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THE PERILS OF PRIVILEGE: WAIVER AND THE LITIGATOR†

Richard L. Marcus*

*"Except for a few privileged matters, nothing is sacred in civil litigation"*¹

Because the "sacred" privileges contravene the maxim that the law has a right to every person's evidence, American law has set its head against them since the mid-nineteenth century. Even the venerable attorney-client privilege is available only when an elaborate series of requirements is satisfied,² and courts intone that it "ought to be strictly construed within the narrowest possible limits consistent with the logic of its principle."³ A prime method for constricting the privilege is waiver; courts adopting a nineteenth-century attitude are likely to hold that any disclosure of privileged material waives the privilege.⁴ Some commentators, meanwhile, view waiver as the way to cure defects in the traditional rules of privilege by abrogating privilege protection where it is cumbersome.⁵

Waiver therefore casts a long shadow. In civil litigation, it makes preservation of the attorney-client privilege perilous indeed. A party

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* Professor of Law, University of Illinois. B.A. 1969, Pomona College; J.D. 1972, University of California, Berkeley. — Ed. I am indebted to the participants in an Illinois Faculty Workshop that discussed these ideas, to my colleagues Tom Mengler and Ron Rotunda, who read a draft of this article and offered helpful suggestions, and to Ed Wilhoite, University of Illinois class of 1987, for research assistance.

1. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 290 (D. Del. 1985). The court accordingly ordered disclosure of "one of the best-kept trade secrets in the world," 107 F.R.D. at 289, the complete formula for Coca-Cola. The company, however, refused to turn over the formula. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 110 F.R.D. 363 (D. Del. 1986) (refusing to impose sanction of default for failure to produce formula).

2. *See, e.g.*, 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (J. McNaughton ed. 1961):

(1) Where legal advice of any kind is sought (2) from a professional legal advisor 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.

3. *Radiant Burners, Inc. v. American Gas Assn.*, 320 F.2d 314, 323 (7th Cir.) (quoting 8 J. WIGMORE, *supra* note 2, at § 2291, at 554), *cert. denied*, 375 U.S. 929 (1963).

4. *See* text accompanying notes 108-09 *infra*.

5. *E.g.*, MCCORMICK ON EVIDENCE § 87, at 206 (E. Cleary 3d ed. 1984) (privilege's "obstructive effect has been substantially lessened by the development of liberal doctrines as to waiver").

may forfeit privilege protection by putting privileged matters "in issue." During discovery, any slip-up in screening materials that are produced can result in waiver. Revelation to nonparties can similarly destroy privilege protection. In witness preparation, allowing a prospective witness to examine privileged materials that relate to his or her testimony can destroy the protection. Despite its pervasive impact, however, waiver has received little broad-based scholarly attention,⁶ leaving some to conclude rather lamely that "[w]aiver can be a tricky concept."⁷

Waiver can be made less tricky, although it will never yield algebraic accuracy. Focusing on civil litigation, this article develops a framework for waiver decisions. It begins by stressing a factor that others have neglected⁸ — the costs generated by broad traditional waiver rules. These costs result largely from changes in lawyer behavior to reduce waiver risks. Thus, enormous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process.⁹ Although commendable, these orders appear totally unenforceable under classical waiver

6. The notable and excellent exception is *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1629-65 (1985) [hereinafter cited as *Developments*]; see also R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION* 545-72 (1985) (surveying grounds for waiver); Davidson & Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637 (1986). Other commentary is limited in scope. See, e.g., Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598 (1983) [hereinafter cited as Note, *Inadvertent Disclosure*]; Note, *The Attorney-Client Privilege After Attorney Disclosure*, 78 MICH. L. REV. 927 (1980) [hereinafter cited as Note, *Attorney Disclosure*]; Note, *Permian Corporation v. United States and the Attorney-Client Privilege for Corporations: Unjustified Severity on the Issue of Waiver*, 77 NW. U. L. REV. 223 (1982) [hereinafter cited as Note, *Unjustified Severity*]; Note, *Waiver of Attorney-Client Privilege in Inter-Attorney Exchange of Information*, 63 YALE L.J. 1030 (1954) [hereinafter cited as Note, *Inter-Attorney Exchange*]; cf. Note, *Waiver of Work Product Immunity*, 1981 U. ILL. L. REV. 953.

7. R. LEMPert & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 696 (2d ed. 1982); see *Developments*, *supra* note 6, at 1630 ("As the exceptions [to the rule that any disclosure works a waiver] have multiplied, it has become difficult to distinguish the exceptions from the rule.").

8. But see Davidson & Voth, *supra* note 6, at 654, 666 (arguing that, due to the burden of deciding questions of privilege in complex cases, "[d]ecisions on questions of privilege may have a far more profound effect on the administration of justice than the decisions on questions of substantive law to which judges give most of their attention").

9. See text accompanying notes 30-35 *infra*.

doctrine. This article urges that the theory, like the courts, should take account of the costs; loss of privilege protection should be justified by something more than antipathy toward the privilege.

Turning to theories for waiver, the article finds two traditional justifications wanting. One, intention, is not a useful guide because truly intentional waivers are extremely rare. Indeed, waiver is often found even though the act upon which it is premised (such as inadvertent production in discovery) was not itself intended. The other, flowing from the general desire to restrict the privilege, is to limit confidentiality to situations where it is essential by treating any act inconsistent with the purpose of the privilege as a waiver. However, this attitude disregards the costs of a broad rule of waiver. More significantly, it assumes certainty about how the purpose of the privilege should be applied where no certainty actually exists. The traditional utilitarian rationale for the purpose is easily stated: the privilege promotes full disclosure by the client to the lawyer. But this can be applied very literally, often providing a pretext, not a reason, for finding a waiver. At the extreme, for example, the purpose analysis can narrow privilege protection to a litmus test resembling the *Miranda* warnings, protecting only those disclosures the client would not have made absent protection.¹⁰ Few endorse this position, however, and the Supreme Court's privilege decisions seem to be moving in another direction, blending attorney-client privilege with work product.¹¹ Ultimately the purpose analysis seems inherently to invite unduly literal decisions that inflate the cost of waiver,¹² and it is therefore preferable to look for a reason, rather than a pretext, for finding a waiver.

What remains is fairness, which courts increasingly invoke as a basis for waivers. But fairness is an extraordinarily elastic term, and the existence of the privilege may well be labeled unfair. The distinguishing feature in waiver cases, however, is some further act characterized as a waiver. This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight.

Since this insight advances the discussion little, this article proceeds to examine the specific litigation contexts in which waiver issues recur to explain how the fairness principle should be applied. This

10. The *Miranda* warnings image comes from Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 606-09 (1980).

11. See text accompanying notes 87-90 & 98-106 *infra*.

12. See text accompanying notes 107-21 *infra*.

analysis shows that courts have distorted waiver doctrine to abrogate privilege on the ground that privileged material is "in issue" where in reality there is no risk of truth garbling and the motivation behind waiver decisions is dislike for the privilege itself. Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice. Finally, it explores the competing fairness concerns in witness preparation and argues for careful attention by courts to avoid broad invasions into privilege on this ground. Although such case-by-case determinations can be difficult, they are preferable to the sort of hair-trigger waiver decisions that result from nineteenth-century rigidity about the privilege.

Having explored the application of the fairness principle in recurring litigation contexts, this article concludes by examining two "slippery slope" objections that could be raised to the emerging fairness analysis. These objections, oddly enough, foresee that the fairness orientation will erode the privilege because fairness decisions are inherently ad hoc and because they turn on need, which could undermine the supposed absoluteness of the privilege. On examination, however, these objections offer no reason for abandoning the flexibility of fairness, which operates to preserve privilege where it would otherwise be lost.

I. THE COSTLY IMPACT OF BROAD WAIVER RULES

Many lawyers are acutely aware of the waiver risks involved in litigation.¹³ Thus, although there are serious doubts about the extent to which the attorney-client privilege affects client behavior,¹⁴ there can be little doubt that waiver rules affect lawyers' handling of litigation,¹⁵ particularly discovery, in ways that cause a number of

13. The lengths to which lawyers go to avoid waivers, *see* text accompanying notes 22-29 *infra*, evidence this concern. The recurrence of the subject on continuing legal education programs also shows the level of attention the subject receives. *E.g.*, Glekel, *Attorney-Client Privilege and Work Product Privilege*, in *FOURTH ANNUAL CIVIL LITIGATION PRACTICE* 337, 344-46 (Law Journal Seminars 1985); Hellerstein & Ringel, *Current Problems About the Attorney-Client Privilege*, in 1 *RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS* 87, 123-32 (1st ed. 1981). Beyond that, the practitioners' literature is full of advice on the subject. *See, e.g.*, Miller, *Preserving the Privilege*, *LITIGATION*, Summer 1984, at 20; Thornburg, *Attorney-Client Privilege: Issue-Related Waivers*, 50 *J. AIR L. & COM.* 1039, 1050 (1985) (attorneys should be "ever mindful" of risk of waiver).

14. *See* notes 74-77 *infra* and accompanying text.

15. Of course, some lawyers do not worry about waiver and therefore do not protect the confidentiality of privileged materials, often because the stakes do not justify the substantial efforts required to avoid a waiver. *See, e.g.*, Rotunda, *Book Review*, 89 *HARV. L. REV.* 622, 625

costs.¹⁶ Nevertheless, academic discussions of waiver pay little heed to these costs, seemingly because they view the problem as entirely theoretical.¹⁷ The theory should take account of this reality.

To appreciate the effects of broad waiver rules, one must begin by realizing the consequences of a finding of waiver. Where disclosure of privileged material operates as a waiver, the waiver ordinarily goes beyond the disclosure in two ways. First, it is effective as to all related matters, precluding later assertion of the privilege as to any material related to the same subject.¹⁸ Second, with regard to all this material, it is effective as to the whole world because the privilege, once waived, cannot be resurrected.¹⁹ Thus, revelation of a single privileged item to *A* results in waiver not only as to all related items as to *A*, but also to *B*, *C*, etc. With broad discovery rules,²⁰ such revelation is not limited to the central issues in the client's dispute with *A*. Instead, the ambit of discovery may include a great deal of material only tangentially related to the present case that might be central in another case. It should be apparent that a great deal is at stake.²¹

A. Increasing Litigation Costs

The risk of waiver can lead to the expenditure of extraordinary amounts of energy (and money) to avoid waiver, particularly in discovery. Perhaps the archetypical example is *Transamerica Computer Co. v. International Business Machines Corp.*,²² in which Transamerica

(1976) (many lawyers lose privilege due to ignorance of limits on its protection); Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J.L. & SOC. PROBS. 179, 180-81 (1972) (survey indicating many lawyers unaware of risks to privilege posed by sharing information with other lawyers). These situations are not cost-free; they raise concerns about favoring the rich, see text accompanying notes 41-46 *infra*, and undermining client confidence in the privilege, see text accompanying notes 51-56 *infra*.

16. Not all these types of costs arise in every litigation context. Thus, where a party loses the privilege for putting a matter "in issue," there is very little avoidance behavior available except withdrawing the claim or defense involved. Obviously, in that case the waiver rule causes different costs.

17. In other areas, the costs of procedural rules do affect their interpretation. See, e.g., Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 444-51 (1986) (unanticipated costs of relaxed pleadings scrutiny cause courts to revive fact pleading).

18. See notes 126-27 *infra* and accompanying text. This consequence may not follow where the waiver is based on use of materials in witness preparation. See note 225 *infra*.

19. See note 2 *supra*.

20. See FED. R. CIV. P. 26(b)(1) (allowing discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action").

21. "The waiver doctrine entails the result of waiver not only of the claim for the particular document, but for any other document relating to the same subject matter. For this reason the risk it poses is enormous." Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RESEARCH J. 375, 399-400.

22. 573 F.2d 646 (9th Cir. 1978).

argued that IBM had waived the privilege by producing some 5800 pages of privileged material during discovery in a suit against IBM by Control Data Corporation (CDC). In the CDC case, the trial judge had ordered IBM to produce some seventeen million pages of material within ninety days. IBM thereupon mounted what the Ninth Circuit called a "herculean effort"²³ to cull privileged items from this mass of material. It hired outside help to examine each page of material to identify items that appeared to be privileged. This process would have taken 34,000 hours at 500 pages per hour, probably a high rate of speed for this task since these seventeen million documents were "particularly difficult to screen for privilege."²⁴ Having located seemingly privileged documents, these reviewers would alert a lawyer, who would make an initial examination. If the document seemed privileged, it would be passed along to another lawyer who would determine whether it was wholly or partly privileged, in which case a partly masked copy had to be made and returned to the original location of the document.²⁵ Finally, IBM stationed a lawyer (colorfully known as the "Interceptor") in the document production room to try to catch any privileged documents that had slipped through.²⁶ Faced with this enormous effort, the Ninth Circuit held that no waiver had occurred, even though Judge Edelstein in New York had earlier reached the opposite result.²⁷

Obviously, there are few cases comparable in magnitude to *Trans-america*, but the added effort caused by the risk of waiver is significant in many cases. The advent of photocopying machines, computers, and

23. 573 F.2d at 648.

24. 573 F.2d at 648. The court explained that the documents were "letters and memoranda . . . randomly strewn throughout various IBM branch offices and divisional headquarters." 573 F.2d at 648. A bit of reflection suggests the difficulties that attend efforts to cull privileged materials. Often they do not bear indicia of privilege, and they may be interspersed with innocuous materials. Consider, for example, a handwritten note saying, "Carol called to say that she sees no AT problems with the Amalgamated deal if we handle it as she suggested." If Carol is a lawyer, and AT means antitrust, the note is probably privileged, but it is obviously hard to identify as such. Finding and properly indentifying this note could well be a great challenge, but failure to do so could easily result in waiver.

25. 573 F.2d at 648-49.

26. 573 F.2d at 649.

27. Judge Edelstein ordered IBM to turn the documents over to the government in its monopolization suit against IBM. This order resulted in a litigation odyssey. A panel of the Second Circuit vacated the order because "[i]t is clear to us beyond peradventure that the delivery of the documents pursuant to the Minnesota court order did not constitute a waiver by IBM." *IBM v. United States*, 471 F.2d 507, 511 (2d Cir. 1972). This ruling was reversed en banc on the ground the court of appeals had no appellate jurisdiction. *IBM v. United States*, 480 F.2d 293 (2d Cir. 1973) (en banc), cert. denied, 416 U.S. 979, 980 (1974). Meanwhile, IBM refused to produce the documents, Judge Edelstein fined it \$150,000 per day for contempt, and the Second Circuit again refused to review his decision, holding that it lacked jurisdiction. *IBM v. United States*, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974).

other technological advances means that there is a great deal of additional material that must be culled in responding to discovery. The increasing incursion of regulation into everyday affairs means that there is a heightened possibility that this material will be privileged.²⁸ Even without broad waiver rules, parties would be likely to make substantial efforts to extract privileged materials because they would prefer not to turn over anything they can withhold. It is unlikely, however, that similar exertion would be required were it not for the risk of a waiver as to the world.²⁹ The question, then, is whether the added effort is worth it.

Many courts think it is not.³⁰ In increasing numbers, they have entered orders, often on stipulation, that provide that inadvertent production of privileged material through discovery is not a waiver. For example, the judge in the CDC case entered such an order early in document production before ordering the "Interceptor" out of the document production room.³¹ In *Transamerica*, the Ninth Circuit found that this order made it "obvious" that IBM did not waive privileges as to documents produced thereafter.³² More generally, courts and litigants view such orders as devices to reduce the burden of screening material and thereby streamline the discovery process.³³ In service to that goal, some courts enforce such protective agreements

28. It may also be that litigants are asking for privileged material more often. See Davidson, *Judicial Procedures for Resolving Claims of Privilege*, LITIGATION, Summer 1982, at 36, 36: "Twenty years ago, a document request made no mention of privileged documents: it was considered ungentelemanly to ask one's adversary about his communications with his client. Now, however, privileged documents are called for by virtually every request . . ."

29. See *id.* ("If you are tempted to avoid the cost [of asserting privilege] by simply producing the uninteresting privileged documents, remember that the broad and vague doctrines of waiver make this a hazardous course.").

30. See, e.g., *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982), in which the court rejected the argument that the privilege should be found inapplicable because the materials in question had not been stored in a special confidential file: "To hold otherwise would be to require every corporation to maintain at least two sets of files. Moreover, a screening committee would then have to be set up whereby some designated official could pass on the need of each employee to know the contents of any requested document." 93 F.R.D. at 142. But cf. *Eigenheim Bank v. Halpern*, 598 F. Supp. 988, 991 (S.D.N.Y. 1984) (defendant so careless in maintaining confidentiality that privilege waived).

31. *Control Data Corp. v. IBM*, 16 Fed. R. Serv. 2d (Callaghan) 1233, 1234 (D. Minn. 1972).

32. 573 F.2d at 652.

33. E.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1216 & n.1 (D.C. Cir. 1981); *Western Fuels Assn. v. Burlington N. R.R.*, 102 F.R.D. 201, 204 (D. Wyo. 1984); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 140 & n.1 (D. Del. 1982); *Jorstad v. IDS Realty Trust*, 489 F. Supp. 1180, 1184 n.1 (D. Minn. 1980), *vacated on other grounds*, 643 F.2d 1305 (8th Cir. 1981); cf. *United States v. Aronoff*, 466 F. Supp. 855, 861 (S.D.N.Y. 1979) ("If the defendant's attorneys wished to avoid an inadvertent waiver during pre-indictment negotiations, they could have agreed in advance with the Government's attorneys that any disclosure would be 'without prejudice.'").

even though not reduced to a court order.³⁴ It appears that these efforts do reduce the cost and delay that would otherwise result from broad waiver rules.³⁵

But the stipulation or order approach is inconsistent with classical waiver doctrine, which holds that *any* disclosure to an outsider destroys the attorney-client privilege. The fact that the parties have agreed in advance that disclosure should not have that effect, with or without the court's blessing, has no bearing on that conclusion.³⁶ Even if such an agreement estops the recipient of the material from claiming waiver, it would have no effect on a nonparty's right to claim the disclosure established waiver. Yet the courts choose to disregard this theoretical glitch, presumably because the concrete reality of protracted discovery is more immediate than the abstract operation of classical waiver doctrine.³⁷ Rather than perpetuate uncertainty about the effectiveness of such orders,³⁸ it would be better to declare them enforceable even though theoretically untidy;³⁹ otherwise the courts

34. In *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35 (E.D.N.Y. 1973), the court accepted a "special method of discovery" adopted by the parties providing there would be no waiver "unless expressed in writing," reasoning: "The court can perceive no sound reason of public policy to rewrite an agreement which facilitates disclosure, closely protects a legitimate privilege, and contemplates a cooperative effort by both parties." 61 F.R.D. at 42-43. Other courts have enforced such agreements in the absence of an order. See *Dowd v. Calabrese*, 101 F.R.D. 427, 439-40 (D.D.C. 1984) (stipulation at deposition); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (agreement that compliance with subpoena would not constitute a waiver).

35. Thus Professors Hazard and Rice, acting as special masters in an exceptionally large case, extolled the virtues of the nonwaiver order entered in the case: "By eliminating the risk of inadvertent waiver through the production of documents, the order eliminated the necessity of hypercareful scrutiny of each document prior to its disclosure. . . . This [order] permitted relatively free exchange of the exceptionally large mass of demanded and subpoenaed materials." Hazard & Rice, *supra* note 21, at 399-400; see also *MANUAL FOR COMPLEX LITIGATION*, SECOND § 21.432 (1985) (supplement to C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (1969-1985)) (agreement preserving privilege "may facilitate the discovery process").

36. See text accompanying notes 18-19 *supra*. Accordingly, in *Chubb Integrated Sys. v. National Bank*, 103 F.R.D. 52 (D.D.C. 1984), the court refused to enforce such a stipulation although it acknowledged that the agreement was "for the mutual convenience of the parties, saving the time and cost of pre-inspection screening." 103 F.R.D. at 67-68. It concluded that these considerations counted for nothing in the face of the accepted dogma that "the attorney-client privilege should be available only at the traditional price: a litigant must maintain genuine confidentiality." 103 F.R.D. at 67 (citations omitted); *accord*, *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84 (E.D.N.Y. 1981).

37. Cf. *Cippollone v. Liggett Group, Ltd.*, 785 F.2d 1108 (3d Cir. 1986), in which the court upheld an "umbrella" protective order that did not require document-by-document justification of confidentiality, reasoning that "the document-by-document approach may be so costly that it may make large-scale litigation too expensive for all but the most affluent parties." 785 F.2d at 1122 n.18; see also Leubsdorf, *Constitutional Civil Procedure*, 63 TEXAS L. REV. 579, 589 (1984) ("Those who are not rich often cannot afford litigation on the scale for which the system is designed.").

38. See, e.g., *MANUAL FOR COMPLEX LITIGATION*, SECOND, *supra* note 35, § 21.432 (1985) (enforceability of such orders "not clear").

39. See *Davidson & Voth*, *supra* note 6, at 655 (footnotes omitted):

are in effect deceiving litigants about their rights.⁴⁰ However this issue is ultimately resolved, the duplicity involved in entering such orders points up the unsuitability of the rigid waiver doctrine to the actual problems of modern litigation.

B. *Favoring the Rich*

A second cost of broad waiver rules derives from the first: Not only do these rules promote overexpenditure to avoid a waiver, they also prefer the rich litigant over the poor one. *Transamerica* again illustrates the extreme — few private litigants could spend as lavishly on discovery screening as IBM, or have as great an incentive to do so in view of the likelihood of collateral litigation. But a simple estimate of the cost of IBM's review⁴¹ suggests the reality that some litigants will be unable to finance such efforts.

Discovery is not the only realm in which a well-heeled litigant can reduce or eliminate risks of waiver by committing more resources to the litigation. Witness preparation provides another good example.⁴² Ideally, witness preparation involves a face-to-face encounter between the trial lawyer and the witness to review the matters that will be covered in direct testimony and the subjects likely to be covered in cross-examination. This ideal is relatively immune to snooping by the opposition, because witness preparation is generally treated as work product.⁴³ But where the witness is busy with ongoing business, spending time with the lawyer is likely to look unattractive.⁴⁴ Even clients resist efforts by their own lawyers to get their attention.⁴⁵ Moreover, unless the lawyer and the witness are located nearby, one of them has to

The single reform of giving effect, in subsequent litigation, to a stipulation or order providing that inadvertent production will not constitute a waiver, would greatly simplify the task of resolving privilege claims. Thousands of arguably privileged documents of innocuous content would no longer have to be withheld out of fear that their production would effect a broad subject matter waiver.

40. Of course, such orders are often requested by the parties and granted to accommodate them. But there is surely something deceptive about entering an order that cannot do what it claims to do.

41. See text accompanying note 24 *supra*. At five dollars per hour, the initial screening would have cost \$170,000. The cost in attorney time could, of course, be much higher.

42. For a detailed examination of the waiver problems presented in the witness preparation situation, see text accompanying notes 199-225 *infra*.

43. See note 212 *infra*.

44. Cf. Levin & Colliers, *Containing the Cost of Litigation*, 37 *RUTGERS L. REV.* 219, 226 (1985) (discussing loss of management time as additional cost of litigation); Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, *LAW & CONTEMP. PROBS.*, Summer 1985, at 5, 15 (same).

45. See Olson, *Dispute Resolution: An Alternative for Large Case Litigation*, *LITIGATION*, Winter 1980, at 22, 24 (describing tendency of corporate managers to give up and leave the matter to the lawyers when business dispute is litigated).

travel to meet with the other, adding that expense to the cost in witness time and lawyer time for extensive preparation sessions.

For a litigant with large resources, like IBM, these impediments can usually be overcome. IBM employees can be relieved of assignments for whatever time is required to consult with the lawyer, who can be sent around the world, if necessary, to meet with the witness. Litigants who are not so well-heeled may have to employ cheaper means that result in the creation of documents. For example, where the lawyer is in San Francisco and the busy client/witness is in New York, the lawyer may have no practical alternative to sending the client a memorandum summarizing the material developed to date through discovery and setting out likely lines of inquiry. This method is not as effective as face-to-face review,⁴⁶ but it is so much cheaper in lawyer and client time that most litigants may have little practical alternative.

To the extent the price for using cheap alternatives is to waive a privilege that would otherwise protect material, waiver rules not only promote needless expenditure on litigation but also give those litigants who can afford such expenditures an advantage (in increased protection of privileged material) over their adversaries.

C. *Judicial Burden*

Resolving disputes about privilege can be time-consuming. One judge, having completed determination of privilege disputes regarding thousands of documents, described it as "the most arduous task [the court] has ever undertaken in its 26 years of public service."⁴⁷ Judges can shift that burden to magistrates or masters who can, in turn, reduce it by insisting on burdensome procedures to claim a privilege.⁴⁸ But those procedures further escalate the cost to the party of claiming privilege.

Much of this judicial effort is unnecessary. To some extent, of course, litigants will claim privilege whether or not the failure to do so results in a waiver. But broad rules of waiver add substantially to the

46. See text accompanying notes 214-16 *infra*.

47. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1192 (D.S.C. 1975). The court had spent twenty-five days on in camera inspection of documents, and the review process yielded, among other things, a 405-page index. 397 F. Supp. at 1189. For other examples of burden, see *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 157 (D. Del. 1977) (court's ruling based on "a careful comparison of the disputed documents with those that have been produced"); Wolfram, *The Antibiotic Class Actions*, 1976 AM. B. FOUND. RESEARCH J. 251, 314-15 ("Various privileges were claimed as to several hundred thousand documents."). See generally Davidson, *supra* note 28.

48. *E.g.*, Hazard & Rice, *supra* note 21, at 400-05 (describing procedures imposed by special masters on claims of privilege).

effort required by these claims of privilege because they force the parties to fight about things they would otherwise not dispute.⁴⁹ Beyond that, broad waiver doctrines will tempt parties to press claims of waiver even where chances of success are small, owing to the potential windfall that success would bring.⁵⁰ The courts' willingness to endorse stipulations against waiver is a recognition that waiver imposes these costs.

D. *Undermining Confidence in Privilege*

There are real doubts about the extent to which the attorney-client privilege actually promotes client disclosure to lawyers,⁵¹ but the privilege does allow the lawyer to assure the client that everything will be held in confidence. The erosion that results from waiver must sometimes make that assurance seem hollow.⁵² Those who are antagonistic to privilege could defend this as a cost-free way to promote full disclosure through empty assurances, while still allowing access to evidence. But this sophistry is too clever by half. Having once lost privilege protection due to waiver, will the client again be willing to trust the lawyer's assurances? Will other clients, although fully aware of the protections of the privilege, remain entirely ignorant of the risk that these protections will be lost due to waiver? The actual operation of the waiver doctrine would seem unavoidably to undermine confidence in the privilege by invading initially privileged communications.

One antidote would be to forbid waiver, thereby making the attorney-client communication truly sacrosanct. Indeed, it seems that the Romans once took such a position, absolutely forbidding the lawyer to testify, even on behalf of his client.⁵³ But such rigidity would be too costly; not surprisingly, early American waiver cases often involved situations in which the waiver was necessary to advance the client's interests.⁵⁴ If waiver must be allowed when the client wants it, it will

49. See note 29 *supra*.

50. Cf. Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 891 (1983) ("The potential benefit to be derived from discovery of an opponent's work product is such that a party may attempt to make a waiver argument even when he knows his chances for success are minimal.").

51. See text accompanying notes 74-77 *infra*.

52. Compare Frankel, *The Search for Truth Continued: More Disclosures, Less Privilege*, 54 U. COLO. L. REV. 51, 59 (1982) ("There is also a large measure of fiction . . . in the assumption that clients now are fairly warned of the limits of confidentiality."), with Saltzburg, *Communications Falling Within the Attorney-Client Privilege*, 66 IOWA L. REV. 811, 813 (1981) (asserting that most attorneys will tell client early on about the privilege).

53. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488-89 (1928).

54. E.g., *Blackburn v. Crawfords*, 70 U.S. (3 Wall.) 175 (1865), where a dispute arose after

also occur sometimes when the client does not want it, thereby eroding the reliability of the privilege.

The extent of this erosion is difficult to gauge. Client confidence in the sanctity of the attorney-client communication may be fostered by assurances from counsel that everything will be held in confidence. To the extent that waivers result from mistakes by counsel,⁵⁵ it would not seem that counsel must mention the risk of mistake to the client, so that the scenario that should induce client confidence need not change due to the possibility of waiver. Indeed, if the client believed the lawyer likely to make mistakes, he would doubtless lose confidence in more important aspects of the lawyer's services than the absolute guarantee of confidentiality. At the same time, the spectre of waiver cannot be irrelevant to the sophisticated client, and it should not be irrelevant to waiver decisions.⁵⁶

E. *Costs Versus Benefits*

It is certainly true that in given cases broad waiver rules make available evidence, possibly critical, that would not otherwise be available.⁵⁷ In far too many instances, however, a hair-trigger approach to waiver results in a broad incursion into privileged material without any corresponding advantage, at least to the litigants in that case. Moreover, the number of cases in which waiver achieves important benefits must be weighed against the number of cases in which broad waiver rules impede litigation efficiency and burden the litigation process.⁵⁸

the testator's death and his lawyer offered to testify about what the testator told him before the will was prepared. The Court held the testimony admissible on waiver principles:

The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related.

70 U.S. at 194.

55. In theory the privilege can only be waived by the client, not the lawyer, but in fact waiver often results from actions by the lawyer, who is considered to be an agent authorized to waive.

56. See *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982) (emphasis in original): "[I]f we are serious about the attorney-client privilege and its relation to the *client's* welfare, we should require more than such negligence by *counsel* before the client can be deemed to have given up the privilege."

57. Cf. Miller, *supra* note 13, at 20 ("Whether you successfully invoke the attorney-client privilege can make or break a case.").

58. The enumeration of costs in the text is not all-inclusive; other costs can surface. For example, when confronted by the argument that a litigator's response to an auditor's request for information on pending litigation is a waiver, see text accompanying notes 178-81 *infra*, some corporate officials suggested that the response would be to hire *two* sets of attorneys on major cases — one to advise the auditors and the other to handle the actual litigation. Moore, *DOE Seeks Litigation Analyses Prepared by Corporate Lawyers*, Legal Times, Nov. 26, 1984, at 1, col.

We must therefore turn to justifications for finding waivers; unless there is some reason for finding a waiver, the possibility that there will be a benefit seems insufficient to warrant the systemic costs described above. The task of identifying justifications for removal of privilege protection is somewhat complicated by the fact that the word "waiver" is used for a wide variety of purposes in civil⁵⁹ and criminal⁶⁰ cases. Whether or not a single theory of waiver can be fashioned for these diverse situations,⁶¹ there are in connection with privilege only a few theoretical grounds for removing its protection.

II. INTENTIONAL WAIVER

The word waiver conjures up images of voluntary relinquishment of a known right.⁶² That is the focus of the criminal guilty-plea cases, where the courts ask whether the defendant was fully aware of his rights,⁶³ leading to a rather elaborate ritual that attends the taking of a guilty plea.⁶⁴ This approach can be applied to civil litigation issues as well; where a party to a contract has agreed to entry of a judgment without notice, or to suit in a distant court, courts may determine the enforceability of this provision by examining circumstances bearing on voluntariness and notice.⁶⁵

2, at 7; see also Becker, *The Use of Experts in Pretrial Discovery*, in *USING EXPERTS IN CIVIL CASES* 1, 20 (M. Kraft 2d ed. 1982) (suggesting using two experts, one for consultation and one to testify, to minimize need to disclose communications with experts). Similar duplication of legal expense could occur in other situations. Where attorney-client communications are discoverable because plaintiff seeks to avoid the statute of limitations by relying on a tolling doctrine, for example (see note 131 *infra*), plaintiff's lawyer may become a witness and therefore be disqualified to represent plaintiff at trial. Cf. *Temple v. Reese*, 109 F.R.D. 1 (D. Neb. 1985) (disqualifying attorneys for plaintiff who were listed as trial witnesses on tolling issue).

59. For example, a party who fails to object to personal jurisdiction, venue, or service of process at the earliest possible time waives the objection. FED. R. CIV. P. 12(h). Similarly, a party waives the right to jury trial by failing to make a timely demand for one. FED. R. CIV. P. 38(d). A party may even waive the right to notice of a claim or trial on the merits. See, e.g., *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (by signing cognovit note, warehousing company waived right to notice and hearing prior to entry of judgment).

60. For discussion of the problems in criminal cases, see, for example, Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977); Dix, *Waiver in Criminal Law: A Brief for a More Careful Analysis*, 55 TEXAS L. REV. 193 (1977); Tigar, *The Supreme Court, 1969 Term — Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 11 (1970).

61. For an effort to develop such a general theory, see Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981). Despite the breadth of this undertaking, it does not address the problem of waiver of privilege.

62. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

63. Some have questioned the extent to which courts actually credit such matters despite claiming to focus on them. See Dix, *Waiver as an Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, 1979 ARIZ. ST. L. REV. 67; Note, *Waiver of the Privilege Against Self Incrimination*, 14 STAN. L. REV. 811, 813 (1962).

64. See FED. R. CRIM. P. 11.

65. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1974).

On occasion, similar analysis supports a finding of waiver of an evidentiary privilege. Consider, for example, the recent decision by San Diego financier J. David Dominelli to waive his attorney-client privilege in connection with civil litigation growing out of the failure of his J. David investment firm, seemingly in hopes of influencing the judge in his criminal case to lighten his sentence.⁶⁶ Investors were able to use the waiver to good effect in discovery to extract information from partners of the New York law firm Rogers & Wells, which they were suing because of its role in representing the J. David investment firm. The firm ultimately settled for a reported forty million dollars.⁶⁷ But the number of situations in which this analysis applies to waivers of privilege is quite limited. As Wigmore recognized, "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation."⁶⁸ Indeed, even where a waiver is voluntary and knowing, the courts are unlikely to enforce it if the privilege-holder changes his mind before the actual disclosure.⁶⁹

Although truly intentional waiver is rare in privilege cases, courts often talk of attempting to discern the privilege-holder's intention.⁷⁰ These assertions are misleading. Instead, the analysis is often whether the fact that the privilege-holder has disclosed privileged material shows that he never actually intended that it be held in confidence, thus defeating one predicate for initial application of the privilege. This analysis highlights the privilege-holder's intention to do the act which is relied upon by the court to justify a finding of waiver. But even then the privilege-holder's abiding desire to preserve the privilege often counts for nothing against the fact of unintended disclosure,

66. Galante, *Firm Loses Privilege in J. David Suits*, Natl. L.J., July 1, 1985, at 3, col. 1.

67. Galante, *Rogers & Wells Will Pay \$40M*, Natl. L.J., Mar. 3, 1986, at 3, col. 1, at 50 (explaining that "a series of potentially devastating admissions" occurred in discovery). Galante, *supra* note 66, reported that Mr. Dominelli's waiver was revealed as a surprise in the deposition of a Rogers & Wells partner. For further details on the difficulties Rogers & Wells encountered due to the waiver, see Masters, *Rogers & Wells Partners Conflict in Testimony on J. David Case*, Legal Times, Sept. 30, 1985, at 1, col. 2.

68. 8 J. WIGMORE, *supra* note 2, § 2327, at 636.

69. There is admittedly little authority on the subject. See *United States v. Aronoff*, 466 F. Supp. 855, 858 (S.D.N.Y. 1979); *Natlee Draft Horse Co. v. Cripe & Co.*, 142 Ky. 810, 135 S.W. 292 (1911); Annot., 158 A.L.R. 219, 220-21 (1945); cf. Simons, *Rescinding a Waiver of a Constitutional Right*, 68 GEO. L.J. 919 (1980). But cf. *Fellman v. Fireman's Fund Ins. Co.*, 735 F.2d 55, 58 (2d Cir. 1984) (consent to trial before magistrate under 28 U.S.C. § 636(c) cannot be withdrawn).

70. For example, in *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981), plaintiff's employees pilfered drafts of letters to counsel from a trash dumpster outside defendants' office. The court found that defendants had lost privilege protection by failing to shred the documents before depositing them in the trash, reasoning that "the relevant consideration is the intent of the defendants to maintain the confidentiality of the documents as manifested in the precautions they took." 91 F.R.D. at 260 (footnote omitted). Such invocation of intent robs the concept of all meaning.

although the absence of intention may cause courts to narrow the waiver. At most, then, intention functions as a basis for limiting the scope of the waiver that results from an unintended act.

III. ACT INCONSISTENT WITH PURPOSE OF PRIVILEGE

As we saw at the beginning, courts use a purpose analysis to confine the privilege as narrowly as possible.⁷¹ This approach leads to the common explanation that a waiver is an act inconsistent with the purposes of the privilege.⁷² Since the early nineteenth century, the accepted purpose for the privilege has been the one prompted by Bentham's utilitarian criticisms of evidence law — that the privilege is designed solely to stimulate the client to make a full disclosure to the lawyer.⁷³ This Part explains why reference to the purpose of the privilege does not provide a satisfactory guide in waiver decisions. The central problem is that the utilitarian rationale is not a workable standard, as demonstrated by decisions involving other privilege issues. Beyond that, the purpose analysis is unpromising as a solution for waiver problems because an alternative purpose is unlikely to be announced in the foreseeable future and because the purpose analysis tends to lead to broad waiver rules without affording any leeway to cope with the resulting costs. Accordingly, the better focus would be on purposes for waiver rather than on using the purposes of the privilege to decide waiver issues.

A. *Problems with the Traditional Utilitarian Analysis*

The first problem with the utilitarian analysis is that it rests on a shaky assumption. There has never been empirical evidence that the privilege's existence actually promotes disclosure by clients,⁷⁴ and there are intuitive reasons for doubting that it often does so. Lawyers

71. See text accompanying note 3 *supra*.

72. *E.g.*, *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("A simple principle unites the various applications of the implied waiver doctrine. Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege.") (footnote omitted).

73. Thus, in *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826), the Court, speaking through Justice Story, found the privilege limited to "facts . . . communicated by a client to counsel, solely on account of that relation."

74. See, *e.g.*, Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956) (disclosure-promotion theory premised on "sheer speculation"); Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 822 (1984) (privilege based on "an educated guess about behavior"); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1236 (1962) ("The mythical average American is, as likely as not, either misinformed or uninformed about the attorney-client privilege.") (footnote omitted).

can emphasize the existence of the privilege to their clients,⁷⁵ and sometimes clients insist upon being reassured that it will apply,⁷⁶ but few clients probably place great importance on the privilege in deciding what to tell the lawyer. Moreover, since the lawyer can emphasize that full disclosure is essential to valid legal advice,⁷⁷ the risk of non-disclosure is likely to seem as great as the risk of disclosure. Thus, one begins with uncertainty about whether the privilege is really necessary to accomplish the stated purpose.

These difficulties are reflected in the application of the privilege. A strict utilitarian analysis could limit the privilege's application to those disclosures that the client would not have made absent the privilege, seemingly requiring parsing of the attorney-client communications and psychoanalysis of the client.⁷⁸ Taking such an approach, some courts have urged that the privilege would apply to what the lawyer told the client only to the extent that disclosure of the lawyer's advice would also reveal what the client told the lawyer.⁷⁹ Not surprisingly, most have not gone so far,⁸⁰ and the actual application of the privilege shows that a strict purpose analysis is not employed.

Upjohn Co. v. United States,⁸¹ the Supreme Court's 1981 rejection of the "control group" limitation on the privilege for a corporate cli-

75. See Saltzburg, *supra* note 52, at 813-14 (client may rely on privilege because attorney tells him about it).

76. *E.g.*, *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 16, 1974, 406 F. Supp. 381, 389 (S.D.N.Y. 1975) (two participants in meeting with co-defendants refuse to proceed until assured privilege will apply).

77. *Upjohn Co. v. United States*, 449 U.S. 383, 392-93 (1981) (corporations must constantly get legal advice to cope with "vast and complicated array of regulatory legislation"); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 140-41 (1978) (describing compelling pressures to get legal advice).

78. For commentary suggesting such an approach, see Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 918-19 (1980) (urging adoption of but-for analysis under which privilege attaches only if statement would not have been made absent privilege); *cf.* Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 480 (1982) ("An ideal privilege would generate no costs because all protected information would be undisclosed absent the privilege."); Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982) ("If clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege."); Note, *supra* note 63, at 813 (waiver finding based on "judicial mind reading").

79. *E.g.*, *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. King*, 536 F. Supp. 253, 261 (C.D. Cal. 1982); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 520-23 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

80. See Sobel, *The Confidential Communication Element of the Attorney-Client Privilege*, 4 CARDOZO L. REV. 649 (1983) (arguing for covering all attorney advice); 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 209, at 738-39 (rev. ed. 1985) (attorney's statement within privilege); MCCORMICK ON EVIDENCE, *supra* note 5, § 89 (better reasoned cases protect attorney communications).

81. 449 U.S. 383 (1981).

ent, exemplifies the current uncertainty about the purposes of the privilege. Outwardly the opinion is unabashedly utilitarian.⁸² But the real focus is different; the Court was looking at the motivations of the lawyer, not the client. It therefore stressed the lawyer's ethical obligation to be fully informed⁸³ and the "Hobson's choice" that would result for him if communications with lower-level employees were not covered by the privilege.⁸⁴ Against this concern, it found the risk of creating a broad "zone of silence" insignificant, because application of the privilege would put the corporation's opponents in no worse position than if the communications had never occurred.⁸⁵ It concluded by invoking "the policies served by the attorney-client privilege" and quoting Justice Jackson's famous epigram from *Hickman v. Taylor* that discovery should not enable lawyers to rely "on wits borrowed from the adversary."⁸⁶

Upjohn cannot be explained as a decision concerned solely with promoting full disclosure by the client; it instead assumes the protected nature of the lawyer's advice.⁸⁷ More significantly, it disregards real questions about the premise that the privilege is necessary in order to encourage lower-level employees to talk to the corporation's lawyer. It has long been recognized that the employee may have different interests from the corporation, particularly where an investigation of the employee's actions is under way.⁸⁸ In those circumstances, the corporation's right to shield communications between the lawyer and the employee provides cold comfort to the employee, because the corporation can use the information to discipline the employee or waive the privilege and turn the employee's revelations over to the authorities. But the *Upjohn* Court was little interested in these issues, and it refused even to hold that the privilege was inapplicable to communications with former employees.⁸⁹ Similarly, it rejected the government's argument that the privilege was unnecessary to prompt full disclosure

82. Thus, the Court explained that the purpose "is to encourage full and frank communication between attorneys and their clients." 449 U.S. at 389.

83. 449 U.S. at 390-91 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1979)).

84. 449 U.S. at 391-92 (quoting *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978)).

85. 449 U.S. at 395.

86. 449 U.S. at 396 (quoting *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)).

87. 449 U.S. at 390 (privilege protects "the giving of professional advice").

88. E.g., O'Leary, *Criminal Antitrust and the Corporate Executive: The Man in the Middle*, 63 A.B.A. J. 1389 (1977); Miller, *supra* note 13, at 21 ("Some commentators have suggested that the company counsel should give *Miranda*-type warnings to company employees about the purpose of an interview and the use of information disclosed.").

89. See 449 U.S. at 394 n.3.

by corporate clients, given the stimulus provided by the risk of civil and criminal liability, on the ground that this argument "proves too much since it applies to all communications covered by the privilege."⁹⁰

One reaction to *Upjohn* is to attack its failure to apply the utilitarian rationale properly. Professor Saltzburg, for instance, has criticized *Upjohn* at length for failing to require that the employee retain an independent right to control waiver.⁹¹ Saltzburg's argument makes perfect sense: if the sole focus is on providing incentives for the "client" to make a full disclosure to the lawyer, allowing the corporation an unfettered right to disclose the employee's revelations is hardly likely to promote revelations by the employee.

The Supreme Court seems little impressed with this logic, however. In 1985 it held that a trustee in bankruptcy, as successor in interest to a debtor corporation, has the right to waive the corporation's attorney-client privilege.⁹² Disclosure was opposed by former high officers of the corporation, who argued that allowing such a waiver would chill attorney-client communications by corporate officials. The Court was not moved: "[T]he chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel."⁹³

In sum, if the traditional purpose does not explain privilege decisions in other areas, it does not provide a workable guideline for waiver decisions.

B. *Problems with the Purpose Analysis*

Despite erosion of the traditional justification for the privilege, a purpose analysis, properly applied, might provide the key to waiver decisions. Indeed, purpose analysis lies close to the heart of contemporary legal reasoning, particularly on procedural issues, because

90. 449 U.S. at 393 n.2.

91. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 306-08 (1984); accord Sexton, *supra* note 78, at 509.

92. *Commodity Futures Trading Comm'n. v. Weintraub*, 471 U.S. 343 (1985). For a discussion of the bankruptcy law issues involved, see Note, *Who Controls the Attorney-Client Privilege in Bankruptcy?*, 13 HOFSTRA L. REV. 549 (1985).

93. 471 U.S. at 357. A related, but different, issue arises when the corporate employee claims that the lawyer was acting in part as his personal counsel, which will enable him to assert the privilege. But the courts rarely find that such personal representation has been established as to high officers of the corporation, and it is even less likely to be found as to lower-level employees. See, e.g., *United States v. Keplinger*, 776 F.2d 678, 699-701 (7th Cir. 1985) (rejecting argument that attorney was personal representative of corporate employees).

courts tend to rely heavily on the purpose of a legal rule in determining whether it should be applied. A number of factors, however, make this solution unpromising for problems of privilege waiver.

First, there is little ground for expecting a new articulation of the privilege's purpose in the foreseeable future. As Professor Radin observed nearly sixty years ago, "Bentham's denunciation [of the privilege] cannot really be met as long as we keep on the level from which Bentham views the subject."⁹⁴ Recently, commentators unsatisfied with the traditional utilitarian theory have attempted to articulate a broader basis by emphasizing the importance of the attorney-client relation to personal autonomy, particularly in a world of pervasive legal regulation.⁹⁵ Viewed in this light, the privilege protects important privacy interests,⁹⁶ but this privacy rationale has been questioned.⁹⁷ Although it referred to the impact of pervasive legal regulation,⁹⁸ the *Upjohn* Court did not articulate a new rationale for the privilege. Some insight may be provided, however, by its invocation of *Hickman v. Taylor*, the seminal work product case,⁹⁹ suggesting that the Court is blending attorney-client and work product ideas.

In theory, work product, which is directed toward the lawyer's incentives, is totally different from the attorney-client privilege.¹⁰⁰ In *Hickman*, the Court was careful to avoid calling the new protection from disclosure it was creating a privilege, a semantic battle carried on to this day by many.¹⁰¹ But since *Hickman* erected an immunity to

94. Radin, *supra* note 53, at 491 (footnote omitted).

95. See *id.* at 492 ("The real fact is that, whether we admit it or not, the Roman and the medieval attitudes are very much in our bones. We, too, think that the relationships based on mutual fidelity are valuable constituents of our society . . ."). The best-known exponent of this view of the lawyer's role is Charles Fried. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1074 (1976) ("The lawyer acts morally because he helps preserve and express the autonomy of his client vis-à-vis the legal system."). But see Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 640 (Fried's view a "dubious definition of friendship").

96. See, e.g., Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 86-92 (1973); Louisell, *supra* note 74, at 110-12.

97. See Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461, 471-72 (1977) ("The privacy basis for the attorney-client privilege . . . is quite weak."); MCCORMICK ON EVIDENCE, *supra* note 5, § 77, at 186 ("the ultimate strategic significance of evidentiary privilege as a bastion for defending privacy values may be doubted").

98. See 449 U.S. at 392 (referring to "the vast and complicated array of regulatory legislation confronting the modern corporation").

99. See text accompanying note 86 *supra*.

100. E.g., Special Project, *supra* note 50, at 882 (policies "fundamentally different").

101. E.g., *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 599 n.10 (3d Cir. 1984) (Becker, J., dissenting) (Supreme Court "assiduous" in terming work product "doctrine," not "privilege"); Cohn, *The Work Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 943 (1983).

discovery it is difficult to generate much enthusiasm for this dispute,¹⁰² and the lower courts today routinely refer to work product as a privilege.¹⁰³ *Upjohn*'s seeming blending of the two, while theoretically untidy, is not surprising. Thus Professor Cleary, the Reporter for the Advisory Committee that drafted the Federal Rules of Evidence, argued that "preserving effective participation by the lawyer in the processes of litigation," the basis of the decision in *Hickman*, "is exactly the [purpose] found for the attorney-client privilege."¹⁰⁴ Indeed, work product seems critical to building client trust; surely the client would lose confidence in his lawyer if the lawyer's work were routinely available to assist the other side.¹⁰⁵ Blending the two privileges also reflects reality, because a great deal of potentially discoverable material falls within both. As a functional matter, then, what the Court may be doing is ensuring a zone of silence for effective and ethical preparation of cases. But the Court simultaneously adheres outwardly to the traditional utilitarian justification for the attorney-client privilege,¹⁰⁶ so it is unlikely that it will announce a new thesis. Without that, the purpose analysis cannot work.

Second, coupled with the courts' animosity toward privileges, a purpose analysis seems to invite overly literal application. We have already seen that some use this approach as a justification for parsing attorney-client communications, excluding all that would be made absent the privilege.¹⁰⁷ In the waiver area, the point is illustrated by cases that treat the attorney-client and work product privileges differently. Work product, these courts reason, is designed only to protect against disclosure to opponents, so that revelation to a person who is not an opponent is not a waiver.¹⁰⁸ The attorney-client privilege, by way of contrast, is supposed to protect the sanctity of the relationship between lawyer and client; *any* revelation supposedly destroys its

102. See Cleary, *Hickman v. Jencks*, 14 VAND. L. REV. 865, 866 (1961) (In *Hickman*, the Court was "saving face by refusing to admit that a contingency had arisen which the rules had not foreseen . . ."). Indeed, in *FTC v. Grolier, Inc.*, 462 U.S. 19, 25 (1983), the Court itself referred to "the work product privilege."

103. E.g., *United States v. Gulf Oil Corp.*, 760 F.2d 292, 294, 295 (Temp. Emer. Ct. App. 1985); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980).

104. Cleary, *supra* note 102, at 866-67; *Developments, supra* note 6, at 1647 n.84 (criticizing view that purpose of attorney-client privilege is limited to preserving confidentiality, because it "overlooks the role of the privilege in protecting the adversarial character of the judicial system").

105. See *United States v. Anderson*, 34 F.R.D. 518, 521 (D. Colo. 1963) (work product "the result of a basic professional relationship between the lawyer and the party . . . or the essential integrity implicit in the lawyer-client relationship").

106. See note 82 *supra* and accompanying text.

107. See note 78 *supra* and accompanying text.

108. E.g., *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

value.¹⁰⁹

This view is too rigid. For the privilege-holder, the value of the attorney-client privilege, like work product, is that it provides a means of keeping hurtful information out of the hands of opponents. Accordingly, the drafters of the Federal Rules of Evidence exempted disclosures from waiver if they are themselves privileged.¹¹⁰ The exception makes sense in that the dual-privilege holder can, by invoking the applicable privilege, prevent his confidant from revealing the privileged material. Thus, the client who confidentially tells his spouse about what transpired in his meeting with the lawyer can contain the information by invoking the spousal privilege to prevent the spouse from revealing it. But this explanation fails to take account of the fact that the attorney-client privilege has, under the strict view, lost its value because of revelation to another. The reality is certainly that disclosure to a spouse or other confidant does not destroy the value of the privilege. Moreover, the proposed approach under the Federal Rules leads to absurd results. Thus, if the client told his child or brother or father there would be a waiver of the attorney-client privilege even though his decision to confide in this relative hardly suggests indifference to confidentiality vis-à-vis the general public.¹¹¹ Courts and commentators have gotten carried away with overly literal use of the purpose analysis.

Other purposes can also succumb to overly literal application. If this article is correct in suggesting that the Supreme Court is blending the attorney-client and work product purposes, attention should shift toward the purpose of the latter. But the traditional justification for work product — assuring the lawyer a zone of privacy in order to avoid deterring preparation of the case — can be narrowed by the same process. As with the traditional purpose of the attorney-client privilege,¹¹² there is little empirical evidence that work product protection actually influences lawyer behavior. To the contrary, as the Court pointed out in *Upjohn*, the lawyer has an ethical duty to investigate fully.¹¹³ Moreover, the 1983 amendments to the Federal Rules of Civil Procedure require the lawyer to investigate before taking a posi-

109. The leading proponent of this view is the District of Columbia Circuit. *See, e.g., United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *accord United States v. Gulf Oil Corp.*, 760 F.2d 292, 295-96 (Temp. Emer. Ct. App. 1985).

110. *See* proposed Fed. R. Evid. 511, 56 F.R.D. 183, 258 (1972) (not enacted).

111. *See, e.g., Note, Attorney Disclosure, supra* note 6, at 935 (rejecting argument that after initial disclosure client has no further interest in privilege); *Note, Inadvertent Disclosure, supra* note 6, at 608-10 (same).

112. *See* notes 74-77 *supra* and accompanying text.

113. *See* note 83 *supra* and accompanying text.

tion in litigation.¹¹⁴ Accordingly, one could easily argue that work product protection is unnecessary to accomplish this purpose of the privilege in many instances where it is now recognized.¹¹⁵

The point can be illustrated with the very issue before the Court in *Upjohn*. Even though lawyers confronted a "Hobson's choice" in deciding whether to interview lower-level employees under the "control group" test,¹¹⁶ there is reason to believe that they nevertheless did so even before that test was rejected by the Court.¹¹⁷ Moreover, after *Upjohn* there remained the risk that material that would nevertheless be protected under its reasoning would be discoverable under more restrictive state law,¹¹⁸ even in federal court.¹¹⁹ A strict purpose analysis could preclude application of the privilege in such circumstances. This same approach could carry over into the waiver area; contrary to the present view that disclosure of work product to allies is not a waiver,¹²⁰ any disclosure could be treated as a waiver because today's allies could easily turn into tomorrow's opponents. A shift in purpose would not, therefore, prevent the overly literal application of the purpose analysis.

Finally, the traditional purpose analysis takes no account of the costs that result from the very broad waiver doctrine it invites. Instead, it is a device to reduce to a minimum the perceived costs of having privileges at all. As we have seen, however, for those who do not take such a one-dimensional view it is not so easy to strike the balance between costs of privileges and costs of broad waiver rules. Courts inclined to consider other factors thus have minimized the

114. See FED. R. CIV. P. 11 (pleading, motion, or other paper); FED. R. CIV. P. 26(g) (request for discovery or response or objection thereto). See generally Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364-65 (1983).

115. Cf. Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675, 683 (1986) ("A closer look at the specific rationales, however, suggests that the work product immunity is largely designed to protect lawyers from themselves and their own unprofessionalism, rather than from their adversaries.").

116. See text accompanying note 84 *supra*.

117. See Barnett, Barnette, Leary & Delone, *Practical Aspects of Internal Antitrust Investigations in Light of the Upjohn Decision*, 51 ANTITRUST L.J. 123, 133 (1982) ("Even lawyers in jurisdictions which followed the severely limited 'control group' test had to pretty well ignore it because they could not otherwise serve their clients. It has never made sense to remain deliberately ignorant of the facts because of a fear of adverse discovery.").

118. E.g., *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982) (retaining control group test); see Note, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175.

119. Under FED. R. EVID. 501, in civil cases where state law supplies the rule of decision, state law of privilege applies in federal court.

120. See text accompanying notes 173-74 *infra*.

costs of broad waiver rules by entering orders preserving privilege.¹²¹ But the traditional view offers no room for such pragmatic incursions on the idea that any disclosure results in a waiver. To accommodate such concerns, the focus should turn from purposes of the privilege to purposes for waiver — to protect against unfairness.

IV. FAIRNESS

If neither intention nor the purposes of the privileges provides a key to the waiver riddle, some other factor must explain decisions to take away privilege protection. The courts that have done more than state conclusions about waiver repeatedly intone fairness as the guide; where the circumstances of the case make it unfair to maintain privilege protection the court will abrogate it. But fairness is an even more plastic term than waiver; from the perspective of an opponent the existence of a privilege may itself seem unfair if it forecloses access to critical evidence. This unfairness is the spectre that has caused American courts to take a hard line on privilege issues. Once the decision has been made to apply privilege protection, however, the social utility of the privilege has presumably been found sufficient to outweigh this unfairness to the opponent.

For waiver purposes, then, the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the privilege in some way. As Learned Hand put it with regard to the fifth amendment, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; . . . it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition."¹²² Thus, in its seminal case about the scope of a waiver of the fifth amendment, the Supreme Court cited the risk that, unless the decision to discuss a certain subject caused a waiver with respect to that entire subject, the privileged material could be used to distort the facts.¹²³ Similarly with the attorney-client privilege, the courts have condemned "selective disclosure," in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable.¹²⁴ It is the truth-gar-

121. See text accompanying notes 30-35 *supra*.

122. *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942), *cert. dismissed as moot*, 319 U.S. 41 (1943). For an argument that the truth-distortion analysis should not be applied to the fifth amendment, see Note, *Testimonial Waiver of the Privilege Against Self Incrimination*, 92 HARV. L. REV. 1752, 1764-68 (1979).

123. *Rogers v. United States*, 340 U.S. 367, 371 (1951).

124. This idea has been recognized for over a century. Thus, in *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 26 F. 55 (C.C.S.D.N.Y. 1885), plaintiff offered in evidence parts of its communications with counsel and the court found a waiver because plaintiff "sought to use them

bling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers. Accordingly, even where they feel impelled by the traditional view to treat an inoffensive disclosure as a waiver, courts will often narrow the scope of the waiver to avoid an unbounded intrusion into otherwise privileged matters.¹²⁵

Although the focus on unfairness resulting from the further act on which the waiver is predicated seems correct, there remains substantial overlap with the underlying sense of unfairness flowing from the existence of the privilege in the first place. Complete inactivity by the privilege-holder might lead to the wrong result owing to absence of the privileged material. Can that possibility be disregarded in evaluating any actions the privilege-holder does take? In actual cases, waiver issues arise in specific contexts. To apply the various grounds for waiver, then, we must examine these specific litigation contexts.

A. *Putting in Issue*

Many decisions are made only after counsel has been consulted regarding the legal ramifications of alternate courses of conduct. Once the decision is made, litigation may ensue. If it does, it may be important to determine how the actors perceived their legal rights or obligations when they made the decision in issue. Obviously, the legal advice they received would be significant evidence should the court find a waiver, a question that usually turns on whether the privilege-holder has put the matter "in issue."

The truth-garbling concern readily supports finding a waiver when a party affirmatively relies on privileged material. For example, if the defendant's president testifies that he terminated the contract with the plaintiff on advice of counsel, there will be a waiver as to all advice he received on that subject,¹²⁶ whether from current counsel or other at-

as a weapon against defendant." 26 F. at 56. The court reasoned that a party may not "remove the seal of secrecy from so much of the privileged communication as makes for his advantage, and insist that it shall not be removed as to so much as makes to the advantage of his adversary." 26 F. at 57. This is, of course, the central concern in defining the scope of waiver, which reaches all communications on the same subject matter. For similar reasoning with respect to work product, see *United States v. Nobles*, 422 U.S. 225 (1975), in which the court found a waiver due to "testimonial use" of work product. 422 U.S. at 239 & n.14.

125. *E.g.*, *Champion Intl. Corp. v. International Paper Co.*, 486 F. Supp. 1328, 1333 (N.D. Ga. 1980) (refusal to find that disclosure of "a very slight amount of privileged material" justifies "waiver of a large amount of other privileged material"); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286, 289 (N.D. Ill. 1976) (narrow reading of waiver to promote fairness); *IBM v. Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968) (narrow reading of waiver fosters free disclosure while protecting against misuse of privilege to distort or mislead).

126. *E.g.*, *Smith v. Alyeska Pipeline Serv. Co.*, 538 F. Supp. 977, 980 (D. Del. 1982), *affd. mem.*, 758 F.2d 668 (Fed. Cir. 1984), *cert. denied*, 105 S. Ct. 2142 (1985); *Perrignon v. Bergen*

torneys.¹²⁷ Only with access to this information can the opponent neutralize the risk that revelation of part of the lawyer's advice creates a misimpression about what the lawyer really said. Accordingly, courts often require parties to commit in advance on whether they will rely on privileged material at trial, thereby enabling the opponent to explore the entire spectrum of advice through discovery.¹²⁸

Were this waiver ground limited to such situations, it would present few difficulties. However, courts frequently premise a waiver on the decision of the privilege-holder to raise certain legal or factual issues. Thus, when a defendant in a civil rights action raised a defense of qualified immunity, the court held that he had waived the attorney-client privilege with respect to any advice he received about the legality of the procedures in issue.¹²⁹ Similarly, when Exxon Corporation defended its pricing practices against claims of overcharges, it was held to have waived the privilege by asserting in defense that it had adopted these practices in reliance on Department of Energy interpretations of prevailing regulations.¹³⁰ An employment discrimination plaintiff who sought to avoid the running of the statute of limitations by relying on the equitable tolling doctrine that excuses delays induced by the prospective defendant's settlement overtures was held to have waived the privilege as to communications with his lawyer that might indicate that he had deferred suing for reasons other than settlement possibilities.¹³¹ Perhaps most remarkably, in a suit to reform a contract on grounds of mutual mistake, the court used this waiver doctrine to require the party seeking reformation to reveal all contemporaneous communications with its lawyer about the

Brunswick Corp., 77 F.R.D. 455, 461 (N.D. Cal. 1978); *Garfinkle v. Arcata Natl. Corp.*, 64 F.R.D. 688, 689 (S.D.N.Y. 1974); *Lee Natl. Corp. v. Deramus*, 313 F. Supp. 224, 227 (D. Del. 1970).

127. *Technitrol, Inc. v. Digital Equip. Corp.*, 181 U.S.P.Q. (BNA) 731, 732 (N.D. Ill. 1974) ("If the rule were limited to only a particular counsel, a party might get several viewpoints and assert reliance on only one, thus barring an inquiry as to the actuality and reasonableness of that reliance."). Assuming that the key question is the president's state of mind at the time he terminated the contract, this reasoning obviously does not apply to advice he received thereafter.

128. *E.g.*, *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 932-33 (N.D. Cal. 1976); *International Tel. & Tel. Co. v. United Tel. Co.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973); *Fautek v. Montgomery Ward & Co.*, 31 Fed. R. Serv. 2d (Callaghan) 420, 421 (N.D. Ill. 1980) (court orders discovery of computerized personnel records prepared as foundation for expert testimony). *But cf.* *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 432 (D. Mass. 1972) (court refuses to find waiver because assertions in affidavits dealt with "pre-trial matters, not evidence").

129. *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

130. *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981).

131. *Russell v. Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456, 458 (S.D. Tex. 1980); *accord Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 423 (S.D.N.Y. 1976).

agreement.¹³²

To the extent these decisions rest on forecasts about the privilege-holder's injection of privileged material at trial, the results are consistent with the truth-garbling fairness analysis.¹³³ In form, however, they involve no such prediction. Instead, they seem to turn on allocation of burdens of pleading and proof and, on that basis, to rob the privilege-holder of privilege protection as the price for raising a given legal issue even though he will not make affirmative use of privileged material. Thus, the courts emphasize *what* the privilege-holder has to prove, not *how* he is going to prove it. Ultimately this shift in focus perverts waiver because it rests on the unfairness of having a privilege, rather than the unfairness of the act relied upon, to show a waiver.¹³⁴

These difficulties are compounded by the courts' tendency to stress the allocation of burdens of pleading and proof in deciding whether a party has "injected" an issue into a case. In a negative sense, stressing pleading burdens is logical because the privilege-holder's right to assert the privilege should not turn on his opponent's decision to raise a certain issue.¹³⁵ But the allocation of pleading burdens does not provide a reliable affirmative guide. Although notions of fairness may support placing the pleading burden on the party with easiest access to the evidence, a variety of other factors also come into play.¹³⁶ For example, when the Supreme Court held qualified privilege to be an affirmative defense in civil rights cases so that defendants have the burden of pleading good faith, it relied mainly on the remedial objectives of the civil rights acts and cited access to proof only as a secondary

132. *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444 (S.D. Fla. 1980).

133. *E.g.*, *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674, 679-80 (S.D.N.Y. 1983) (plaintiff must rely on given document to establish element of case).

134. For a similar conclusion, see *Developments, supra* note 6, at 1641-43. See also *Standard Chartered Bank v. Ayala Intl. Holdings, Inc.*, 111 F.R.D. 76, 84-85 (S.D.N.Y. 1986):

If SCB's position were correct, the privilege would be a nullity in all the vast commercial litigation in which fraud or reliance is an issue. Whenever parties entered into a transaction, they would have to restrain themselves from free and frank communications with their attorneys in the realization that all their confidences would be revealed if litigation on the transaction were ever to ensue.

135. See *Chase Manhattan Bank v. Drysdale Sec. Corp.*, 39 Fed. R. Serv. 2d (Callaghan) 1206, 1207 (S.D.N.Y. 1984) ("It cannot be possible for Anderson to justify breaching Chase's privilege by reason of its own pleading of an affirmative defense.") (emphasis omitted). But see *AM Intl., Inc. v. Eastman Kodak Co.*, 35 Fed. R. Serv. 2d (Callaghan) 311 (N.D. Ill. 1982), in which defendant responded to a suit for patent infringement with a counterclaim alleging the suit was brought in bad faith. Defendant then sought production of work product showing plaintiff's assessment of the validity of the patent on which plaintiff sued. The court found that defendant was entitled to access because "the opinions of [plaintiff's] attorneys as to the merits of the action" were "[d]irectly at issue." 35 Fed. R. Serv. 2d at 313.

136. See generally Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-14 (1959) (discussing factors to be considered in allocating burdens of pleading and proof).

consideration.¹³⁷ Since the "putting in issue" form of waiver ordinarily involves the privilege-holder's state of mind, fairness would always point toward imposing the pleading burden on him. Obviously that does not happen; the fact that a securities fraud plaintiff must plead and prove that defendant acted with scienter¹³⁸ is but one of many examples in which plaintiff must plead and prove defendant's state of mind. Different fairness factors may apply to pleading and waiver decisions, but the central point is that fairness does not regularly control the allocation of pleading burdens, so that allocation should not be the determinative matter on waiver. Indeed, the party who bears the burden of pleading and proving his opponent's state of mind has a stronger argument for access because he has a greater need to develop evidence on that subject.

The heart of the courts' attitude seems to be that in some litigation contexts the existence of the privilege is *too* unfair. Thus, when the court stripped Exxon of the privilege in its overcharge case as the price for relying on its understanding of Department of Energy regulations,¹³⁹ it explained that "[t]here is no other reasonable way for plaintiff to explore Exxon's corporate state of mind, a consideration now central to this suit."¹⁴⁰ The concern that, as to certain issues in certain cases, the existence of a privilege hampers the opponent too much is a legitimate one that can affect substantive decisions. Thus, in upholding its rule that the defendant in a defamation case has the burden of proving truth, the Supreme Court of Pennsylvania cited that state's shield law, which enables the media to refuse to disclose sources,¹⁴¹ as a reason for placing the burden on defendant,¹⁴² although the United States Supreme Court recently found that the first amendment forbids

137. *Gomez v. Toledo*, 446 U.S. 635, 638-40 (1980) (stressing policy objective of construing 42 U.S.C. § 1983 generously); 446 U.S. at 640-41 (pointing out that immunity depends on facts peculiarly within defendant's knowledge).

138. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

139. *See* note 130 *supra* and accompanying text.

140. *United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981). *Developments, supra* note 6, at 1642, labels the court's result "outrageous." This outcome is hardly unique, however. For other examples, see *Russell v. Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456, 458 (S.D. Tex. 1980) (privilege breached because "[i]t is essential to proper resolution of the equitable tolling issue to know when the plaintiffs learned of the 180-day requirement"); *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 447 (S.D. Fla. 1980) (privilege abridged because it "would have served to eliminate the one source of evidence likely to contradict [privilege-holder's] allegations").

141. 42 PA. CONS. STAT. § 5942(a) (1982).

142. *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 327-28, 485 A.2d 374, 386-87 (1984) ("[T]his additional protection to a media defendant and the resulting impediment imposed upon the plaintiff in seeking to establish the falsity of the statements provides a further justification for maintaining our current practice of requiring the defendant to prove truth in defense of such a suit."), *revd.*, 106 S. Ct. 1558 (1986).

such a burden shift.¹⁴³ Similar adjustments of pleading burdens or standards of proof in other areas might redress unfair advantage resulting from the existence of privileges. Removal of privilege protection might also serve this goal. In some states, for example, the doctor-patient privilege is inapplicable in any case where the patient's condition is in issue, whether or not that issue was raised by the patient.¹⁴⁴

Whatever the future of such solutions to the problem of perceived unfairness created by the existence of the attorney-client privilege,¹⁴⁵ distorting waiver analysis is not a promising solution.¹⁴⁶ The waiver decisions abandon the underlying principle of fairness because they do not focus on unfairness resulting from the act giving rise to the waiver.¹⁴⁷ At the same time they fail to distinguish between cases

143. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). The five-Justice majority was "unconvinced that the State's shield law requires a different constitutional standard than would prevail in the absence of such a law." 106 S. Ct. at 1565. It is worth noting that the Court has refused to find that the first amendment affords newspaper reporters a privilege akin to the one provided by the Pennsylvania shield law. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

144. *E.g.*, ILL. REV. STAT. ch. 110, § 8-802(4) (1985).

145. See text accompanying notes 237-57 *infra* for an examination of the implications of the fairness analysis on the "absolute" protection of the privilege.

146. One method of minimizing unwarranted incursions into the attorney-client privilege would be to shift focus again to the purposes of the privilege. With the doctor-patient privilege, for example, it is accepted that where a personal-injury plaintiff places his physical condition in issue he waives that privilege. See, e.g., MCCORMICK ON EVIDENCE, *supra* note 5, § 103, at 254. This waiver is based in part on fairness. See *Collins v. Bair*, 256 Ind. 230, 240, 268 N.E.2d 95, 100 (1971) (patient would not be allowed to "stack the deck" and use the privilege to "misrepresent the precise origin of the injury with impunity"); *Awtry v. United States*, 27 F.R.D. 399, 401 (S.D.N.Y. 1961) (impairment of defendant's ability to prepare a defense a factor in decision to find a waiver); cf. *Schlagenhauf v. Holder*, 379 U.S. 104, 119 (1964) (where plaintiff places his physical condition in issue, good cause for a physical examination is obvious from the pleadings). But the waiver is principally based on a purpose analysis. By calling attention to his physical condition, courts reason, plaintiff has nullified the value of a privilege designed principally to keep such facts secret. See, e.g., *McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. 1968). This approach is not helpful with the attorney-client privilege, however. Where the privilege-holder does not rely on the content of his communications with his lawyer (invoking the truth-garbling fairness concern), there is no act inconsistent with the privilege. But cf. *Jack Winter, Inc. v. Koratron Co.*, 50 F.R.D. 225, 229 (N.D. Cal. 1970) (relying on handling of doctor-patient privilege to find waiver of attorney-client privilege).

147. It might be argued that there is a connection between the fairness concerns and the triggering events because the privilege-holder is likely to testify about this subject, thereby raising truth-garbling concerns unless access to privileged material follows. This argument is not persuasive because it could apply to any litigant who offers evidence on an issue while simultaneously invoking the privilege. The "truth-suppressing" role of the privilege, see text accompanying note 122 *supra*, involves, in large part, denying the opponent access to this impeaching material.

In this vein, it is worth noting that the opponent is not entirely unprotected against perjury. The lawyer's obligation not to assist the client in committing perjury applies to all information he has received from the client. The Supreme Court has recently held that this duty authorizes even appointed counsel for a criminal defendant to threaten to breach confidentiality and testify for the prosecution, in order to deter his client from perjuring himself, if he reasonably believes the client intends to do so. *Nix v. Whiteside*, 106 S. Ct. 988 (1986).

seemingly involving comparable fairness implications, due to the happenstance of pleading burdens. Instead, this waiver doctrine should be limited to cases in which the privilege-holder injects the privileged material itself into the case.

B. *Revelation to Opponent*

Very different considerations arise when waiver is predicated on pretrial disclosure, particularly "inadvertent waiver," a frequent occurrence due to the breadth of modern discovery. We have seen the high costs that efforts to avoid such a waiver can generate.¹⁴⁸ Owing to the natural inclination not to turn over that which may be withheld, some efforts to withhold privileged material would be likely whether or not there was a waiver risk. The waiver question is whether the failure of such a screening effort forever deprives the privilege-holder of the privilege.

A starting point in the analysis is to recognize that the troubling discovery waiver issue does not arise in situations in which the privilege-holder himself affirmatively relies on the privileged material, because by doing so he puts it in issue — thereby creating a situation that precisely raises the truth-garbling concern.¹⁴⁹ But even in such circumstances, other litigation concerns may counsel caution. For example, in settlement discussions lawyers may reveal privileged information either to demonstrate candor or to show the weakness of the opponent's position. Where there is some prospect that the privilege-holder will decide to use the material at trial (should settlement not occur), there is at least as strong an argument for finding a waiver as in cases where the court insists on a pretrial commitment on whether the privilege will be waived at trial.¹⁵⁰ Some courts have been hesitant to take this step, however, because they are concerned that the risk of waiver will impede settlement negotiations by making the parties overly circumspect.¹⁵¹ To the extent there would be a waiver at trial absent settlement, this attitude is of doubtful wisdom because it disregards the truth-garbling problem, and other courts treat settlement

148. See Part I *supra*.

149. See text accompanying notes 123-25 *supra*.

150. See note 128 *supra* and accompanying text.

151. E.g., *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) (waiver limited to matters disclosed); *American Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972) ("Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that private opinions and reports drafted by an attorney for his client become discoverable."); Note, *Attorney Disclosure*, *supra* note 6, at 942 (same).

disclosure as waiver.¹⁵² The fact that this result does not follow automatically shows, however, that the courts will weigh genuine fairness concerns against other factors in making waiver decisions.

Against this background, the "inadvertent waiver" situation presents much simpler problems. Almost by definition, these are not materials that the privilege-holder will offer in evidence.¹⁵³ Ordinarily they hurt his position, and were turned over to his opponent only because of some slip-up in the discovery screening process. Intention is hardly a ground for finding a waiver here because there was probably not only no intention to waive, but not even an intention to deliver the materials to the opponent. Fairness similarly fails to support a finding of waiver. Since the question is whether the slip-up will create a wind-fall of access to privileged material, fairness cuts, if anything, against waiver. Many courts therefore treat the inadvertent delivery of privileged material as no waiver.¹⁵⁴ Indeed, as indicated above, some even enshrine this commitment in pretrial orders purporting to sanitize inadvertent revelations.¹⁵⁵

In many other quarters, however, a harsher nineteenth-century attitude prevails. Harking back to the Wigmorean view that any disclosure destroys the privilege, these courts regularly find waivers where the disclosure was clearly an attorney's mistake.¹⁵⁶ Indeed, in *Trans-america Computer Co. v. IBM*¹⁵⁷ the Ninth Circuit escaped this prece-

152. *E.g.*, *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84 (E.D.N.Y. 1981); *R.J. Hereley & Son Co. v. Stotler & Co.*, 87 F.R.D. 358 (N.D. Ill. 1980). A better approach might be to require a pretrial election whether to waive at trial. *See* text accompanying note 128 *supra*.

153. *See Developments, supra* note 6, at 1664 ("[I]nadvertent disclosures create a waiver issue only when the material is favorable to the privilege-holder's adversary: if the matter were unfavorable to him, he would not seek to place it in evidence."). Owing to the risk that opponent *B* will claim that waiver results from inadvertent production to opponent *A*, it is important to keep in mind the fact that the privileged material may not be harmful vis-à-vis *A*, and thus that, but for the risk of waiver to the world, it would be quite understandable that only limited efforts would be made to cull it out. *See* text accompanying notes 18-21 *supra*.

154. *E.g.*, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 36 Fed. R. Serv. 2d (Callaghan) 1511, 1518-19 (W.D.N.Y. 1983) (refusing to find waiver as to "peek-a-boo documents" briefly shown to adversary); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982); *Dunn Chem. Co. v. Sybron Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,561, at 67,463 (S.D.N.Y. 1975); *see* Special Project, *supra* note 50, at 888 n.790 ("[N]o waiver occurs if the disclosure is made inadvertently; disclosure must be made knowingly.").

155. *See* text accompanying notes 30-35 *supra*.

156. *E.g.*, *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 25 n.13 (9th Cir. 1981) ("[W]hen, as here, the privileged communication is voluntarily disclosed without objection by the asserting party's counsel . . . it may be unnecessary to look beyond the objective fact of disclosure . . ."); *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). *Contra* *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1980).

157. 573 F.2d 646 (9th Cir. 1978); *see* text accompanying notes 22-27 & 31-32 *supra*.

dent only by emphasizing the extraordinary pressures under which IBM was operating and the "herculean" measures it employed to cope with those pressures. The court was therefore able to pass off IBM's slip-up as tantamount to erroneously compelled production of privileged materials.¹⁵⁸ But the judge had never ordered IBM to produce privileged materials. To the contrary, his order preserving privilege despite inadvertent disclosure showed he had no such intention. However extraordinary the circumstances in *Transamerica*, they merely illustrate in macrocosm the type of problems that parties confront regularly in microcosm.

The real question, then, is why the Wigmorean attitude should be indulged at all. Courts and commentators who recoil from Wigmorean rigidity tend to urge instead some sort of negligence or reasonable efforts standard.¹⁵⁹ Given the natural incentive of litigants not to turn over that which they can withhold, however, there seems to be little reason for the courts to scrutinize the adequacy of their efforts in deciding whether to inflict the additional consequences of waiver on them, particularly in view of the various costs that attend this course. At least theoretically, then, waiver through discovery should be limited to those situations in which the privilege-holder seeks to use the material affirmatively, raising the truth-garbling concern.¹⁶⁰

This solution fails to deal with the problem created by the fact the opposing party now *has* the privileged material. Can the rabbit be stuffed back into the hat? Where a party steals privileged material a court may, in effect, "suppress" it, as with illegally seized evidence in criminal cases.¹⁶¹ In inadvertent disclosure cases, courts that enter privilege-preservation orders sometimes provide that privileged mater-

158. See 573 F.2d at 650-52.

159. *E.g.*, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) ("the reasonableness of the precautions to prevent inadvertent disclosure"); Note, *Inadvertent Disclosure*, *supra* note 6, at 616-19.

160. For an example, see *First Wis. Mortgage Trust v. First Wis. Corp.*, 86 F.R.D. 160 (E.D. Wis. 1980), in which the court found that defendants had gained no advantage through disclosure of 32 privileged documents among 150,000 pages of material produced, and that fairness therefore did not mandate a waiver. 86 F.R.D. at 174; *accord* *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 519 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

161. See *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981), in which the court declined to order stolen privileged information returned, ruling that the privilege had been lost because it had not been maintained in confidence. The court appeared to assume it could order return of genuinely privileged material. For an example of a court taking action regarding wrongfully obtained material in a civil case, see *EEOC v. United Assn. of Journeyman & Apprentices of the Plumbing & Pipefitting Indus., Local 189*, 311 F. Supp. 464 (S.D. Ohio 1970) (court suppresses statements taken from black workers through coercion outside discovery process).

ials be returned once identified as such.¹⁶² Similar measures could be used generally; inadvertently produced materials could be held unavailable as evidence to the opposing party, although the memory of their contents cannot be erased. While incomplete, these measures do remove some of the sting resulting from the mistake. But they probably should not be employed for two reasons. First, if unintended delivery of privileged material could always be taken back, even the normal incentive to screen out such material would be withdrawn, and 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.

Second, and more significant, this "now you see it, now you don't" approach creates a risk of undermining the appearance of justice. To take a simple example, suppose the item in question is a letter from the defendant to his lawyer that says, "The light was red," and defendant testifies at trial that the light was green. Putting aside ethical constraints on defendant's lawyer,¹⁶³ the truth-suppressing consequence of the privilege¹⁶⁴ would effectively deprive plaintiff of this contradictory evidence. That cost is different, however, from the cost that would result had defendant inadvertently produced the letter and later asked that it be suppressed. Then plaintiff would know of the existence of the contradictory evidence but still be unable to use it, a result that not only suppresses the truth but threatens to make justice a mockery.¹⁶⁵ That cost may be justified where the privileged material is stolen, but not where the opposing party received it innocently.

It is a far different matter, however, to treat the inadvertent disclosure as a waiver with respect to other material that was not turned over. Although the inadvertent disclosure works something of a wind-fall by giving the opponent materials he would not otherwise have, there is no need to take the much greater step and treat it as a waiver.¹⁶⁶ It is simply an inadvertent disclosure of evidence that could

162. See *Mills v. Blazer Fin. Servs., Inc.*, Nos. 78 C 4277 & 79 C 134 (N.D. Ill. Dec. 11, 1985) (available on LEXIS, Genfed library, Dist file) (inadvertently produced privileged material "shall be immediately returned to the producing party").

163. Cf. *Nix v. Whiteside*, 106 S. Ct. 988 (1986) (attorney for criminal defendant can threaten to testify against him if he gives perjured testimony at trial).

164. See text accompanying note 122 *supra*.

165. See text accompanying notes 196-97 *infra*.

166. For an analogous approach in the settlement negotiations situation, see *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974), in which the court held that disclosure worked a waiver but limited the waiver to the matters disclosed. Owing to the possibility that this material will be used affirmatively, see text accompanying notes 150-52 *supra*, this handling is questionable.

have been held back.¹⁶⁷

To make the point clear, consider the next step in the argument — that if inadvertent disclosure to *A* waives the privilege as to him, it also waives as to *B*, *C*, *D*, etc. As to them, one does not confront the threshold reality that by the time the issue arises they already possess the inadvertently revealed material. Is each of them nevertheless automatically entitled to receive the inadvertently produced material because *A* got it? They might well get it if *A* were to introduce it into evidence at trial.¹⁶⁸ But most cases are settled, like CDC's suit against IBM, so that discovery results may never become part of the public record.¹⁶⁹ Moreover, *A* may agree to return the material as part of the settlement package, giving him an additional pawn to play in the settlement negotiation.¹⁷⁰ But if the inadvertent delivery could not be taken back, *B*, *C*, and *D* would get a windfall and *A* would lose the opportunity to bargain away his good fortune in receiving the erroneously produced materials. The appropriate reaction should mirror the view of the Supreme Court in *Upjohn* that the disclosure "puts the adversary in no worse position than if the communications had never taken place."¹⁷¹

In sum, although the fact that *A* has the materials does complicate the situation, it does not mean that inadvertent production must be treated as a waiver.

C. Information Sharing

The litigant who avoids improvident delivery of privileged material to his opponent may nevertheless decide to reveal it to somebody else. He may have various reasons for wishing to do so. Most understandable as a matter of strategy is the frequent need for co-parties to share

167. Waiver may result, however, if the privilege-holder tries to defuse this evidence by injecting more privileged material into the gap to explain away the evidence. That affirmative use of the material would trigger the truth-garbling concern. See text accompanying notes 126-28 *supra*.

168. Ordinarily the use of confidential information as evidence at trial makes it a part of the record and presumptively available to the public. See *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981) (litigant markets trade secrets of opponent after they were introduced in evidence at trial).

169. Even where such materials are not in evidence, there may be a public right of access to them because they have been involved in pretrial rulings. Thus, in finding a waiver argument one court reasoned that "[o]nce the document was produced for inspection, it entered the public domain." *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). For a criticism of this "public access" attitude, see Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 46-49 (1983).

170. See Marcus, *supra* note 169, at 27-28.

171. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

information with each other in aid of the common litigation effort.¹⁷² One step removed is the desire to share information with a nonparty, particularly the government, which may provide some assistance. Beyond that, information-sharing may serve a litigant's emotional needs. Litigation can be a lonely, confusing experience, and it may often be helpful to have some confidant other than the lawyer.

Traditionally the courts have taken a narrow view of the circle of persons with whom such sharing is possible free of waiver. Sharing with co-parties has long been immunized against waiver,¹⁷³ as has sharing with nonparties who have a common foe,¹⁷⁴ and courts are fairly free in finding common interests sufficient to avoid a waiver.¹⁷⁵ But disclosure to a close relative or other confidant can be expected to result in a waiver¹⁷⁶ unless this further communication is itself privileged, such as a communication to a spouse or psychotherapist.¹⁷⁷

The most striking impact of this narrow view, however, comes with accountants and auditors, not relatives. For publicly held companies, receiving a clean bill of health from an auditor or accountant may be essential to continued acceptance of the company's securities in financial markets.¹⁷⁸ But this professional may insist on access to privileged matters as part of a complete examination of the company's financial condition. Under these circumstances, the company's acquiescence can only in the loosest sense be labeled "voluntary." In turn-

172. See McSweeney & Brody, *Defending the Multi-Party Civil Conspiracy Case*, LITIGATION, Spring 1986, at 8, 8 ("[I]f knowledge is power in litigation, then shared knowledge is power multiplied."). Such strategic sharing is not limited to co-defendants. See Kirsch, *Evidence-Sharing*, CAL. LAW., June 1985, at 19 (describing sharing of information between plaintiffs' attorneys).

173. *E.g.*, *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964); *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 16, 1974, 406 F. Supp. 381, 392-94 (S.D.N.Y. 1975). In *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977), the court held that where attorney for one co-defendant in an antitrust case had attended joint defense meetings, he could be subject to disqualification at the request of another defendant on the ground that defendant had revealed confidences at the meetings. *But cf.* *Fred Weber, Inc. v. Shell Oil Co.*, 432 F. Supp. 694 (E.D. Mo.) (no disqualification where no confidential information actually shared), *aff'd.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978). As the court noted in *Kaskie v. Celotex Corp.*, 618 F. Supp. 696, 699 (N.D. Ill. 1985), "Co-defendants and their attorneys are simply not as likely to 'bare their souls' to each other."

174. *E.g.*, *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980); 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(b)[06], at 503-60 (Aug. 1980) ("Only if there is no common interest and the interests of the parties are totally antagonistic will the privilege be denied."); Note, *Inter-Attorney Exchange*, *supra* note 6.

175. *E.g.*, *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985) (information sharing among potential merger partners who later became adversaries not a waiver).

176. See *Dutton v. State*, 452 A.2d 127, 145 (Del. 1982) (disclosure to friend waives privilege).

177. See text accompanying note 110 *supra*.

178. See, *e.g.*, *United States v. Arthur Young & Co.*, 465 U.S. 805, 818-19 (1984).

ing over such materials, the company is hardly sharing them with the world. Indeed, the auditors themselves argued unsuccessfully that a new privilege should cover their dealings with their clients, so that revelation of unprivileged material would be protected.¹⁷⁹ The prevailing judicial view, however, is that the disclosure destroys the confidentiality of previously privileged materials. Although this view may to some extent reflect the Securities Acts' policy of full disclosure,¹⁸⁰ given the array of matters an auditor may investigate it could destroy the privilege altogether.¹⁸¹

Perhaps sensing this problem, the courts fall back on a fairness argument that criticizes "selective disclosure" — revelation to *A* but not to *B*. Some courts invest this argument with a rather moral tone, asserting that a privilege-holder can only share information with third parties at "the traditional price."¹⁸² But this is not the dangerous type of selective disclosure unless it leads to selective use of part of the material as evidence, thereby raising the truth-garbling concern.¹⁸³ Otherwise, there seems to be little unfairness to *B* flowing from revelation to *A*, even if *A* and *B* are adversaries.¹⁸⁴ Indeed, the courts' willingness to permit information-sharing among those who have a

179. *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

180. *See In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982), in which the company argued that such a disclosure was "coerced by the legal duty of due diligence and the millions of dollars riding on the public offering of registered securities." The court found this factor irrelevant because "[f]ederal securities laws put a price of disclosure upon access to interstate capital markets. Once materials are utilized in that disclosure, they become representations to third parties by the corporation." 675 F.2d at 489.

181. *See Developments, supra* note 6, at 1659 n.141 ("This facially innocuous strain of waiver doctrine conceals an ability to completely eviscerate the attorney-client privilege for publicly held corporations.").

182. *E.g., Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *Chubb Integrated Sys. v. National Bank*, 103 F.R.D. 52, 67 (D.D.C. 1984); *Maryville Academy v. Loeb Rhoades & Co.*, 559 F. Supp. 7, 9 (N.D. Ill. 1982).

183. For a striking example of the confusion of these two concepts, see *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984). The materials in question had been submitted to the SEC as part of its "voluntary disclosure program," *see* note 188 *infra*, and private plaintiffs then served a subpoena on the company's lawyers for the documents. Finding that submission to the SEC was a "testimonial" use of the privileged materials, the district court ordered them turned over, 99 F.R.D. 582, 586 (D.D.C. 1983), and the court of appeals affirmed. As to the SEC, the truth-garbling concern surely would have justified finding a subject matter waiver. Whether or not the SEC was given a distorted picture, however, the company had made no evidentiary use whatsoever of the materials in their litigation with the private plaintiffs, and the same fairness concerns have no bearing. *See Developments, supra* note 6, at 1654-56 (criticizing the reasoning of this decision).

184. *See Special Project, supra* note 50, at 889 ("The inherent unfairness associated with 'testimonial use' of privileged materials that necessitates waiver of evidentiary privilege is not present when disclosures are made to third parties in the course of trial preparation.") (footnote omitted). This point is a variant of the argument made above about the fairness of treating inadvertent disclosure to *A* as a waiver vis-à-vis *B*, *C*, *D*, etc. *See* text accompanying notes 168-71 *supra*.

common adversary¹⁸⁵ shows that the fact that such sharing may rebound to the disadvantage of *B* (who is confronted by better-prepared adversaries) is not a form of unfairness that justifies finding a waiver.¹⁸⁶ Surely *B* has less to complain about if *A* is not his adversary, for he would then be in the same position vis-à-vis the disclosure as everyone else.¹⁸⁷ Moreover, there may be substantial social benefits from promoting disclosure to *A* through a no-waiver rule,¹⁸⁸ and the "selective disclosure" objection provides no counterweight to these considerations.

There are legitimate explanations for the courts' uneasiness about permitting such disclosures without a waiver, however. First, there is no easy way to handle attempts to obtain the information from the party to whom it was disclosed. Accordingly, some attack arguments that disclosure should not work a waiver as creating a "new" privilege,¹⁸⁹ something courts abhor. If the privilege-holder can prevent the recipient from revealing the privileged material, this argument has some surface appeal since it would seemingly endow the privilege-holder with a new right to close the mouth of the recipient, the "new" privilege. But the real source of privilege protection is the existing privilege, and the real question is whether disclosure destroys that protection.

The "new" privilege argument proves too much. As part of the

185. See notes 173-75 *supra* and accompanying text.

186. In some cases courts may find disclosure to some, but not all, the parties in a case to be unfair. For example, in *In re Natta*, 48 F.R.D. 319, 322 (D. Del. 1969) (footnote omitted), the court reasoned that "[i]t would be most inequitable to hold that privileged matter can be waived as to one party to [a patent interference proceeding] but not to another, thus giving a superior advantage to one party over another." But since the objective of such sharing is to achieve such an advantage by pooling information, it is difficult to see why this reasoning will often apply.

187. See text accompanying note 19 *supra* (describing broad impact of traditional waiver rules which treat waiver as effective as to the world).

188. A well-known example is provided by the SEC's "voluntary disclosure" program, which was designed to encourage full disclosure to the agency. In *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1976), the court ruled that, in order to promote disclosure, delivery to the SEC would not be a waiver in spite of the normal waiver rules. *Accord* *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 684-89 (S.D.N.Y. 1980). In *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), the court rejected this view. The issue has generated a lively academic debate. See Hacker & Rotunda, *Officers, Directors, and Their Professional Advisors: Rights, Duties, and Liabilities*, 2 CORP. L. REV. 250 (1979); Comment, *supra* note 78; Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789 (1984) [hereinafter cited as Note, *SEC-Corporation Privilege*]; Note, *Unjustified Severity*, *supra* note 6. These issues are not limited to disclosure to the SEC, however. The Antitrust Civil Process Act, 15 U.S.C. § 1312(c)(2) (1982), preserves privilege despite delivery of material to the Antitrust Division in certain situations. More generally, the kinds of emotional and other factors that would tend to prompt privilege-holders to confide in others, see text following note 172 *supra*, seem equally worthy of respect absent countervailing fairness concerns.

189. E.g., Note, *SEC-Corporation Privilege*, *supra* note 188; *Developments*, *supra* note 6, at 1645-48.

ordinary confidentiality analysis to determine whether the privilege attaches, it has long been recognized that presence of other persons necessary to the relationship or communication via intermediaries would not destroy the privilege.¹⁹⁰ Accordingly, the privilege-holder could prevent these persons from revealing the privileged information without running afoul of the "new" privilege problem. To a certain extent, this analysis can be applied to the joint defense situation,¹⁹¹ but it is a poor fit for information-sharing among unrelated persons with a common adversary.¹⁹² Certainly the enforceability of privilege-preservation orders¹⁹³ cannot be fit within the traditional framework. In a similar vein, where unprivileged confidential business information is revealed through discovery, the courts regularly enforce agreements to maintain confidentiality without worrying about "new" privileges.¹⁹⁴ Thus, accepted limitations on waiver themselves founder on the "new" privilege objection.

The real question is how to decide whether to permit further expansion of the charmed circle with whom sharing does not work a waiver. The most reasonable focus is to look for an explicit or implicit undertaking by the recipient of the information to hold it in confidence. The courts already recognize some such undertakings as enforceable, as the longstanding acceptance of sharing among co-parties shows. The order preserving privilege is similarly premised on allowing the party who obtains such material through discovery to refuse to turn it over to others. Such promises are not always forthcoming, and the courts do not enforce unilateral claims that privilege has been retained despite disclosure.¹⁹⁵ Where there has been such an undertaking, however, the charge that allowing the recipient to refuse to turn over privileged material creates a new privilege is a distraction.

The second problem presents more difficulties. At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that

190. MCCORMICK ON EVIDENCE, *supra* note 5, § 91.

191. *See* note 173 *supra* and accompanying text.

192. *See* notes 174-75 *supra* and accompanying text.

193. *See* notes 30-35 *supra* and accompanying text.

194. *See generally* Marcus, *supra* note 169, at 9-11.

195. *E.g.*, *In re Subpoenas Duces Tecum to Fulbright & Jaworski*, 99 F.R.D. 582, 585 (D.D.C. 1983) ("The lawyers' self-serving declaration about confidentiality was not accepted by the SEC . . ."), *aff'd*, 738 F.2d 1367 (D.C. Cir. 1984); *W.R. Grace & Co. v. Pullman, Inc.*, 446 F. Supp. 771, 775 (D. Okla. 1976).

many others (who do have the information) know to be wrong.¹⁹⁶ Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn "selective disclosure" to some but not others.¹⁹⁷

As with the "new privilege" objection, however, this concern does not compel an automatic finding of waiver upon disclosure to anyone, because explicit or implicit promises of confidentiality can assure effective containment of the information. Obviously the fact that the privilege-holder confides in a close relative does not mean that the whole world knows as a result. Moreover, the number of cases in which the information is so contradictory as to hold the judicial result up to scorn must be limited. Although there may well be cases in which this public scorn problem would require abrogation of the privilege,¹⁹⁸ that possibility does not mandate a uniform rule that disclosure to anyone works a waiver. Instead of invoking an inflexible rule, the court should focus on these factors in deciding whether to treat disclosure as destroying the privilege-holder's preexisting right to contain the information.

D. *Witness Preparation*

The fourth major waiver category can be labeled witness preparation, although it encompasses events beyond that precise activity. It has long been true that, where a witness uses a document for assistance while testifying, the opposing party is allowed to examine the

196. Cf. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1373 (1985) (arguing that hearsay rule furthers similar interests because, by insisting on cross-examination, it "minimizes the risk that a verdict will be undercut by ensuring that the declarant cannot easily recant his statement"). For a criticism of Professor Nesson's article, see Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057 (1986).

197. The language of courts that condemn "selective disclosure" suggests that some such general currency for information may be a significant factor in their attitude. See, e.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted . . . to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."); *Green v. Crapo*, 181 Mass. 55, 62, 62 N.E. 956, 959 (1902) (Holmes, C.J.) ("The privacy for the sake of which the privilege was created was gone . . . , and the privilege does not remain under such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice.").

198. For an example, consider *In re Grand Jury Investigation of Ocean Transport*, 604 F.2d 672 (D.C. Cir.) (per curiam), cert. denied, 444 U.S. 915 (1979), in which a group of privileged documents was produced to the Antitrust Division by mistake. The privilege-holder did not ask that they be returned for a year and a half, however. Noting that by then the documents had been digested and shown to several grand jury witnesses, who were questioned about them, the court held that their confidentiality "has been so irretrievably breached that an effective waiver of the privilege has been accomplished." 604 F.2d at 675; see also *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706 (S.D.N.Y. 1983) (issuance of public statement regarding internal investigation waives privilege because it summarizes report).

document as an aid in cross-examination to show how the document affected the witness' testimony.¹⁹⁹ But testimony may be affected by documents reviewed before testifying. Accordingly, Federal Rule of Evidence 612 provides that in such circumstances the court can order that the document be turned over if that "is necessary in the interests of justice."²⁰⁰

Rule 612 presents the litigator with an uncertain and potentially sweeping risk of waiver. The rule says that it applies only when the witness uses the document "to refresh his memory for the purpose of testifying." It may often be difficult to determine whether a document was so used, however, and some courts have suggested that the focus should be on the likelihood the document affected the witness' testimony.²⁰¹ This approach is consistent with the purpose of the rule, but it poses grave difficulties for the litigator who wishes to avoid a waiver. Even correspondence with the client could theoretically be called for if the client testifies.²⁰² Certainly the lawyer's memoranda analyzing the case could affect testimony if forwarded to the client/witness. The risk is even greater with experts hired by the lawyer. Often the lawyer will not know initially whether he wants to call the expert as a witness. The most effective way to get useful assistance from the expert is often to provide him access to the lawyer's analysis of the case, both as an introduction and to pinpoint the areas on which the lawyer needs help. If the expert's opinion turns out to be favorable, and the lawyer decides to call him as a witness, it is quite possible that a court will conclude that the introductory materials affected the expert's view of the case, and hence his testimony.²⁰³

199. MCCORMICK ON EVIDENCE, *supra* note 5, § 9, at 20-21.

200. FED. R. EVID. 612. Some have suggested that rule 612 was not intended to override privilege claims. See *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118, 119 (W.D. Mo. 1980); cf. MCCORMICK ON EVIDENCE, *supra* note 5, § 93, at 226 (House Judiciary Committee report adopted "strict no-waiver position"). But a privileged document would not be exempt from the traditional requirement of disclosure if used by the witness while testifying, where rule 612 would make disclosure mandatory, so it is odd to suggest that discretionary access to privileged materials is unavailable with respect to pretrial inspection. Given the risk that the lawyer might select privileged materials *because* they are privileged (and therefore exempt), such disparate treatment would be unwise. As the discussion below indicates, the courts have not exempted such materials.

201. *E.g.*, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615 (S.D.N.Y. 1977) (court reasons that, "at least to a strongly arguable degree, [the materials] may be supposed to have had 'an impact upon the testimony of the witness'"). For a criticism of *Berkey*, see Note, *Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules*, 88 YALE L.J. 390, 398-402 (1978).

202. *E.g.*, *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.*, 81 F.R.D. 8, 9 (N.D. Ill. 1978) (witness' review of file of correspondence with counsel mandates production of file).

203. When the expert is designated a witness, a further waiver problem may arise because FED. R. CIV. P. 26(b)(4)(A)(i) requires revelation of "the substance of the facts and opinions to

These risks can be substantially reduced through planning and the expenditure of more time and money on the case. We have already seen that, by sending a lawyer to the witness and doing all witness preparation orally, one can eliminate the risk of waiver at the formal preparation-for-testimony stage.²⁰⁴ The larger the client, the less likely that the person engaging in regular attorney-client communications will testify. With experts, the lawyer can create a new set of sanitized introductory documents, do the introduction orally, or simply set the expert loose (presumably on an hourly billing basis) to work up his own information. This avoidance behavior increases the cost and reduces the quality of the professional services involved.

It should be apparent that the events that trigger this waiver — disclosure to client or retained expert — do not lead to a finding of intentional waiver or action inconsistent with the privilege involved. To take the easiest example, showing privileged materials to the client is not inconsistent with the privilege although the client is going to testify. Fairness, equally obviously, should provide the key to deciding whether to order disclosure. The problem is that fairness points both ways.

Refusing access to materials that were used in preparation for testifying creates real risks of distorting the fact-finding process. At a minimum, there is a substantial likelihood that the memory "refreshing" process will suggest things the witness does not recall or induce inappropriate certainty.²⁰⁵ Some memory-refreshing techniques create such a risk of distortion that courts refuse to permit persons thus refreshed to testify.²⁰⁶ With expert witnesses, moreover, the suggestions

which the expert is expected to testify and a summary of the grounds for each opinion." Arguably this provision independently requires that privileged materials that form the "basis" for an opinion be revealed. See Note, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 COLUM. L. REV. 812 (1985).

204. See text accompanying notes 42-47 *supra*.

205. See, e.g., Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 549-56 (1984) (surveying risks of witness interviews); Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391, 401 (1933) ("Imagination and suggestion are twin-artists ever ready to retouch the fading daguerrotype of memory."); Hutchins & Schlesinger, *Some Observations on the Law of Evidence — Memory*, 41 HARV. L. REV. 860, 867-69 (1928) (describing tendency of memory "refreshment" to induce certainty of recollection although recollection not accurate). Presumably this risk exists only as to disclosures to witnesses, but the court in *R.J. Herely & Son Co. v. Stotler & Co.*, 87 F.R.D. 358 (N.D. Ill. 1980), took the reasoning a step further to find use by the attorney to refresh his own recollection a waiver. See 87 F.R.D. at 359. This added step seems entirely unwarranted, but it exemplifies existing uncertainty in the area.

206. The customary example is hypnosis. See, e.g., *People v. Shirley*, 31 Cal. 3d 18, 35-39, 641 P.2d 775, 784-86, 181 Cal. Rptr. 243, 252-55, cert. denied, 459 U.S. 860 (1982). See generally MCCORMICK ON EVIDENCE, *supra* note 5, § 206, at 632-33; Note, *Hypnotically Refreshed Testimony and the Balancing Pendulum*, 1985 U. ILL. L. REV. 921.

are in effect coming from the witness' employer.²⁰⁷ Indeed, there is at least a possibility that privileged materials were selected for witness preparation precisely because they are privileged, in hopes that the protective cloak of privilege could be drawn around the process.²⁰⁸ On the other hand, if the privileged materials were used because no others would do the job, that fact strengthens a need-based argument for disclosure of these unique materials. Some courts go to great lengths to minimize abuse of witness preparation in other respects,²⁰⁹ and it would be odd to exempt these critical items.

There are countervailing factors, however. To begin with, there is nothing wrong with witness preparation. Whatever one may think of it in the abstract,²¹⁰ it is a fact of life in American litigation. Indeed, a lawyer who fails to do it may be failing to satisfy his professional obligations.²¹¹ The preparation process itself is to some extent protected as work product.²¹² By spending more time (and money) the lawyer

207. See *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 598 (3d Cir. 1984) (Becker, J., dissenting) (arguing that "evidence demonstrating that an economist's theory did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion" could "critically alter the finder of fact's assessment of the expert's testimony"); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985) (describing expert witnesses as "saxophones": "The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes.").

208. *E.g.*, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (noting that "[t]here is no indication at all of a calculated plan to exploit the work product in a significant way for preparing the experts while planning to erect the shield of privilege against discovery"); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D. Ill. 1972) (referring to "the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection").

209. Thus, in *In re Asbestos Litig.*, 492 A.2d 256 (Del. Super. Ct. 1985), the court forbade attorney-client consultation during depositions. See also *Ellenberg v. Tuffy's Div. of Starkist Foods, Inc.*, 2 Fed. R. Serv. 3d (Callaghan) 927, 935 (D. Minn. 1985) (court suggests that efforts by attorney to mislead or threaten witness would fall within crime/fraud exception to attorney-client privilege).

210. See Langbein, *supra* note 207, at 833: "If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial." Some therefore urge that such contacts be forbidden. See Landsman, *supra* note 205.

211. "[A] lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly." Committee on Legal Ethics, D.C. Bar, Op. No. 79, Limitations on a Lawyer's Preparation of a Witness's Testimony, reprinted in *Legal Times* of Washington, Dec. 24, 1979, at 27, col. 1, at 28; accord *Hamdi & Ibrahim Mango Co. v. Fire Assn.*, 20 F.R.D. 181, 182-83 (S.D.N.Y. 1957). See generally M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 62-76 (1975). Thus, the lawyer may suggest language for testimony, even if the facts originate from sources other than the client, so long as the lawyer reasonably believes the suggestions are not false or misleading. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-6 (1981). This "can involve a rehearsal process that exceeds the length of the actual deposition." Coffee, *supra* note 44, at 17.

212. In *Ford v. Phillips Elecs. Instruments Co.*, 82 F.R.D. 359, 361 (E.D. Pa. 1979), for example, the court refused to require revelation of the exact questions asked by opposing counsel while preparing a nonparty witness. Accord *Phoenix Natl. Corp. v. Bowater United Kingdom*

can do it personally, without endangering the privilege, by telling the witness what is in the documents.²¹³ But that maneuver should not eliminate worries about truth distortion. To the contrary, there is no reason why documents are needed to influence testimony.²¹⁴ Perhaps the most famous piece of allegedly fabricated testimony in the annals of American trials — the seemingly memorized testimony of a prosecution witness in the Triangle Shirtwaist trial in New York in 1911²¹⁵ — could hardly, with this illiterate witness, have depended on using documentary preparation. Moreover, the intensity of face-to-face

Paper Ltd., 98 F.R.D. 669, 671 (N.D. Ga. 1983); *see also* IBM v. Edelman, 526 F.2d 37 (2d Cir. 1975) (court may not require that witness interviews be on the record).

An area of particular concern has been the "witness kits" that counsel are likely to prepare, containing selected pieces of evidence they want the witness to review with particular care. *See, e.g.,* Halverson, *Coping With the Fruits of Discovery in the Complex Case — The Systems Approach to Litigation Support*, 44 ANTITRUST L.J. 39, 42 (1975) ("You will want to prepare evidentiary witness kits for your witnesses . . ."). Assuming that these materials have all been produced through discovery, the question remained whether the opposing party could compel production of the witness kit itself.

In *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982), the court acknowledged that such a witness kit is work product because it reflects the lawyer's analysis of the facts. *But cf.* *City Consumer Servs., Inc. v. Horne*, 100 F.R.D. 740, 745-47 (D. Utah 1983) (attorneys' selection among discovered documents not work product). The *Julian* court nevertheless ordered the kit turned over because "[w]ithout reviewing those binders defendants' counsel cannot know or inquire into the extent to which the witnesses' testimony has been shaded by counsel's presentation of the factual background." 93 F.R.D. at 146.

In *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985), the Third Circuit rejected this view: "Proper application of Rule 612 should never implicate an attorney's selection, in preparation for a witness' deposition, of a group of documents that he believes critical to a case." 759 F.2d at 318. The Third Circuit's position seems clearly preferable. Unless skillful witness preparation is itself unfair, the very arguments that support applying rule 612 also cut against requiring revelation, for they emphasize the lawyer's full preparation. The hard problem, with which the text deals, appears when the witness has seen materials that have never been disclosed to the opponent.

213. Some courts have hinted at this possibility. Thus, one noted that a "sophisticated prospective witness [would] . . . use a 'coach' who has examined the documents, rather than the documents themselves." *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118, 120 n.2 (W.D. Mo. 1980); *see also* *Barrar v. Women's Natl. Bank*, 96 F.R.D. 202, 204 n.1 (D.D.C. 1982) ("Counsel can adequately protect the attorney-client privilege by not making such a document available for *perusal* by a client to prepare for a forthcoming deposition.") (emphasis added); Note, *supra* note 203, at 826 ("requiring disclosure of work product materials may encourage attorneys to influence their experts by relating the same information orally").

214. Even Professor Landsman, who urges that the rules regarding witness preparation be altered to provide that "written materials should not be offered to disinterested witnesses to refresh their recollections or to provide them with new information," Landsman, *supra* note 205, at 558-59, makes this proposal because documents potentially have the same impact as a number of oral strategies of prompting witnesses. *See id.* at 558.

215. For a description of the case, leading up to the cross-examination of the witness who seemed to have memorized her story, *see* A. STEUER, MAX D. STEUER: TRIAL LAWYER 89-109 (1950). Max Steuer, as counsel for defendants, effectively discredited the witness by having her repeat her story several times. Interestingly, he had expected to encounter some such memorization, and had tried the same cross-examination technique on two earlier witnesses. *See id.* at 109. Lest the case be thought unique, *see* Goodman, Golding & Haith, *Jurors' Reactions to Child Witnesses*, J. SOC. ISSUES, Summer 1984, at 139, 147 (describing child witness who repeated testimony seven times as lacking independent recall).

preparation may foster shading of testimony.²¹⁶ In terms of promoting independent, reliable testimony, one might prefer witness preparation at a distance using written communication over face-to-face encounters. Given the underlying work product concerns, it is odd to penalize the litigant who, due to lack of resources, lack of foresight, or absence of a desire to fabricate, employs a less intense method.²¹⁷

The courts are left to balance these factors in individual cases. In view of the substantial potential intrusion that may result from this waiver theory, a starting point would be to narrow the concept of witness preparation to the more formal activity itself. Indications of abusive use of privileged material to immunize preparation²¹⁸ point, of course, toward production. Beyond that, the basic concern is whether denial of access will unfairly limit the opponent's opportunities for cross-examination.²¹⁹ Where the witness testifies that the document did refresh recollection, the arguments in favor of disclosure mount considerably. Otherwise, in camera review of the material by the judge can shed light on the need for access.²²⁰

This case-by-case process is not an easy one for judges, but it is not unique. Where a party requests access to grand jury transcripts of testimony by a witness who will testify in a civil case, the courts are directed to require that the party seeking access make a showing of "particularized need."²²¹ Generally this determination turns on a

216. On a somewhat analogous issue, the Supreme Court has emphasized the face-to-face nature of certain interactions as warranting disciplinary limitations. Compare *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (lawyer properly disciplined for face-to-face solicitation of client), with *In re Primus*, 436 U.S. 412 (1978) (discipline forbidden where solicitation was through public presentation with written follow-up). See generally 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW* § 20.31, at 151-54 (1986).

217. Simple mistake may also explain the disclosure of privileged materials. For example, in *Boring v. Keller*, 35 Fed. R. Serv. 2d (Callaghan) 1596 (D. Colo. 1983), defendant's attorney inadvertently included an unedited version of plaintiff's deposition summary among the materials supplied to defendant's expert witnesses. Although the summaries contained the lawyer's impressions and evaluations of plaintiff's demeanor as a witness, 35 Fed. R. Serv. 2d at 1597, the court ordered disclosure because "[t]he information which was shared will affect the credibility of the witnesses." 35 Fed. R. Serv. 2d at 1600.

218. See note 208 *supra* and accompanying text.

219. See, e.g., Note, *Discovery Under the Federal Rules of Civil Procedure of Attorney Opinion Work Product Provided to an Expert Witness*, 53 *FORDHAM L. REV.* 1159, 1179-80 (1985) (disclosure should be required only where adversary hampered in cross-examination).

220. E.g., *In re Comair Air Disaster Litig.*, 100 F.R.D. 350, 353 (E.D. Ky. 1983) (decision whether to order disclosure depends on "determination . . . regarding the extent to which the documents were consulted and relied upon"); 3 J. WEINSTEIN & M. BERGER, *supra* note 174, ¶ 612[04], at 612-40 to 612-41 (Aug. 1981) ("Unless the judge finds [from in camera review] that the adverse party would be hampered in testing the accuracy of the witness' testimony, he should not order production of any writings which reflect solely the attorney's mental processes."). For an example of the analysis in a case denying disclosure, see *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 780-81 (S.D.N.Y. 1982).

221. FED. R. CRIM. P. 6(e) has been interpreted to require a showing of "particularized need" to justify access. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

comparison of the witness' testimony in the civil case and before the grand jury, with production of the grand jury transcript "where in camera examination . . . uncovers material discrepancy or significant facts which the witness concealed, or failed to remember."²²² Under rule 612 the focus is on a different type of need, but judges should be able to make reliable evaluations of the need for disclosure in particular cases. Although it is certainly important to avoid making the process too cumbersome,²²³ the task is worthwhile to avoid the costs that flow from broad waiver rules.²²⁴ Moreover, compared with the grand jury transcript situation, the rule 612 issue is less likely to depend on detailed understanding of the complicated facts of the case and more likely to draw on the judge's experience as a litigator. Absent indications of abuse, under rule 612 substantial latitude should be accorded the accepted witness-preparation process, with access ordered only in cases of considerable need.²²⁵

V. THE IMPLICATIONS OF A FAIRNESS ANALYSIS: DOWN THE SLIPPERY SLOPE?

As we have seen, the trend toward accommodating competing interests with a fairness analysis for waiver sometimes requires difficult decisions. Beyond that, the trend can be criticized on two fundamental grounds. First, it depends on ad hoc decisions that threaten to undermine the privilege. Second, by stressing need the fairness analysis may herald the demise of the absolute protection the privilege affords. Both of these objections in essence rely on slippery-slope reasoning — that although failure to find a waiver in the particular

For an elaboration of this requirement, see *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222-24 (1979).

222. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 486, 491 (E.D. Pa. 1962), *quoted in* *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 227 (1979). It is not clear that courts uniformly require strong showings of need. *See, e.g., Grumman Aerospace Corp. v. Titanium Metals Corp.*, 1984-1 Trade Cas. (CCH) ¶ 65,890 (E.D.N.Y. 1984) (court orders disclosure of grand jury testimony of specified witnesses because it was "struck by the overall haziness of their recall" in their depositions) (emphasis in original).

223. *Cf. In re Sealed Case*, 676 F.2d 793, 814 (D.C. Cir. 1982) ("Any system that requires courts to make highly refined judgments — perhaps concerning volumes of documents — will most likely collapse under its own weight.").

224. *See* Part I *supra*.

225. If disclosure is ordered, the court may confront disputes about the extent of the waiver. Unlike the traditional subject matter waiver, it would not seem appropriate for the waiver to apply to anything except that which the witness reviewed. *See Marshall v. United States Postal Serv.*, 88 F.R.D. 348, 350 (D.D.C. 1980) (rejecting attempt to "solder together" concept of subject matter waiver and disclosure required under rule 612). Indeed, even where the witness reviews materials while testifying, the court may limit the disclosure required to the parts referred to, in order to protect the privilege against undue incursion. *See S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 409-10 (W.D. Pa. 1984).

case may be commendable the reasoning permits pernicious results in other cases.²²⁶ But these risks appear less significant than the costs that attend rigid waiver rules, and they therefore are not grounds for halting the current trend.

A. *Ad Hoc Decisions*

It is a truism that bright lines are desirable to make privileges reliable. The fairness principle, however, often fails to provide a clear delineation of the situations in which a waiver should be found. Instead, the court is to make a multi-factor analysis to determine whether it would be "fair" to allow the privilege-holder to continue to assert the privilege.²²⁷ Given the uncertainty of this standard, the court may be tempted to decide in favor of access whenever it senses that the material involved is important, thereby undermining the privilege by making it unreliable.

This is a legitimate concern, and some cases suggest that courts will indulge suspicions about unfairness to justify finding a waiver. For example, while acknowledging that there was no showing of any "specific prejudice" to defendants resulting from plaintiff's partial disclosure, one court nevertheless found a waiver. "In defining the extent of a party's waiver of the privilege," it reasoned, "a court is not required to determine whether the party has gained any particular tactical advantage by its partial disclosure."²²⁸ But if no particulars need be shown, it would seem that almost any disclosure could be found a waiver because negating possibilities of unfairness would be a virtually impossible task.

Nevertheless, concern about careless reasoning does not justify abandonment of the trend toward emphasizing fairness. First, it is simply not true that the rigid purpose analysis yields a bright line for waiver decisions any more than it does on other privilege issues.²²⁹ Instead, this approach to waiver seems to have invited courts to invent debatable reasons why disclosures are inconsistent with the purposes of the privilege.²³⁰

More fundamentally, one may question the proposition that bright

226. See generally Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

227. See *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329 (N.D. Cal. 1985) ("[T]he modern trend seems to be towards a case by case determination of waiver based on a consideration of all the circumstances."); cf. MCCORMICK ON EVIDENCE, *supra* note 5, § 77, at 186-87 (suggesting that evolution away from utilitarian approach may lead from rigid rules to "the finer touch of the specific solution").

228. *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452, 453 (N.D. Ill. 1982).

229. See text accompanying notes 78-93 *supra*.

230. See text accompanying notes 107-11 *supra*.

lines actually prevail in privilege law. In *Upjohn*, for example, the Court praised the idea of bright lines²³¹ but refused even to articulate a standard for application of the privilege in the corporate context.²³² Chief Justice Burger rebuked the Court for neglecting its duty of providing guidance to the lower courts in applying the privilege.²³³ Similarly, the longstanding crime or fraud exception has allowed courts to abrogate privilege protection under a standard that is hardly crystal clear. Although in theory limited to situations in which the client has sought legal advice to assist in committing the crime or fraud, the doctrine has been applied where the misconduct is the lawyer's idea.²³⁴ Indeed, a recent decision in the Dalkon Shield IUD litigation suggests that it may apply where defendant has used "stonewalling" tactics in defense of litigation.²³⁵ Despite the rhetoric, then, bright lines are not prevalent.

Second, the context in which waiver decisions arise inherently limits the slippery-slope problem because they are keyed to some further act of the privilege-holder that waives preexisting privilege protection. Even with the "putting in issue" ground for abrogating privilege, where the courts often indulge dislike for the privilege instead of focusing on the unfairness of the act upon which the argument is based,²³⁶ there is still a further act that forms the predicate for finding a waiver. Properly applied, the fairness argument is limited to the implications of the disclosure that prompts claims of privilege. Absent some such further action by the privilege-holder, there can be no waiver argument, and risks of broad abrogation of privilege do not exist.

Third, this slippery-slope argument disregards the fact that the fairness analysis developed in an effort to *preserve*, not defeat, assertions of the privilege, and it would be ironic to jettison it because it threatens the privilege. The problem with the prevailing purpose analysis was that courts developed a trigger-happy attitude that any disclo-

231. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

232. See 449 U.S. at 396-97:

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. . . . While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.

233. See 449 U.S. at 403-04 (Burger, C.J., concurring).

234. *E.g.*, *Clark v. State*, 159 Tex. Crim. 187, 261 S.W.2d 339, *cert. denied*, 346 U.S. 855 (1953).

235. *In re A.H. Robins Co.*, 107 F.R.D. 2 (D. Kan. 1985).

236. See text accompanying notes 133-34 *supra*.

sure was inconsistent with the privilege and therefore a waiver. Far from abrogating the privilege in situations where it would previously have been applied, then, the fairness analysis protects it unless there is some reason for removing it.

B. *Away from Absolutism?*

The second objection to the fairness analysis is broader: by emphasizing need, the fairness orientation threatens to abolish the absolute protection that is said to be the hallmark of the attorney-client privilege.²³⁷ As Judge Kaufman put it thirty-five years ago, "[t]he scope of the privilege contracts as the need for discovery grows."²³⁸ Undeniably, the fairness analysis emphasizes need; in most contexts it limits waiver to those situations in which the act upon which the waiver is premised creates a need for further disclosures by placing the privilege-holder's opponent at an unfair disadvantage. But if need is critical in that context, it arguably justifies access in the absence of some act that supports a waiver argument. Thus, the shift in focus could abolish the time-honored absolute privilege and replace it with a qualified privilege akin to work product. Coupled with the alleged inability of courts to balance the systemic interest in privilege against the need for evidence in specific cases,²³⁹ this revision could "subject the privilege to the hazards of fortune."²⁴⁰ This potential seems to have been realized in cases where courts reason that the privilege-holder has waived by raising certain issues even without using privileged material.²⁴¹

The actual risks do not appear to justify concern about undermining the theoretical absoluteness of the privilege. First, the fairness argument does not accept *every* need as sufficient. To the contrary, it is not only limited to situations in which there has been some act upon which a waiver can be premised, it also is limited to unfairness flowing from that act rather than the mere existence of the privilege. The problem with the overbroad "putting in issue" cases is that they disre-

237. *E.g.*, Saltzburg, *supra* note 91, at 299 (absolute protection the "principal difference" between attorney-client and work product privileges).

238. *Magida ex rel. Vulcan Dentinning Co. v. Continental Can Co.*, 12 F.R.D. 74, 77 (S.D.N.Y. 1951).

239. *E.g.*, Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 464 (1977) ("Courts are wholly unwilling to balance in discrete cases the harms of excluding evidence against the benefits of the attorney-client privilege."). Thus, it has been noted that courts are most willing to find a waiver of the privilege against self-incrimination in criminal cases when testimony is important to guilt or innocence. Note, *supra* note 122, at 1762.

240. *Developments*, *supra* note 6, at 1641.

241. See text accompanying notes 133-34 *supra*.

gard this distinction. It therefore seems odd to "protect" the privilege by rejecting flexible waiver rules that preserve privilege protection where it would previously have been lost.

Moreover, if explicit recognition of the fairness analysis leads to modification of other rules to cope with special unfairness resulting from the existence of the privilege, that is not necessarily a bad thing. It may well be that the broader "putting in issue" cases present situations in which the law should be adapted to accommodate such concerns.²⁴² But the waiver format provides no analytical tools for developing such rules, and waiver rules should not be distorted in place of analysis of the underlying issues.

Second, the absolutism of the privilege was often self-defeating because it engendered such rigid pitfalls that the theoretically absolute protection was too often nonexistent. A good example is provided by the eavesdropper cases. Animated by the absolute protection afforded by the privilege, Wigmore decreed that the privilege-holder bear the risk that the lawyer-client communication might be broached by an outsider, no matter how fortuitous or criminal the interception.²⁴³ Even today, some courts hold the privilege inapplicable where interlopers manage to obtain privileged material,²⁴⁴ although others protest this unfairness.²⁴⁵ Thus, the theory of absolute protection may be little more than a theory; surely we need not abandon fairness in service to a mirage.

Third, pessimism about the courts' ability to weigh the privilege against need may be overstated. The argument is typical of slippery-slope analysis — the courts will always find the general interest in the privilege outweighed by the immediate need of the opponent for relevant privileged material.²⁴⁶ But the objection seems more applicable to the traditional purpose analysis²⁴⁷ than to the fairness approach. The assumption that the material will always seem highly important is doubtful in civil litigation, where discovery can range far and wide.²⁴⁸ Moreover, experience with opinion work product suggests that courts can credit the needs of privilege while evaluating need-based argu-

242. For a discussion of some such concepts, see text accompanying notes 139-44 *supra*.

243. 8 J. WIGMORE, *supra* note 2, § 2326.

244. *E.g.*, *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) (privileged materials stolen from opponent's garbage).

245. *E.g.*, *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982) (rejecting Wigmore doctrine as "atavistic").

246. *See* Schauer, *supra* note 226, at 374 (describing fear that judge will not adhere to principle when called upon to apply it as reason for avoiding slippery-slope situation).

247. *See* text accompanying notes 107-11 *supra*.

248. *See* note 20 *supra*.

ments. In a recent case, for example, a divided panel of the Third Circuit held it was error to order production of attorney memoranda provided to expert witnesses.²⁴⁹ Despite the strong need for access to such materials for effective cross-examination,²⁵⁰ the court directed the district judge to perform an in camera review to redact all attorney opinions.²⁵¹ The case is not unique in upholding a privilege claim despite a showing of need.²⁵² Indeed, some find the protection of opinion work product to be effectively as absolute as that actually accorded material covered by the attorney-client privilege, despite the authority to order production in cases of need.²⁵³ Balanced against the impact of automatic disclosure without reference to fairness or countervailing costs, concern that the courts will be unable to perform a genuine balancing seems unimportant.

Finally, recent trends in other areas of attorney-client privilege law show that need is an emerging justification for abrogating privilege. Thus, recent revisions of ethical rules emphasize the attorney's duty to disclose client confidences to prevent client wrongdoing.²⁵⁴ Although

249. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984). The lower court's decision had apparently been based on the requirement of FED. R. CIV. P. 26(b)(4)(A)(i) that, as to testifying experts, the grounds for the opinions of the expert witness are to be disclosed. See 738 F.2d at 590-91; see also note 203 *supra*. The panel rejected this argument, 738 F.2d at 593-95, stressing the special protections accorded opinion work product. 738 F.2d at 592-93.

250. See note 207 *supra* and accompanying text.

251. *Bogosian*, 738 F.2d at 595-96.

252. For a similar example, see *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674 (S.D.N.Y. 1983), in which plaintiff's vice-president testified at his deposition that in preparation for the deposition he had looked at the privileged document in dispute. Defendant argued that this predeposition use of the document constituted a waiver, urging also that "any privilege is overcome by the critical importance of these documents to the litigation." 101 F.R.D. at 679. The court rejected these arguments, stating that "I see no facts which would warrant a discretionary decision to override the privilege." 101 F.R.D. at 679; see also *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) (party seeking privileged information must make "strong showing of need" to breach privilege); *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 781 (S.D.N.Y. 1982) ("[T]he value to Beatrice is outweighed by the principle precluding disclosure of this type of work-product."). In the same vein, recall that some courts hesitate to find a waiver as to materials disclosed during settlement negotiations despite persuasive reasons for disclosure. See text accompanying notes 150-52 *supra*. What these cases show is that judges can exercise self-restraint and do genuine balancing on the issue of waiver.

253. *E.g.*, *In re Sealed Case*, 676 F.2d 793, 812 n.72 (D.C. Cir. 1982); *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973). In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Court said that it was "not prepared at this juncture to say that such material is always protected by the work product rule," but that disclosure depended upon "a far stronger showing of necessity and unavailability" than would be true of other forms of work product. 449 U.S. at 401-02. There are cases directing disclosure of opinion work product. See, *e.g.*, *AM Intl., Inc. v. Eastman Kodak Co.*, 35 Fed. R. Serv. 2d (Callaghan) 311 (N.D. Ill. 1982), described in note 135 *supra*.

254. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983), allowing the lawyer to reveal information to prevent the client from committing a crime likely to result in death or bodily harm. The originally proposed rule was broader, allowing disclosure to prevent crimes or frauds likely to result in financial harm, but it was narrowed after objections from bar

this provision might be analogized to the crime/fraud exception,²⁵⁵ it goes further because it does not depend on the client's misuse of the privileged relationship but rather rests on recognition of the greater need for disclosure. More telling is the rule that the lawyer may disclose client confidences to rebut attacks on him, whether by the client or others.²⁵⁶ Whatever the propriety of recognizing the needs of lawyers as superior to the needs of others,²⁵⁷ the reality is that need-based limitations on the privilege are on the rise. There is no reason to reject more flexible treatment of waiver because it also incorporates concepts of need.

CONCLUSION

Attitudes toward waiver reflect attitudes toward privilege.²⁵⁸ Courts have traditionally indulged their dislike for the attorney-client privilege by finding excuses for withdrawing it, couched in terms of the purposes of the privilege, which make preservation of the privilege perilous. But this attitude is costly in civil litigation, and this article has therefore proposed recasting the question in terms of whether there is a reason for withdrawing privilege protection. This shift in focus leads to the conclusion that waivers should be based on fairness, which is the emerging trend in the courts. The proper emphasis of the fairness analysis, in turn, is unfairness resulting from the act upon which the waiver argument is premised. The prime concern is that a

groups. The narrower version has caused much controversy. See, e.g., Hall, *States Modifying ABA's Ethics Rules*, Legal Times, Aug. 12, 1985, at 1, col. 2, at 4-5. This development may be seen as part of an ongoing debate about the relative importance of increased access to evidence as opposed to client confidentiality. See, e.g., Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981); Frankel, *supra* note 52; cf. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984) (impact of rules regarding lawyer's duties with regard to client perjury).

255. See text accompanying notes 234-35 *supra*.

256. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983); see *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir.) (institution of suit against lawyer not a waiver for subsequent proceedings), *cert. denied*, 106 S. Ct. 1518 (1986).

257. Consider the trenchant comments of Professor Rhode:

[N]othing . . . explains why disclosures to protect lay victims will erode client trust, while revelations to secure attorneys' financial interests will not. . . . Once one acknowledges that clients' general expectation of confidentiality can be maintained despite some limited risk of betrayal, it is unclear why the pecuniary concerns of lawyers should assume priority over the potentially more significant claims of third-party victims.

Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 615-16 (1985); see *Nakasian v. Incontrade, Inc.*, 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976) (lawyer who sues former client may use confidential information about former client's affairs to attach its funds).

258. "The courts' attitude toward the waiver varies inversely to their attitude toward the privilege. The greater the desire to find and maintain the privilege, the less the desire to find waiver and vice versa." Note, *Privileged Communications Between Attorney and Client — Waiver of Privilege*, 16 MINN. L. REV. 818, 819 n.4 (1932).

privilege-holder may affirmatively use privileged material to garble the truth, while invoking the privilege to deny his opponent access to related privileged material that would put the proffered evidence in perspective.

Applying this fairness analysis to recurrent civil litigation situations suggests clear resolutions for some enduring problems. Thus, the "putting in issue" waiver should be limited to situations in which the privilege-holder makes affirmative use of privileged material as evidence; it should not be imposed as a tax on the decision to raise certain issues.²⁵⁹ Similarly, inadvertent revelation of damaging material to an opponent should not work a waiver.²⁶⁰ Beyond these situations, the fairness analysis requires a sometimes difficult assessment of the circumstances of the case in order to decide whether to find a waiver. Where privileged information has been shared, for example, a key question is whether the sharing has given it such currency that denying it to the opponent would threaten to make a mockery of justice.²⁶¹ Similarly, where material has been used in witness preparation, the question is whether the opponent will be unfairly hampered in cross-examining the witness without the material.²⁶²

The further implications of this approach remain uncertain. Shifting the focus from the waiver issue to fairness need not lead down a slippery slope to the demise of the privilege altogether, but expansion of the analysis into new areas might lead to new complexities. An obvious example would be relaxation of the traditional eavesdropper rule, which places on the privilege-holder total responsibility for ensuring confidentiality of attorney-client communications.²⁶³ More difficult issues may arise with extension of the analysis to criminal cases.²⁶⁴ If these prospects deter courts from adopting this analysis, they may continue simultaneously to declare that the privilege is sacred and to devalue it with hair-trigger waiver decisions.²⁶⁵ If so, waiver will remain unnecessarily tricky, and privilege protection will remain unnecessarily perilous.

259. See text accompanying notes 133-47 *supra*.

260. See text accompanying notes 153-71 *supra*.

261. See text accompanying notes 165, 196-97 *supra*.

262. See text accompanying notes 218-25 *supra*.

263. See text accompanying notes 243-45 *supra*.

264. See Hazard, *Perspectives on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978) (hard core of privilege is in criminal cases).

265. Cf. *Rogers v. United States*, 340 U.S. 367, 378 (1951) (Black, J., dissenting) (allowing waiver of fifth amendment privilege against self-incrimination without knowledge relegates privilege to "second rate position").