of law and administration of justice."[144] Promoting attorney responsibility is particularly important in today's day and age where reports of public distrust of attorneys are increasingly common.[145] Attorney responsibility also fosters the non-utilitarian considerations behind the attorney-client privilege because it promotes the client's desire and ability to rely on attorneys, something that is needed to "help[ ] laymen protect their rights and avoid litigation in the

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141. *See, e.g., Underwater Storage*, 314 F. Supp. at 549.

142. See *infra* note 160 on the feasibility of bringing a malpractice claim in the inadvertent disclosure situation. Recently, a California court of appeals ruled that the lower court improperly sanctioned a lawyer who was the recipient of inadvertently transmitted privileged documents for using the documents. Aerojet-General Corp. v. Transport Indem. Ins., 22 Cal. Rptr. 2d 862, 867-68 (Ct. App. 1993). In reversing the lower court, the court noted that "[o]nce [the recipient] had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf." *Id.*

143. For a discussion of the utilitarian and non-utilitarian analyses of the attorney-client privilege, see *supra* notes 116-18 and accompanying text.

144. *Upjohn*, 449 U.S. at 389.

145. *See, e.g.*, Rorie Sherman, *Overhaul of Lawyer Discipline on Docket*, NAT'L L.J., Mar. 21, 1994, at A6; Kay Saillant, *A Plea Against Lawyer Jokes Brings Backlash*, L.A. TIMES, Sept. 29, 1993, at B3 (quoting the President of the State Bar of California, who noted that "attorneys rated 'just above used-car salesmen' " in public confidence polls).

face of complex laws."[146] This section analyzes the various waiver tests currently used against the backdrop of attorney responsibility.

A. *Attorney Responsibility and the Traditional Test*

Though easy to apply, the simplistic strict liability approach embodied by the traditional test does not adequately address the modern realities of inadvertent disclosure. The traditional test's first rationale that the client's intent to waive is manifested solely by the fact of disclosure[147] is unrealistic at best and punitive at worst. The traditionalists seek to "punish" the client by placing the onus of maintaining the confidentiality of privileged materials on him.[148] The rationale flouts the stated purpose of the privilege: to promote free flow of information between attorneys and clients.[149] Punishing the client hampers the desired flow of information.[150]

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146. *Attorney-Client Privilege, supra* note 116, at 1504 n.21 (citing Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 605 (1980)).

147. *See Underwater Storage*, 314 F. Supp. at 549; *supra* text accompanying notes 28-31.

148. *See, e.g.*, International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450, 465 (D.D.C. 1988) ("[M]istake or inadvertence is . . . merely a euphemism for negligence, and, certainly . . . one is expected to pay a price for one's negligence.") (quoting *In re* Standard Fin. Management Corp., 77 B.R. 324, 330 (Bankr. D. Mass. 1987) (alteration in original)); *Underwater Storage*, 314 F. Supp. at 549 ("The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client.").

The traditional approach's second rationale, that the revelation of confidential communications makes the privilege no longer necessary, *id.*, is also problematic. Knowledge of a document's contents and ability to use the document in litigation are different things. *See* Manufacturers & Traders Trust Co. v. Servotronics, Inc., 522 N.Y.S.2d 999, 1004 (App. Div. 1987). As many courts and commentators have noted, a protective order banning the use of the revealed confidences will give some protection to the client. *See, e.g., id.*; Data Sys., Inc. v. Philips Business Sys., Inc., No. 78 Civ. 6015-CSH, at *7-*8 (LEXIS, Genfed Library, DIST File) (S.D.N.Y. 1981). *See generally* Ayres, *supra* note 8, at 74 (noting there is a trend toward maintaining the privilege despite disclosure); Note, *supra* note 1, at 607-09 (stating that a court can prevent the use of a confidential document at trial). Another problem is when an adversary knows of the existence of documents containing information damaging to the privilege holder, but does not know the actual contents. *See supra* text accompanying notes 79-81. The facts surrounding the disclosure in a particular case may point to a finding of waiver. However, rather than imposing a blanket rule which would cover situations where an adversary has not actually obtained the "gist" of a document's contents, and situations where the adversary has complete knowledge, the reasonable precautions test uses the extent of the disclosure as one of the factors used to determine the waiver issue. *See Lois Sportswear*, 104 F.R.D. at 105; *supra* text accompanying notes 79-81. Presumably the more the adversary knows, the less likely the privilege will be upheld. *See supra* text accompanying note 81.

149. Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10, 13 (D. Mass. 1993).

150. *See id.*

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From a pragmatic point of view, the traditional view is equally detrimental because it is not realistic to expect a client to take precautions against an attorney's inadvertent disclosure of privileged documents. It is one thing if the client has not taken any precautions and has allowed documents to be inadvertently disclosed,[151] but this is the exception in the disclosure cases; the overwhelming majority of cases involve inadvertent disclosure by an attorney or agent of the attorney.[152]

Notwithstanding the criticism leveled at the traditional test, courts continue to use it.[153] *International Digital Systems Corp. v. Digital Equipment Corp.* exemplifies the traditional test's misplaced retributive rationale.[154] There, plaintiff's attorney inadvertently disclosed twenty

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151. *See e.g.,* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 256 (N.D. Ill. 1981) (holding that documents otherwise within privileged confidential attorney-client communications were no longer privileged when recovered by a third party from the client's garbage).

152. *See, e.g., International Digital,* 120 F.R.D. at 446-47 (noting that document preparation included both attorneys and paralegals); Liggett Group v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207 (M.D.N.C. 1986) (inadvertantly disclosed by attorney or paralegal); *Manufacturers & Traders,* 522 N.Y.S.2d at 1002 (noting that the inadvertent disclosure was due to a paralegal);

153. The traditional test is firmly accepted by the United States Court of Appeals for the District of Columbia and its district court. *See, e.g., In re* Sealed Cases, 877 F.2d 976, 980 (D.C. Cir. 1989); *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), *cert. denied sub nom.*, Sea-Land Serv., Inc. v. United States, 444 U.S. 915 (1979); Chubb Integrated Sys. v. National Bank of Wash., 103 F.R.D. 52, 66-67 (D.D.C. 1984). For example, in Wichita Land & Cattle Co. v. American Fed. Bank, 148 F.R.D. 456, 457-58 (D.D.C. 1992), the court reaffirmed its adherence to the traditional test of waiver, despite its acknowledgement that reasonable precautions to avoid the disclosure of privilege documents were taken. The case arose out of the FDIC's takeover of two savings and loan associations. *Id.* at 456-57. Plaintiff's counsel inadvertently produced two privileged documents amongst "some forty boxes" of documents produced. *Id.* at 457. When plaintiff's counsel became aware that defendants had seen the privileged documents in their initial review of the forty boxes, counsel refused to meet defendant's request that the documents be copied and delivered. *Id.* In granting defendant's motion to compel production, the District Court for the District of Columbia, stated: "[T]he rule in this Circuit is clear. Disclosure of otherwise-privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege." *Id.* The court refused to consider the precautions taken by plaintiff's counsel to avoid disclosure, or that counsel acted immediately upon learning of the error. *Id.* at 459. Its refusal was based on an adherence to *stare decisis* and on its view that confidentiality, once breached, could not be regained. *See id.* "What is more important than process or intent is that the confidentiality of the disputed documents has been irrevocably breached." *Id.*

No other circuit court of appeals has specifically stated which waiver test should be used. *See* Harding, *supra* note 9, at 475. At least one commentator has noted that the district courts have not been given any guidance by the higher courts, and that this has led to a variety of rules and forum shopping. *Id.* at 474-79.

154. *See International Digital,* 120 F.R.D. at 449-50.

privileged documents among some 500,000 produced.[155] Although the court recounted the extensive precautions taken to avoid a disclosure, the court ruled that the inadvertent production waived the attorney-client privilege as to those documents, and denied plaintiff's motion for a protective order.[156] The court held that the disclosure itself was proof that the precautions were inadequate.[157] Adopting the reasoning of the traditional approach, the court noted that

> [m]istake or inadvertence is . . . merely a euphemism for negligence, and, certainly . . . *one is expected to pay a price for one's negligence[;]*
> . . . . a strict rule that "inadvertent" disclosure results in a waiver of the privilege would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure.[158]

The flaw in such reasoning is apparent: although the negligence is the attorney's, the penalty harms the client, whose confidential materials were exposed and used against him.[159] The client pays the price for his attorney's negligence.[160]

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155. *Id.* at 446. The number of inadvertent disclosures compared to the extent of disclosure, a factor courts using the reasonable precautions test consider, certainly would be deemed reasonable. See *supra* note 76 for a list of cases which have analyzed this factor.

156. *International Digital*, 120 F.R.D. at 447-50. However, the *International Digital* court refused to find a complete subject matter waiver, limiting the waiver to the documents disclosed. *Id.* at 446 n.1.

157. *Id.* at 449-50.

158. *Id.* at 450 (second omission in original) (citation omitted) (quoting *In re Standard Fin. Management Corp.*, 77 B.R. at 330 (emphasis added).

159. *See* Harding, *supra* note 9, at 497 & 497 n.159.

160. *See id.* at 497. At least one court using the traditional test suggested that the client had recourse against his attorney through a malpractice suit. *See Mendenhall*, 531 F. Supp. at 955 ("Mendenhall's lawyer . . . might well have been negligent. . . ."); *see also* Davidson & Voth, *supra* note 8, at 646; Note, *supra* note 1, at 604 n.27. However, the feasibility of a successful lawsuit based on an inadvertent disclosure of privileged documents is questionable. *See* Harding *supra* note 9, at 497 n.159; Note, *supra* note 1, at 604 n.27. The elements of a tort action for malpractice include (i) the duty to use such skill, prudence, and diligence as would the reasonable attorney, (ii) breach of duty of care, (iii) proximate cause between the negligent act or omission and harm to the plaintiff, and (iv) actual loss or harm to the plaintiff. *See generally* DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 14, 39-40 (1980) (discussing legal malpractice). The plaintiff bears the burden of proving these elements. *Id.* at 39. The client may have difficulty in establishing that the attorney breached his duty to use reasonable care. Harding, *supra* note 9, at 497 n.159. The duty of reasonable care requires only that the attorney "render fair and reasonable professional services on a par with other attorneys acting under similar circumstances." MEISELMAN, *supra*, at 14. As noted by Harding, if the attorney shows that he took reasonable precautions to avoid inadvertent disclosure, "a jury would

While on its face it appears that the traditional test is the most effective means of promoting attorney responsibility, in fact, the opposite may be true.[161] The result of an inadvertent disclosure is an automatic waiver;[162] however, unprofessional or sloppy conduct may not have been the cause of the disclosure.[163] A blanket rule does not discriminate between different degrees of care an attorney might take to avoid disclosure and therefore does not reward professional excellence.[164] The traditional test may also result in the decreased flow of information between attorney and client, in direct contradiction to the purposes of the privilege.[165]

B. *Attorney Responsibility and the Subjective Intent Test*

The subjective intent test demands that a client actually intend to waive his privilege; therefore, the test eliminates waiver as a result of

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probably find that reasonable care had been used." Harding, *supra* note 9, at 498 n.159. Reasonable care may exist even if the attorney has violated his ethical responsibilities. *See id.* Most cases hold that such a violation does not constiute malpractice. *E.g.*, Palmer v. Westmeyer, 549 N.E.2d 1202, 1205 (Ohio Ct. App. 1988); Weiszmann v. Kirkland & Ellis, 732 F. Supp. 1540, 1544 (D. Colo. 1990); Peck v. Meda-Care Ambulance Corp., 457 N.W.2d 538, 541-43 (Wis. Ct. App. 1990).

Thus, even in a case using the traditional test of waiver, when the attorney's duty of care is questioned, the issue, for malpractice purposes, ultimately comes down to whether the attorney took reasonable precautions. *See* Harding, *supra* note 9, at 497 n.159. However, in using the traditional test, something akin to a shifting of the burden of proof occurs. *See* MEISELMAN, *supra*, at 39-40; Harding, *supra* note 9, at 497 n.159. As noted above, in the malpractice suit that results from application of the traditional test's harsh waiver rule, the plaintiff will have to establish that the attorney did not follow a reasonable standard of care. MEISELMAN, *supra*, at 39-40; Harding, *supra* note 9, at 497 n.159. In contrast, under the reasonable precautions test, the party seeking a protective order barring the use of inadvertently produced documents bears the burden of proving that reasonable care was taken to avoid disclosure. *See* Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1990).

The client in a traditional test case also will likely have difficulty in establishing the elements of actual harm and proximate cause. Harding, *supra* note 9, at 497 n.159. For a thorough analysis of the feasibility of a malpractice suit based on an inadvertent disclosure, see *id.* at 497 n.159.

161. *See* Harding, *supra* note 9, at 497 n.159 (noting that with the difficulty faced by the client in holding an attorney responsible for a disclosure, there is little pressure on the attorney to be more careful).

162. Meese, *supra* note 9, at 536-37; Note, *supra* note 1, at 598.

163. *See Wichita Land*, 148 F.R.D. at 457-58 (holding that privilege waived despite reasonable precautions to avoid disclosure taken by the attorney); Harding, *supra* note 9, at 497 n.159.

164. *See* Harding, *supra* note 9, at 497 n.159.

165. *See* Meese, *supra* note 9, at 536-38. The goal of the privilege is to encourage frank communication between client and attorney. *See supra* note 121 and accompanying text.

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an inadvertent disclosure.[166] Neither courts that reject the subjective intent test nor commentators who espouse it have concentrated on the broader question of attorney responsibility and the concomitant ethical considerations of confidentiality.[167] The subjective intent test is completely ineffective in fostering attorney responsibility[168] even though it is undoubtedly the most effective means of upholding the attorney-client privilege since waiver never occurs.[169] Its effectiveness in upholding the privilege is the very reason that the subjective intent test does nothing to increase attorney responsibility.[170] An attorney need not take any care in protecting against waiver if he knows no sanctions will be visited upon him.[171] From a cost-benefit analysis, he would be foolish to spend time taking care to protect against inadvertent disclosure because no harm, in terms of waiver, will occur if he is careless.[172] Instead, the subjective intent test improperly places the burden of attorney responsibility on the recipient of the privileged materials.[173] The recipient, who already is at a disadvantage in that he is not going to receive all relevant information because of the truth-suppressing function of the attorney-client privilege,[174] should not bear this responsibility. Moreover, the attorney for the recipient should not bear the burden of maintaining his opposing counsel's ethical responsibility to keep his client's confidences.[175]

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166. *See supra* notes 43-44 and accompanying text.

167. *See, e.g.*, Hartman v. El Paso Natural Gas Co., 763 P.2d 1144, 1152 (N.M. 1988) (failing to address attorney responsibility and ethics while explicitly rejecting the subjective intent test); Ayres, *supra* note 8, at 61 (focusing on the narrow question of what should constitute waiver in the context of inadvertent disclosure rather than considering the broader policy issue of attorney responsibility).

168. An argument could be made that recklessness or gross negligence on the attorney's part would amount to a waiver since the cases only speak in terms of mere negligence. *Mendenhall*, 531 F. Supp. at 955.

169. *See, e.g., id.* Rarely would a client admit an intent to disclose privileged materials. WIGMORE, *supra* note 3, § 2327, at 636.

170. *See Mendenhall*, 531 F. Supp. at 955. The *Mendenhall* court held that without the subjective intent to waive on the part of the client, a lawyer's negligent disclosure of privileged information is not sufficient to waive the attorney-client privilege. *See id.* In effect, the subjective intent test takes away the incentive for the attorney to protect a client's privileged information because the privilege will not be waived by attorney negligence. *See id.*

171. *See supra* note 170 and accompanying text.

172. *See Mendenhall*, 531 F. Supp. at 955.

173. *See supra* text accompanying notes 109-10 (stating that the receiving attorney is responsible for screening the information believed to be privileged under the subjective intent test).

174. WIGMORE, *supra* note 3, § 2291, at 554.

175. *See* Aerojet-General Corp. v. Transport Indem. Ins., 22 Cal. Rptr. 2d 862, 867 (Ct. App. 1993) (noting that the recipient of inadvertently disclosed material did not act in violation

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Commentators who support the subjective intent test suggest that without an absolute rule against waiver, privilege will be secondary to the search for information in a particular case.[176] This fear is misplaced. The broad policy underpinnings for the attorney-client privilege may or may not justify applying it in a case where the adversary knows specific damaging information. Certainly circumstances exist where the privilege may be upheld even though an adversary has seen specific information. For example, courts do not allow a party or its agent to use privileged materials that have been stolen.[177] However, situations also

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of any rule in keeping the material and that any duty the attorney owed was to protect the interest of his own clients).

176. *See, e.g.*, Meese, *supra* note 9, at 535-36. This fear was specifically rejected by the court in Lien v. Wilson & McIlvaine, No. 87 C 6397, 1988 U.S. Dist. LEXIS 5129, at *6 (N.D. Ill. June 2, 1988), which, in denying a motion to compel production of an inadvertently disclosed document, noted:

> It is now necessary to comment upon defendant's claim that the relevance of the document overcomes the privilege. It is a rare case, undoubtedly, in which access to attorney-client material would not aid the search for truth. It is axiomatic that the privilege may act in derogation of the truth. Nevertheless, it is believed that overall the search for truth is enhanced by a client's full and complete disclosure to one's attorney. Defendant has cited no authority for its proposition that the probative quality of the evidence should determine whether the veil of privilege should be lifted, and the court believes there is none.

Id. at *6.

177. *See In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979), *aff'd as modified*, 629 F.2d 548 (8th Cir. 1980); State v. Sugar, 417 A.2d 474, 480 (N.J. 1980). *See generally* Kanellis, *supra* note 1 (discussing applicability of attorney-client privilege to stolen information). In the past, courts did not follow the rule that stolen material retained their privileged status. *Id.* at 269. The traditional view on involuntary disclosure, akin to the traditional test on inadvertent disclosure, was that any disclosure waived the privilege. *See* WIGMORE, *supra* note 3, § 2326, at 633. At least two proposed *Federal Rules of Evidence* dealt specifically with involuntarily disclosed material. Proposed *Federal Rule of Evidence* 503(a)(4) stated: " 'A communication is "confidential" if not *intended* to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.'" *Mendenhall*, 531 F. Supp. at 955 n.8 (quoting proposed *Federal Rule of Evidence* 503(a)(4)). Proposed *Federal Rule of Evidence* 511 stated:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

FED. R. EVID. 511 (Proposed 1973), *reprinted in* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 258 (1973).

exist where waiver would be appropriate. For example, where an adversary has seen and relied on information he inadvertently obtained, the court may find the privilege waived.[178] Any absolute rule that does not take into account the particulars of an inadvertent disclosure is undesirable.

The subjective intent test's failure to encourage attorney responsibility may also compromise an attorney's vigilance in keeping his ethical duty to maintain client confidences. Even though the attorney may be subject to disciplinary proceedings for violating the professional rules of conduct, an inadvertent waiver will not result in any legal repercussions to the case.[179] The client retains an evidentiary privilege against use of the disclosed information, but is left with the knowledge that his confidences were revealed and his privacy breached, possibly subjecting him to embarrassment or other criticism.[180]

In sum, the subjective intent test, on its face the most protective of the attorney-client privilege, in fact gives attorneys no incentive to avoid inadvertent disclosure and therefore may ironically diminish both the likelihood that client confidences remain undisclosed and client trust in attorneys. As one court noted, the subjective intent test "poses the risk of undermining the obligation of counsel to exercise due diligence and to employ reasonable and effective screening procedures . . . ."[181]

Congress did not enact these sections, passing instead the more general *Federal Rule of Evidence* 501, which states: "the privilege of a . . . person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." *See* FED. R. EVID. 501. However, courts and commentators consider the proposed rules as a guide to the existing *Federal Rules of Evidence. See Mendenhall*, 531 F. Supp. at 955 n.8; Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646, 651 (9th Cir. 1978); Kanellis, *supra* note 1, at 269.

178. *See In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d at 674 (finding waiver where adversary based deposition on information contained in privileged documents and privilege holder waited 15 months before claiming that the documents were privileged).

179. *See* RULES REGULATING THE FLORIDA BAR Rule 41.6 (1994). Each state has procedures for filing complaints of breaches of ethical duties against attorneys. *See, e.g.*, RULES REGULATING THE FLORIDA BAR Rule 3-7.3 (1995). Typically, a grievance committee is established to receive, investigate, and impose sanctions. *See, e.g., id.* Available sanctions include censureship, suspension, and disbarment. *See, e.g.*, State ex rel. Florida Bar v. Murrell, 74 So. 2d 221, 223 (Fla. 1954). However the extremely small amount of cases in which attorneys' have been disciplined has eroded confidence in the self-governence of lawyers and in the legal profession in general. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 89 (1994).

180. *See generally* Davidson & Voth, *supra* note 8, at 641 (calling the privilege a protection of privacy and stating that the client may not feel comfortable revealing confidences if he knows others may have access to them).

181. Bras v. Atlas Constr. Corp., 545 N.Y.S.2d 723, 725 (N.Y. App. Div. 1989); *see also* Marcus, *supra* note 1, at 1636.

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C. *Attorney Responsibility and the Reasonable Precautions Test*

Although courts and commentators never make specific reference to it, attorney responsibility is seemingly the unspoken premise of most of the factors considered in determining whether reasonable precautions have been taken. For example, the first factor, reasonableness of precautions taken,[182] considers the mechanics of the overall document production and how the accidental disclosure occurred.[183] This analysis focuses almost solely on what the attorney has done to cull privileged documents.[184] Thus, where a client responded to a subpoena *duces tecum* requesting all non-privileged documents by shipping the entire non-segregated file to his attorneys, and the attorneys then failed to remove all of the privileged materials, the court asked why the attorney took no other precautions.[185] The court was concerned with the level of legal expertise of the screener and why a second screening was not ordered.[186]

It is the attorney who must decide the appropriate screening structure for the type of document production sought. For example, with a voluminous production, an elaborate procedure with multiple layers of review may be warranted. The more elaborate the screening procedure devised by the attorney, the more likely it is that a finding of reasonableness will be made if an inadvertent disclosure occurs.[187] Of course, a well-structured screening procedure should have the benefit of reducing the number of inadvertent disclosures.[188]

On the other hand, procedures in place to avoid a clerical mistake such as a missent fax may be nothing more than having adequate clerical training. The courts have answered the question of whether a single clerical error will waive the attorney-client privilege,[189] an issue

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182. *Lois Sportswear*, 104 F.R.D. at 105.

183. *See* Kanter v. Superior Court, 253 Cal. Rptr. 810, 819 (Ct. App. 1988); *supra* notes 70-73 and accompanying text.

184. *See Kanter*, 253 Cal. Rptr. at 819.

185. *See id.*

186. *Id.*

187. *See supra* note 72 and accompanying text.

188. *See id.* The procedure need not be so elaborate as to guarantee non-disclosure, but only a reasonable procedure. *See Lois Sportswear*, 104 F.R.D. at 105. The level of precautions needed has evolved, and will continue to evolve, as the courts rule on the cases before them, thereby setting the standard of reasonableness as they do in other contexts where reasonableness is the criteria.

189. *See, e.g.*, Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 263 (D. Del. 1995) (holding no waiver of privilege where law firm staff incorrectly photocopied documents that they were instructed not to photocopy).

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the ABA addressed in its first opinion on inadvertent disclosure.[190] In all such situations, the courts employing a reasonable precautions test, or a variation of the reasonable precautions test, have refused to find a waiver of the attorney-client privilege.[191] In so doing, the courts have implicitly established a standard of reasonableness that recognizes that isolated clerical mistakes do happen.[192] Therefore, to the extent the ABA appears to have adopted a subjective intent test to avoid the finding of waiver for the errant release of privileged materials,[193] adoption of a reasonable precautions test will create the same result, without the costs the subjective intent test entails.[194]

Attorney responsibility also governs the second factor used in the reasonable precautions test—the number of documents disclosed.[195] The courts consider the total number of documents produced compared to the number of privileged matters released and the production's time frame.[196] One commentator has noted that considering a ratio of privileged to non-privileged documents produced will encourage attorneys to produce an excessive amount of documents that may add additional time and expense to already protracted litigation.[197] Thus, even criticism of the test centers on what an attorney might do. In fact, the commentator's fears are misplaced because the courts are aware of this litigation strategy and any attempt to "dump" documents on an adversary would be evaluated as part of the "overall fairness" factor.[198] In any event, over-production of documents as a litigation strategy is a double-edged sword since there is greater likelihood that privileged

190. *See* ABA, *supra* note 15, at 1001:158; *supra* text accompanying notes 97-98.

191. *See, e.g.*, United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part and vacated in part*, 491 U.S. 554 (1989) (vacating holdings regarding when an *in camera* review is appropriate); Robertson v. Yamaha Motor Corp., U.S.A., 143 F.R.D. 194, 198 (S.D. Ill. 1992).

192. One would expect that the courts would not find that repeated clerical errors were reasonable.

193. *See* ABA, *supra* note 15, at 1001:158; *supra* text accompanying notes 103-05.

194. *See supra* notes 54-58 and accompanying text.

195. *Lois Sportswear*, 104 F.R.D. at 105.

196. See *supra* notes 75-76 and accompanying text for citations to cases which compare the number of documents to the number of disclosures.

197. Meese, *supra* note 9, at 542.

198. *See* Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 51 (M.D.N.C. 1987) (considering charge of "document dumping" in its five factor review); Granada Corp. v. Honorable First Court of Appeals, 844 S.W.2d 223, 227 (Tex. 1992) (reasoning that looking only to proportion of inadvertent disclosure to total disclosure may encourage a flooding of discovery documents); Advance Medical, Inc. v. Arden Medical Sys., Inc., No. 87-3059, 1988 U.S. Dist. LEXIS 7297, at 7-8 (E.D. Pa. July 18, 1988).

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matters will be disclosed.[199] Attorneys should thus be discouraged from document dumping.

The fourth and fifth factors the courts examine, promptness of response to disclosure and overall fairness,[200] also emphasize *attorney* action. Typically, it is the attorney who moves to rectify the problem. The attorney's failure to act promptly may cause the court to rule that intent to waive existed, whereas an attorney's prompt action to retrieve the material will inure to his benefit.[201]

The reasonable precautions test, which calls for an individual examination of the details of the inadvertent disclosure,[202] best promotes societal goals of encouraging attorney-client communications and individual faith in the system. Additionally, it encourages and rewards attorneys who take care to avoid inadvertent disclosure,[203] while protecting clients from bearing the heaviest burden of their attorneys' lack of due care.[204] Blanket rules on waiver may be easy to apply, but they are too broad to ensure the fair administration of each case or to promote systemic benefits to society.[205] Thus the traditional test's rigidity has led one court to criticize it as "atavistic, generating harsh results out of all proportion to the mistake of inadvertent disclosure."[206] At the other extreme, never finding waiver as espoused by the

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199. *See Advance Medical*, 1988 U.S. Dist. LEXIS 7297, at *6. An additional risk of document dumping that should discourage its use is that if there is an inadvertent disclosure the courts may find a subject matter waiver and order the production of all other privileged documents relating to the same subject. *See, e.g.*, Hartman v. El Paso Natural Gas Co., 763 P.2d 1144, 1152-53 (N.M. 1988).

200. *Lois Sportswear*, 104 F.R.D. at 105. See *supra* text accompanying notes 82-92 for a description of the fourth and fifth factors.

201. See *supra* notes 85-86 and accompanying text.

202. *See Lois Sportswear*, 104 F.R.D. at 105. See *supra* text accompanying notes 64-96 for a description of the reasonable precautions test.

203. *See In re* Grand Jury Investigation, 142 F.R.D. 276, 279-80 (M.D.N.C. 1992).

204. *See supra* notes 148, 159-60 and accompanying text; see also *supra* notes 160 and accompanying text for a discussion of the malpractice aspects of an inadvertent disclosure. Since reasonable precautions, or the lack thereof, would be the basis of the client's suit against his attorney, *see supra* note 160 and accompanying text, the reasonable precautions test best protects the client.

205. Other situations exist where rules are moving from specific to more generalized standards. For example, in the criminal law area, the legislatures have been moving from strict tests of what constitutes provocation sufficient to reduce murder to manslaughter to more flexible standards of measuring extreme emotional disturbance. *Compare* People v. Casassa, 404 N.E.2d 1310, 1316 (N.Y. 1980) (concluding that extreme emotional disturbance is measured from the subjective viewpoint of the defendant, and then objectively assessed to determine whether the disturbance was reasonable) *with* Commonwealth v. Bermudez, 348 N.E.2d 802, 803 (Mass. 1976) (stating the Massachusetts rule that "[i]nsults or quarreling alone cannot provide a reasonable provocation").

206. *Mendenhall*, 531 F. Supp. at 955 n.8.

subjective intent test, may also generate unfair results.[207] Instead, the appropriate waiver test should focus on the attorney's actions. The reasonable precautions test allows for an examination of the totality of the circumstances in determining whether there has been a waiver through inadvertent disclosure of the attorney-client privilege.[208] This test most fairly addresses the needs generated by large scale document productions while placing the emphasis on the entity most responsible for controlling the problem: the attorney. In doing so, the reasonable precautions test best comports with the reasoning behind the attorney-client privilege and with the ethical and legal obligations attorneys have toward their clients.

D. *The ABA Test and Attorney Responsibility*

The ABA's approach to inadvertently transmitted documents appears to state a blanket rule that a receiving attorney should return an inadvertently disclosed document that on its face appears to be confidential, because the receiving attorney will know that the document is privileged and know that the sending attorney does not want him to use it.[209] In placing the confidentiality of the document above all other concerns,[210] the ABA approach is similar to the subjective intent test of waiver.[211] The blanket rule of "return and ignore" not only limits the receiving attorney's ability to use inadvertently sent materials, it places a burden on the recipient to rectify the situation by notifying the sender and returning the document.[212] In so doing, the ABA has ignored the sending attorney's responsibility to take care to avoid inadvertent disclosure and to bear responsibility when the disclosure occurs.

To the extent that the ABA test is seen as adopting a subjective intent test,[213] it fails to encourage attorney responsibility for the same reasons that apply to the subjective intent test.[214] The ABA test not only does nothing to encourage attorney care, its reasoning is flawed once it is extended beyond its factual setting, an isolated occurrence of

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207. Harding, *supra* note 9, at 484; *see supra* text accompanying notes 54-58.

208. Harding, *supra* note 9, at 478.

209. *See* ABA, *supra* note 15, at 1001:155.

210. *Id.* at 1001:155-56.

211. *See Mendenhall*, 531 F. Supp. at 955; see *supra* text accompanying notes 43-53 for a description of the subjective intent test.

212. *See* ABA, *supra* note 15, at 1001:155.

213. *See supra* text accompanying notes 103-04.

214. *See* discussion *supra* Part III.B. Whether the ABA has, in fact, adopted the subjective intent test is not clear. *See supra* text accompanying notes 103-05.

an errant transmittal of a single document.[215] In that instance it is fair to say that when an attorney receives a document addressed to someone else but mistakenly faxed to him, he should know that the disclosure was accidental. Return of the document seems the fair and just response. The recipient cannot claim reliance since the error is immediately apparent. However, the ABA test falters when one analyzes it against the backdrop of a large document production. It may not be apparent to the recipient that he is viewing privileged documents, and the burden should not be placed on him to rectify the situation.[216] Because the attorney had no part in the mistaken transmittal and may have already relied upon the information contained in the document, the rule of "return and ignore" is unrealistic and unfair.

As noted above, to the extent one views the ABA approach as adopting the subjective intent test,[217] it does nothing to encourage professional excellence.[218] However, the ABA opinion does contain language suggesting ABA endorsement of the reasonable precautions test.[219] Reconciling the ABA opinion with the reasonable precautions test is desirable for two reasons. First, doing so reduces the conflict between the two sets of rules that protect client confidences, the attorney client privilege and the ethical rules of professional responsibility.[220] Second, since the reasonable precautions test best promotes attorney

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215. The ABA's analogy to bailment law, ABA, *supra* note 15, at 1001:159-60, appears to be most applicable in the context of the single errant document. In that situation, it would be obvious to a reasonable person that the transmittal was not meant for the recipient. But in the more common situation, not specifically addressed by the ABA opinion, a number of privileged documents are released as part of a large-scale document production. *See, e.g.*, Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646, 650 (9th Cir. 1978). It may not be clear to the recipient that the sender did not intend him to use the materials. In such a situation the recipient may not be the document's bailee since as a general rule, a bailment does not arise when possession of property passes to another by mistake. 8 AM. JUR. 2D *Bailments* § 63 (1980).

216. *See, e.g.*, Aerojet-General Corp. v. Transport Indem. Ins., 22 Cal. Rptr. 2d 862, 865 (Ct. App. 1993) (reversing a sanction imposed on a recipient of inadvertently disclosed information for not notifying the sender of the error and noting that the attorney had no legal or ethical duty to the sender). The ABA opinion is specific to "materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer." ABA, *supra* note 15, at 1001:155.

While the ABA opinion concerns a situation that arose out of a complex asbestos litigation, the disclosure itself was not part of a massive document production, but was the result of an isolated clerical error. *See supra* note 97 and accompanying text.

217. *See supra* text accompanying notes 103-04.

218. *See* discussion *supra* Part III.B. (discussing the failures of the subjective intent test).

219. *See* ABA, *supra* note 15, at 1001:158-59; *supra* text accompanying notes 104-07.

220. *See* discussion *supra* Part II.

responsibility, which, in turn, provides systemic benefits to society,[221] an interpretation of the ABA opinion that endorses the reasonable precautions approach would also be most effective in promoting attorney responsibility.

The ABA's endorsement of the reasonable precautions test is apparent in a number of ways. First, the ABA's reliance on property law[222] lends support to a reasonable precautions test as determinative of when a recipient may make use of missent documents. More specifically, when one speaks of the recipient "using" a privileged document, one means that the recipient will be using the information contained in the document. Assuming that the ideas contained in a privileged document are themselves the sender's property,[223] one may

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221. *See* discussion *supra* Part III.C.

222. *See* ABA, *supra* note 15, at 1001:159-60; *supra* notes 108-15 and accompanying text.

223. An in-depth analysis of whether raw information or ideas may qualify as property is beyond the scope of this Article. However, when the raw information is contained in a document covered by the attorney-client privilege, it becomes the creator's property because it has the critical features of property. *See* Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 370 (1989). The term "property" is defined in terms of the property holder's rights. *See* BLACK'S LAW DICTIONARY 1217-18 (6th ed. 1990). Typically, the rights include: (1) the right to use, possess, and enjoy; (2) the right to transfer; and (3) the right to exclude others. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). These are commonly referred to as a "bundle of rights." *See, e,g.,* Kaiser Aetna v. United States 444 U.S. 164, 176 (1979).

The definition works easily with tangible items or "things." *See* Samuelson, *supra*, at 370. An individual's house, car, or merchandise belongs to that person and can be physically possessed. Employing the "bundle of rights" test, the courts have also deemed certain intangible items as one's property. *See, e.g.,* Andrew Beckerman-Rodau, *Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis*, 47 ARK. L. REV. 603, 605 n.5 (1994) (noting that courts have considered pension rights, trade secrets, valid contracts, and real estate liens as property).

Moving down the spectrum of tangibility, the law traditionally has been reluctant to classify information or ideas as property. Samuelson, *supra*, at 365. One commentator has suggested that the reluctance stems from the Age of Enlightenment principle that information should be shared to stimulate innovation and to increase wealth. *Id.* at 367. Moreover, the difficulty in defining what is meant by the term "information," and the fact that information is virtually incapable of confinement, contribute to the difficulty in recognizing it as "property." *Id.* at 368. Therefore, the law typically has not protected information, but rather, the form it takes. For example, copyright and patent laws deem that a property interest arises, not in the ideas or information that form the basis of one's work or invention, but the unique presentation of the information or in the manner in which it may be used. *Id.* at 372-73 (discussing that what copyright laws protect is the writer's "expression," or the form the information takes); *see also* 35 U.S.C. § 154 (1994) (stating that patent holders have the exclusive right to make, use, or sell their inventions for 17 years).

The law of trade secret comes closest to holding that information is property. Samuelson, *supra*, at 374. For a further discussion of trade secrets, see *infra* notes 224-56 and accompanying text.

make an analogy to the protection the law gives to other types of confidential property.

For example, in the area of trade secrets,[224] such as formulas or customer lists, the law imposes not a strict responsibility test, as embodied by the traditional test of waiver,[225] but a reasonable precautions test[226] to determine whether the confidentiality of such materials should be enforced.[227] The reasoning employed by courts considering trade secret questions is instructive on how the courts should view the inadvertent disclosure of privileged communications. As with the attorney-client privilege, the purpose of affording trade secret status to certain types of information, and to protect them from disclosure or use by one other than its holder, is to maintain the confidentiality of the materials.[228] Thus, secrecy is the most important factor in trade secret

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The Supreme Court has given some indication that it will consider some types of raw information as one's property. *See* International News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) (finding a quasi-property interest in the results of one newspaper's news gathering efforts); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984) (holding that property interest in environmental data is cognizable as a trade secret). For an in-depth analysis of the implications of these Supreme Court cases, see Samuelson, *supra*.

224. The *Restatement of Torts* defines a trade secret as one which

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 433, 438 (1985) (defining trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that . . . (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy").

225. *See supra* text accompanying notes 28-31.

226. *See supra* notes 66-92 and accompanying text.

227. *See, e.g.*, Defiance Button Mach. Co. v. C & C Metal Prods. Corp., 759 F.2d 1053, 1063 (2d Cir.) (stating that inadvertent disclosure of trade secrets is not waiver of protection if reasonable precautions are taken to protect secrecy), *cert. denied*, 474 U.S. 844 (1985).

228. *See* Beckerman-Rodau, *supra* note 223, at 627-29. Professor Beckerman-Rodau takes the position that, under certain circumstances, ideas may be deemed property. *Id.* at 649. According to him, trade secrets law has developed to provide control over the access to such ideas. *Id.* at 627-28. Unless confidentiality exists, the ideas will no longer be protected. *Id.* at 627. He notes,

> Property rights in something normally do not depend on maintaining secrecy; however, the definition of property requires that the owner has the right of dominion and control over the thing and thereby the right to exclude others from using it. If the trade secret owner fails to maintain secrecy, the trade secret will become public information, and it will be impossible for the owner to exert any

protection.[229] Without secrecy, the need for trade secret protection no longer exists.[230] Thus if the material for which trade secret protection is sought is "readily ascertainable,"[231] in other words, not secret, the protection is denied.[232] Yet even with the strict secrecy requirements of trade secret law, the law of misappropriation of trade secrets uses a reasonable precautions test to determine whether information is a trade secret.[233] In other words, the law of trade secrets has not found that disclosure *per se* is the decisive factor in denying trade secret protection; the issue is whether the holder of the trade secret took reasonable precautions to protect it.[234] The courts will refuse trade secret protection, even where improper means were employed to obtain the materials, if the holder did not take reasonable precautions against disclosure.[235]

The trade secret reasonable precautions standard directly parallels the reasonable precautions test used to decide whether an inadvertently disclosed document is still protected by the attorney-client privilege. The following example demonstrates the extent of the similarities in concept and treatment between the preservation of trade secret protection and of privileged documents. *Frank W. Winne & Son, Inc. v. Palmer,*[236] involved a manufacturer whose trash was routinely taken by a rival manufacturer.[237] In the trash, the rival found customer invoices, customer lists, purchase orders and other documents relating to the manufacturer's pricing and territory.[238] The plaintiff claimed that the materials found in the trash were trade secrets and sued its rival for interference with its trade secrets.[239] The rival argued that information

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dominion and control over it.

Id.

229. *Id.*

230. *Id.*

231. *See* UNIF. TRADE SECRETS ACT § 1; *supra* note 227, at 438.

232. *See, e.g., Defiance,* 759 F.2d at 1063-64.

233. *See supra* text accompanying note 227.

234. The courts, in considering whether an item of information is entitled to trade secret protection are asked to look to a number of factors including "the extent of measures taken . . . to guard the secrecy of the information." *Defiance,* 759 F.2d at 1063.

235. *See, e.g., id.* at 1064; Julie Research Lab., Inc. v. Select Photographic Eng'g, Inc., 810 F. Supp. 513, 520 (S.D.N.Y. 1992), *aff'd in part, vacated in part,* 998 F.2d 65 (2d Cir. 1993); Greenblatt v. Prescription Plan Servs. Corp., 783 F. Supp. 814, 826 (S.D.N.Y. 1992).

236. No. 91-2239, 1991 U.S. Dist. LEXIS 11183 (E.D. Pa. Aug. 7, 1991).

237. *Id.* at *1.

238. *Id.*

239. *Id.*

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in the trash was not a protected trade secret because the plaintiff had not taken adequate precautions to avoid disclosure.[240]

The court agreed with the defendant and stated that the information in the trash had probably lost its trade secret protection.[241] As a starting point, the court noted that, even though secrecy is the most important factor in the law of trade secrecy,[242] the standard by which to judge whether a trade secret has been established is the degree of *reasonable precautions* taken to ensure secrecy.[243] Thus, the issue became whether the plaintiff, in putting its office documents in the garbage and out for collection, took reasonable precautions to ensure the secrecy of its materials. The *Winne* court relied on Fourth Amendment cases that have held that "there is no reasonable expectation of privacy in trash which is placed out for collection,"[244] to find that plaintiff failed to take reasonable precautions to protect its trade secret since it could not, as a matter of law, have a reasonable expectation of privacy in the trash.[245]

Almost identical facts faced the United States District Court for the Northern District of Illinois in *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*[246] There, instead of containing trade secrets, the trash left out for collection consisted of drafts of confidential letters sent by a client to his attorney, matters plainly protected by the attorney client privilege.[247] As in *Winne*, the parties were business competitors.[248]

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240. *Id.* at *2.

241. *Id.* at *4. The court denied the defendant's motion to dismiss stating that the record lacked the details necessary to grant the motion. *Id.* at *19. However, the court did state that, "it is rather difficult to find that one has taken reasonable precautions to safeguard a trade secret when one leaves it in a place where, as a matter of law, he has no reasonable expectation of privacy from prying eyes." *Id.* at *11.

242. *Id.* at *3.

243. *Id.* at *7. The court also stated that " '[t]he secrecy in which a purported trade secret is shrouded need not be absolute but reasonable precautions under the circumstances must be taken to prevent disclosure to unauthorized parties.' " *Id.* (quoting Anaconda Co. v. Metric Tool & Die Co., 485 F. Supp. 410, 422 (E.D. Pa. 1980)).

244. *Winne*, 1991 U.S. Dist. LEXIS 11183, at *10. *See generally* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (concluding that respondents lost their Fourth Amendment protection by leaving garbage on a public street); United States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981) ("Every circuit considering the issue has concluded that no reasonable expectation of privacy exists once trash has been placed in a public area for collection."); Commonwealth v. Perdue, 564 A.2d 489, 493 (Pa. Super. Ct. 1989) (holding that appellant had no expectation of privacy in garbage left in a garbage can on private property but in an area that was open to the public).

245. *Winne*, 1991 U.S. Dist. LEXIS 11183, at *10.

246. 91 F.R.D. 254 (N.D. Ill. 1981).

247. *Id.* at 256.

248. *See id.* at 255.

Plaintiffs made it a practice of going through defendant's trash to look for evidence to confirm their suspicions that defendants were engaged in unlawful price discrimination.[249] Upon defendant's refusal to answer interrogatories based on the documents plaintiff had found in the trash, plaintiffs filed a motion to compel answers.[250] The *Suburban* court was faced with the issue of whether materials placed in the trash maintain their privileged status.[251] At the outset, the *Suburban* court rejected the traditional test that disclosure itself was conclusive proof of intent to waive.[252] Instead, it acknowledged the "modern trend" and applied a reasonable precaution test as the measure of intent to waive.[253]

Though noting that the case presented, a "very close question," the court concluded that reasonable precautions were not taken and that the attorney-client privilege was waived.[254] It noted, as did the *Winne* court, that defendants could not have a reasonable expectation of privacy in the trash since, under Fourth Amendment considerations, the trash would have been deemed abandoned.[255] The finding of abandonment was an indication that reasonable precautions were not taken.[256]

The courts have developed strikingly similar lines of reasoning in the areas of trade secret protection and attorney-client privilege to decide when they should protect a privileged document's confidentiality. The ABA's analogy to property law to decide when an ethical obligation exists to return inadvertently received documents[257] is therefore consistent with the reasonable precautions test.

Another way in which the ABA opinion endorses the reasonable precautions test is that, in support of its position that the fact of disclosure alone should not strip a document of its confidential status, the opinion specifies the five factors contained in the reasonable

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249. *Id.* at 255-56.

250. *Id.* at 256.

251. *Id.* at 255.

252. *Id.* at 260.

253. *Id.*

254. *Id.* Commentators have criticized the *Suburban* holding because, notwithstanding its rejection of the traditional test, it appeared to go beyond requiring that reasonable precautions be taken, requiring instead that "all possible precautions" be taken. Kanellis, *supra* note 1, at 273; Davidson & Voth, *supra* note 8, at 643-45. Other courts have also criticized its ruling. *See, e.g., Mendenhall*, 531 F. Supp. at 955 n.8 ("With all respect this Court does not concur in Judge Leighton's conclusion that the 'case presents a very close question. . . .' ") (citation omitted).

255. *Suburban*, 91 F.R.D. at 256; *see also Winne*, 1991 U.S. Dist. LEXIS 11183, at *10.

256. *Suburban*, 91 F.R.D. at 257. The court pointed out that evidence of the use of a shredder or other measures to destroy the documents would have had bearing on whether reasonable precautions were taken. *Id.* at 260. The *Winne* court made the same observation. *Winne*, 1991 U.S. Dist. LEXIS 11183, at *12.

257. *See* ABA, *supra* note 15, at 1001:159.

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precautions test that the courts consider in determining waiver.[258] Additionally, it refers to the rule embodied by the subjective intent test as only a "minority" view and relegates *Mendenhall*, the seminal subjective intent case to a footnote.[259] If the ABA had intended to adopt a rule imposing an ethical obligation to automatically return inadvertently disclosed materials, it would not have minimized the relevance of the subjective intent test.

IV. CONCLUSION

Currently, three judicially created tests exist for determining whether the inadvertent disclosure of privileged documents waives the attorney-client privilege.[260] These tests range from an absolute ban on waiver based on inadvertent disclosure (the subjective intent test)[261] to an absolute finding of waiver based only on the act of disclosure (the traditional test).[262] In between lies the reasonable precautions test that measures intent to waive by the steps taken to avoid inadvertent disclosure.[263] Additionally, the ABA has promulgated a fourth test to decide an attorney's ethical obligation to return inadvertently disclosed documents,[264] that appears to adopt the subjective intent test, although it may be reconciled with the reasonable precautions test.[265] Deciding which test best serves the parties concerned should be based on the underlying goals of the attorney-client privilege and the ethical duty to maintain client confidences. The goals of both are to promote client trust in attorneys and to encourage the free flow of information.[266] Basing a waiver test on attorney responsibility will best serve these goals. Since it is, in fact, the attorney who controls the discovery process, a test that measures the attorney's care should be the decisive factor in waiver analysis. Under this analysis, the reasonable precautions test, which places the most emphasis on attorney action, is the most appropriate measure of intent to waive.

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258. *See id.* at 1001:158 (citing Hartman v. El Paso Natural Gas Co., 763 P.2d 1144, 1152 (N.M. 1988)). The ABA opinion notes that "[a] review of the relevant cases demonstrates, with few exceptions, an unwillingness to permit mere inadvertence to constitute a waiver. *Something more, like a failure of counsel to spend any time reviewing the documents to be produced in discovery, is required before a waiver is found." Id.* (footnote omitted) (emphasis added).

259. *Id.* at 1001:158 n.3.

260. *See supra* text accompanying notes 28-96.

261. *See supra* text accompanying notes 43-62.

262. *See supra* text accompanying notes 28-42.

263. *See supra* text accompanying notes 63-96.

264. *See supra* text accompanying notes 98-114.

265. *See supra* text accompanying notes 100-07.

266. *See supra* notes 116-18 and accompanying text.

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