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Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege

It is well-established\(^1\) that intentional disclosure of communications subject to the attorney-client privilege\(^2\) by the attorney or client\(^3\) waives the privilege.\(^4\) Traditionally, courts have held that unintentional or inadvertent disclosure\(^5\) also waives the attorney-client privilege. Courts have found the privilege waived because they assume that inadvertent disclosure shows that the client did not intend to keep the disclosed material confidential.\(^6\) Alternatively, courts have reasoned that inadvertent disclosure renders the privilege useless to the client.\(^7\)

1. Under Federal Rule of Evidence 501, rules of privilege at the federal level are developed by the federal courts. Rule 501 provides in part:

   Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

   FED. R. EVID. 501.


2. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950), provides a definition of the attorney-client privilege which is often cited. The court stated that the privilege applies only if:

   (I) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Wigmore's definition of the privilege is also cited frequently. He states that the privilege applies to the following situation:

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

8 J. WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961) (emphasis omitted).

3. The client is theoretically the only person who can waive the attorney-client privilege. However, the client can implicitly or explicitly authorize the attorney to waive the privilege. See note 27 infra.

4. See notes 25-26 infra and accompanying text.

5. Inadvertent disclosure is the unintentional revelation of the contents of a document otherwise subject to the attorney-client privilege. This definition is refined at notes 27-30 infra and accompanying text.

6. See notes 38-39 infra and accompanying text.

7. See notes 41-42 infra and accompanying text.
The problem of inadvertent disclosure in large document productions challenges traditional assumptions about the waiver of the attorney-client privilege. Privileged documents can easily slip through a screening procedure into adversaries' hands. This problem has become increasingly common as litigation and document productions grow in size. In response to the increased difficulty of preventing disclosure, many courts have modified or abandoned the traditional approach. Some of these courts find that inadvertent disclosure of documents waives the attorney-client privilege unless the intervention of an outside force caused the disclosure. Other courts hold that inadvertent disclosure waives the privilege only if the client has failed to take reasonable precautions to maintain

8. This Note examines inadvertent disclosure and the attorney-client privilege in the context of document productions. Inadvertent disclosure also occurs in other settings. See, e.g., Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 257-61 (N.D. Ill. 1981) (privilege waived when third party discovered documents in a trash container); In re Grand Jury Proceedings Involving Berkeley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979) (company may claim the privilege for documents "stolen" and disclosed by a former employee), aff'd as modified, 629 F.2d 548 (8th Cir. 1980).

9. In Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978), the court described the difficulty of maintaining confidentiality when responding to a large request for documents:

There were literally millions of ways for mistakes to be made in the screening process. For example, mistakes could easily occur during any of the millions of purely mechanical steps necessary for successful screening. . . . The failure to perform so simple a mechanical act as the insertion of a document into a folder would also result in the production of privileged material. In addition to the plethora of opportunities for mechanical blunders, there were inherent in the process numerous opportunities to overlook privileged material resulting from what might be characterized as visual or judgmental mistakes. 573 F.2d at 652.


12. See note 62 infra and accompanying text.
This Note evaluates these judicial approaches to inadvertent disclosure in the context of document productions. Part I briefly reviews the purposes of the attorney-client privilege and argues that any test of waiver should be based on the client's intent to maintain confidentiality. Part II examines the traditional approach to waiver and rejects the rationales which support it. Part III concludes that a test based on the sufficiency of precautions taken against disclosure, rather than a test based on the intervention of an outside force, best reflects a client's intent. Part IV examines various factors that might be included in the reasonable precautions test.

I. PURPOSES OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege rests on the assumption that expert legal advice is essential in our society. The privilege encourages consultation with lawyers by assuring the client that neither he nor his attorney may be compelled to disclose confidential communications between the two. While the privilege is designed primarily to benefit the client, who is permitted to obtain legal advice without

13. See note 77 infra and accompanying text.
14. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("the privilege recognizes that sound legal advice . . . serves public ends"); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice."); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) ("In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential."); 8 J. WIGMORE, supra note 2, § 2285, at 527 ("The relation must be one which in the opinion of the community ought to be sedulously fostered.") (emphasis omitted); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, Standard Sil advisory committee note, at 511-1 (1982) [hereinafter cited as 2 J. WEINSTEIN] ("the central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy of confidentiality").
15. See Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (advise of attorneys can only "be safely and readily availed of when free from the consequences or the apprehension of disclosure"); Permian Corp. v. United States, 665 F.2d 1214, 1218 (D.C. Cir. 1981) (the privilege "exists . . . to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential") (quoting United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980)); In re Penn Cent. Commercial Paper Litigation, 61 F.R.D. 453, 464 (S.D.N.Y. 1973) ("The theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege.") (footnote omitted); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) ("To induce clients to make . . . communications [with attorneys], the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.") (emphasis omitted); 8 J. WIGMORE, supra note 2, § 2291, at 545.
16. The privilege benefits clients by encouraging the attorney-client relationship. See note 15 supra. Moreover, commentators have suggested that the privilege benefits clients by promoting their rights to individual privacy. See, e.g., Krattenmaker, Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach, 64 Geo. L.J. 613, 651-52 (1976) ("By providing individuals with a tool to control the limits of the dissemination of personal information they choose to disclose, testimonial privileges serve as important protectors of the right of privacy."); see also Louisell, Confidentiality, Conformity and Confusion: Priv-
sacrificing confidentiality, it also benefits attorneys\textsuperscript{18} and, arguably, society as a whole.\textsuperscript{19}

These benefits of the attorney-client privilege, however, are qualified by its substantial cost. The attorney-client privilege suppresses evidence by protecting certain communications between attorney and client.\textsuperscript{20} As neither the attorney nor the client can be compelled

\textit{illeges in Federal Court Today, 31 Tul. L. Rev. 101, 110-11 (1956) ("Primarily [privileges] are a right to be let alone, or a right to unfettered freedom, in certain narrowly prescribed relationships. . . . ").}

17. The privilege consistently has been defined to protect only confidential attorney-client communications concerning legal matters. See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950) (to be protected, the communication must have been made for the purpose of "securing primarily . . . an opinion of law or . . . legal services or . . . assistance in some legal proceeding."). It is conceded that "[i]t is not easy to frame a definite test for distinguishing legal from nonlegal advice" because "[a] lawyer is sometimes employed without reference to his knowledge and discretion in the law." 8 J. Wigmore, \textit{supra} note 2, § 2296, at 566-67. Nevertheless, confidential communications not made for the purpose of obtaining legal advice are not protected by the attorney-client privilege. \textit{Id.}, § 2294, at 562; \textit{see also} Supreme Court Standard 503, \textit{cited in} 2 J. Weinstein, \textit{supra} note 14, at 503-1.

18. The attorney-client privilege benefits attorneys as well as clients. First, the existence of the privilege may make an attorney's job easier. Commentators have pointed out that even given the protection of the privilege, "clients do not universally disgorge the complete truth to their lawyers. Without it, the doctrine teaches, competent advice and advocacy would become more nearly unavailable than they are now." M. Frankel, \textit{Partisan Justice} 64 (1980); \textit{see also} 2 J. Weinstein, \textit{supra} note 14, ¶ 503[02], at 503-15 ("The privilege is now seen to rest on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously . . . . ").

It also has been suggested that the privilege originally was created to protect "the oath and the honor of the attorney." 8 J. Wigmore, \textit{supra} note 2, § 2290, at 547 (emphasis in original). Without the privilege, the attorney might disclose a client's secrets, thus "perverting the function of his counselling." Louisell, \textit{supra} note 16, at 112. According to Wigmore, this rationale was replaced by one which emphasized "the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal advisor." 8 J. Wigmore, \textit{supra} note 2, § 2290, at 547 (emphasis in original). Some scholars, however, still believe that the protection of the attorney's honor remains a viable rationale for the privilege.

The customary formulation of the issue to be resolved in determining the scope of the attorney-client privilege cheapens what is probably the most basic obligation of any lawyer, an obligation that gives his work great dignity and purpose—the obligation to serve his clients rather than to become part of the official machinery that judges them.

A. Schuler, \textit{The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?}, 52 Univ. of Col. L.R. 349, 355 (1981); \textit{see also} Louisell, \textit{supra} note 16, at 112. But see M. Frankel, \textit{supra}, at 64 (1980) (suggesting that a lawyer's ethics are compromised by having to maintain the secrecy of "evil and needed facts").


to reveal the contents of protected communications, evidence which might aid the “investigation of the truth” is excluded from the trial.

Despite the cost of the attorney-client privilege, virtually no one proposes that it be abolished. Instead, courts define the privilege narrowly and apply the privilege only to situations that promote its underlying purpose. Thus, courts find the privilege waived when protecting confidentiality is not necessary to encourage consultation with a lawyer. Waiver frequently occurs when the client demon-

BOOK OF THE LAW OF EVIDENCE § 87, at 195 (E. Cleary 2d ed. 1972); M. FRANKEL, supra note 18, at 64-65 (1980).

21. 8 J. WIGMORE, supra note 2, § 2291, at 554.

22. See, e.g., Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826) (the privilege is “indispensable for the purposes of private justice”); C. MCCORMICK, supra note 20, § 87, at 176 (society would be “outraged” at any attempt to abolish the privilege); Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061, 1062 (1978) (“[T]he issue concerning the attorney-client privilege is not whether it should exist, but precisely what its terms should be.”); Note, The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?, 81 MICH. L. REV. 665, 666 n.5 (1983).

23. The privilege does not protect all communications between attorney and client. It applies only to confidential communications from client to attorney to obtain legal advice. See notes 2 and 17 supra. Moreover, when applying the attorney-client privilege to specific cases, courts state that the privilege is to be narrowly construed. See, e.g., Radiant Burners, Inc. v. American Gas Assn., 320 F.2d 314, 323 (7th Cir. 1963) (quoting 8 J. WIGMORE); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 257 (N.D. Ill. 1981) (“A court must balance the possibility that the privilege indirectly promotes free and honest communication with the policy of liberal discovery to enhance the search for truth. For these reasons, the privilege must be strictly construed.”); Teachers Ins. & Annuity Assn. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981) (“Because the privilege covers materials which otherwise would be discoverable . . . it is to be construed as narrowly as is consistent with its purpose.”); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547 (D.D.C. 1970); 8 J. WIGMORE, supra note 2, § 2291, at 554.

Some commentators justify construing the privilege narrowly by insisting that its “benefits are all indirect and speculative” while its cost is “plain and concrete.” 8 J. WIGMORE, supra note 2, § 2291, at 554; see also C. MCCORMICK, supra note 20, § 87, at 175-76; 2 J. WEINSTEIN, supra note 14, ¶ 503[02], at 503-15 (“This assumption underlying the privilege is unverifiable. . . .”). These commentators argue that it is difficult to know whether protecting confidential communications encourages the attorney-client relationship, or whether that relationship is good for society. On the other hand, the cost of the privilege is clear: evidence which would have been used in the search for truth at trial is excluded. However, another scholar doubts that the cost of the privilege is any easier to verify than its benefits. “Just discussions of evidentiary privileges . . . suggest without evidence or analysis that all privileges necessarily impair the search for truth.” Alschuler, supra note 18, at 350 n.6 (1981).

Even assuming that the cost of the privilege is more concrete than its benefits, the benefits might still outweigh the cost. “[It] is nevertheless submitted that there are things even more important to human liberty than accurate adjudication. One of them is the right to be left by the state un molested in certain human relations.” Louisell, supra note 16, at 110. For Louisell, “the fact that the existence of these guarantees sometimes results in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges’ vitality.” Id. at 101.

24. This assumes that the court defines the purpose of the privilege as the promotion of the attorney-client relationship, as most courts do. See notes 14-15 supra and accompanying text. A court defining the purpose of the attorney-client privilege differently would find waiver under different circumstances. See, e.g., Cohen v. Jenkintown Cab Co., 238 Pa. Super. 456, 464, 357 A.2d 689, 693-94 (1976) (“The privilege exists only to aid in the administration of justice, and when it is shown that the interests of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed.”).
strates a lack of concern with confidentiality by intentionally revealing all\(^25\) or part\(^26\) of his communications with the lawyer. Before

\(^{25}\) Courts agree that a client's intentional disclosure of documents protected by the attorney-client privilege waives the privilege. See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) ("Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege."); In re Weiss, 596 F.2d 1185 (4th Cir. 1979); In re Grand Jury Subpoena Served Upon Simon Horowitz, 482 F.2d 72, 81 (2d Cir.) ("disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed"), cert. denied, 414 U.S. 867 (1973); United States v. Krulewitch, 145 F.2d 76, 79 (2d Cir. 1944) ("When their possessor chooses to bring into the light the transaction to which the communications relate, he may no longer suppress the communications themselves. The justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public."); In re Subpoenas Duces Tecum to Fulbright & Jaworski, Fed. Sec. L. Rep. (CCH) ¶ 99,505 (D.D.C. Sept. 25, 1983) (intentional disclosure of report to SEC precludes assertion of the attorney-client privilege in a subsequent lawsuit); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981) ("The justification [for waiving the privilege] is that the nature of the transaction and the surrounding circumstances are inconsistent with the notion that the communication was intended to be confidential.") (footnote omitted); W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976) ("One cannot produce documents and later assert a privilege which ceases to exist because of the production."); In re Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 464 (S.D.N.Y. 1973) ("Once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies."); D'Ippolito v. Cities Serv. Co., 39 F.R.D. 610 (S.D.N.Y. 1965) ("Any privilege that may have attached was destroyed by the voluntary act of disclosure."); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464 (E.D. Mich. 1954); 2 J. Wigmore, supra note 14, § 511[02], at 511-6, 511-7 (1982); 8 J. Wigmore, supra note 2, §§ 2311, 2325, 2327, at 599, 632, 634.

\(^{26}\) A client's disclosure of some protected documents can waive the attorney-client privilege for all documents relating to the same topic. Wigmore terms this phenomenon "waiver by implication." 8 J. Wigmore, supra note 2, § 2327, at 635. The purpose of the rule is to prevent selective disclosure, i.e., clients using the privilege to protect some attorney-client communications while revealing others which benefit their case. See In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) ("A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes."); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("Thus, a party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving."); I.T.T. Corp. v. United Tel. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) ("However, the privilege was intended as a shield, not a sword. Consequently a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving.").
formulating a standard to govern waiver of the attorney-client privilege, inadvertent disclosure must be defined. Inadvertent disclosure at a document production is the accidental production of a document otherwise subject to the attorney-client privilege, whereby the adversary acquires knowledge of its contents. This describes a narrow range of cases. First, inadvertent disclosure cases are distinct from those in which anything less than the content of the communication has been revealed. Second, inadvertent disclosures do not tently . . . does not constitute a waiver as to other privileged material.”); see also Principle Business Enterprises v. United States, 210 U.S.P.Q. 26, 27 n.2 (1980). But see Permian Corp. v. United States, 655 F.2d 1214, 1220-21 (D.C. Cir. 1981).

27. Inadvertent disclosures during document productions by either the client or his attorney can waive the attorney-client privilege. Technically, the client holds the privilege, and he alone can waive it. See C. MCCORMICK, supra note 20, § 93, at 194; 8 J. WIGMORE, supra note 2, § 2327, at 634-35.

However, when an attorney negotiates or litigates on behalf of a client, the courts will probably conclude that the client has impliedly authorized the attorney to waive his privilege. See, e.g., Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir.), cert. denied, 338 U.S. 860 (1949); 8 J. WIGMORE, supra note 2, § 2325, at 632-33. See generally Note, The Attorney-Client Privilege After Attorney Disclosure, 78 Mich. L. Rev. 927 (1980). In the context of document productions, then, an attorney will be authorized to waive the client's privilege in most instances. See In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.) (“Original counsel acted within the scope of authority conferred upon it, and [the client] may not now be heard to complain about how that authority was exercised.”), cert. denied, 444 U.S. 915 (1979). But cf. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (inadvertent disclosure at document production by negligent attorney does not waive the client's attorney-client privilege); Cities Serv. Helex, Inc., 214 Ct. Cl. 765, 768-69 (1977) (government attorney had no authority, express or implied, to waive the privilege), discussed at note 11 infra. This is appropriate. If the client is willing to vest the attorney with the authority to decide which documents to produce, the client should abide by those decisions. Otherwise, clients could avoid waiver simply by allowing their attorneys to handle all document productions. This Note's discussion of inadvertent disclosure assumes that the client has implicitly authorized the attorney to waive the privilege, or that the client himself is responsible for the inadvertent disclosure. It excludes cases where the attorney acts in bad faith, see 8 J. WIGMORE, supra note 2, § 2325, at 633, or otherwise acts outside the scope of his implied authority. The sole issue addressed here is whether inadvertent disclosure at document productions by a person authorized to waive the attorney-client privilege waives the privilege.

It should be noted, however, that an attorney acting within his implied waiver authority may still be liable to the client for malpractice if he erroneously fails to protect privileged documents. This conclusion is based on the elements of a tort action for attorney malpractice: (i) the duty to use such skill, prudence, and diligence as would the "reasonable attorney," (ii) breach of duty of care, (iii) proximate cause between the negligent act or omission and harm to the plaintiff, and (iv) actual loss or harm to the plaintiff. See generally Haughey, Lawyers' Malpractice: A Comparative Appraisal, 48 Notre Dame Law. 888 (1973); Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755 (1959). If an attorney disclosure constitutes a breach of his duty of care and, as a result, proximately causes the plaintiff injury, then it appears that the client can bring an action for malpractice. At least one case has hinted that such an action may be available. In Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982), the court said that an attorney's unauthorized and accidental disclosure of documents might be characterized as "negligent." 531 F. Supp. at 955. Although the court said nothing about a malpractice action, presumably the client would be able to seek redress for injuries proximately caused by the attorney's negligence. The most problematic part of such an action would be proof of damages: in the typical case it is difficult to envision how a client would demonstrate injuries from disclosure of confidential documents.

28. The attorney-client privilege protects the confidentiality of the contents of communica-
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include those which were intended at the time of disclosure but were regretted later. 29 Finally, the term inadvertent refers to the disclosure: an intentional disclosure that has the unintended effect of waiving the privilege is an inadvertent waiver, not an inadvertent disclosure. 30

The purpose of the privilege dictates that the client’s intent to disclose 31 be the focus of a test of waiver. The privilege encourages
attorney-client communications by protecting only those documents which the client intended to be confidential.32 Thus, intentional disclosure of privileged communications during a document production waives the attorney-client privilege, as the client has shown that he is not "desirous of secrecy."34 Inadvertent disclosure during a document production, however, presents a different question. In cases of inadvertent disclosure, the client may or may not intend that the disclosed material remain confidential.35 This suggests that some, but


33. If a client intends to disclose a privileged document and does so of his own accord, then the privilege should be waived. The privilege is designed to protect only those communications intended to be confidential. See note 32 supra. If the client no longer intends confidentiality, then there seems little reason to uphold the privilege. Cf. Suburban Sew 'N Sweep v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981) (citations omitted) ("the privilege no longer applies when the information is communicated in the presence of a third party, . . . unless that party's presence does not indicate lack of intent to keep the communication confidential").

34. 8 J. Wigmore, supra note 2, § 2311, at 599-603.

35. The question in inadvertent disclosure cases is whether the client intends that the documents be kept confidential. See, e.g., Suburban Sew 'N Sweep v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981) ("The justification for these decisions is that the nature of the transaction and the surrounding circumstances are inconsistent with the notion that the communication was intended to be confidential."); Suburban Sew 'N Sweep, 91 F.R.D. at 258 n.3 ("[T]he traditional rule effectively presumed that if the parties to a communication intended it to be and remain confidential, they could protect its confidentiality."); National Helium Corp. v. United States, 219 Ct. Cl. 612, 614 (1979) ("It seems clear to us that, as a subjective matter, plaintiff wished to retain its privilege as to all attorney-client documents. The only question is whether the procedure followed by plaintiff was so lax, careless, or inadequate that plaintiff objectively be considered as indifferent to disclosure.").
not all, cases of inadvertent disclosure should waive the attorney-client privilege.

Courts have formulated several tests to govern waiver of the attorney-client privilege during document productions. The first of these, the traditional approach, is examined in Part II.

II. THE TRADITIONAL APPROACH

Under the traditional view, inadvertent disclosure waives the attorney-client privilege.36 Traditionalists find waiver because they view inadvertent disclosure, like intentional disclosure, as inconsistent with the purposes of the privilege.37 Two rationales support the traditional view: first, disclosure betrays a lack of intent to maintain the confidentiality of the communications; second, disclosure makes achievement of the benefits of the privilege impossible.

Proponents of the first rationale argue that an attorney and his client possess sufficient means to preserve the secrecy of a communication should they so desire.38 Thus, any disclosure, deliberate or inadvertent, reflects a lack of intent to maintain confidentiality and waives the privilege.39 However, the assumption that an attorney and client can always keep their communications secret appears to be highly unrealistic. A party could genuinely intend confidentiality


37. See Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) ("Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege."); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954) ("Since the privilege exists in derogation of the overriding interest in full disclosure of all competent evidence, where the policy underlying the rule can no longer be served [i.e., protection of confidential communications], it would amount to no more than mechanical obedience to a formula to continue to recognize it."); see also W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771 (W.D. Okla. 1976) (quoting Underwater Storage).

38. See 8 J. WIGMORE, supra note 2, § 2326, at 633 ("Since the means of preserving secrecy of communication are largely in the client's hands and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its protection to third persons . . . ."); see also 8 J. WIGMORE, supra note 2, § 2325, at 633 ("[The law] leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents.").

39. Courts applying the traditional approach refer to the client's ability to prevent disclosure, and find that failure to do so justifies waiver. See W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp 771, 775 (W.D. Okla. 1976) ("[d]efendant could have taken necessary steps to remove purportedly privileged documents prior to permitting discovery"); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954) ("It is difficult to be persuaded that these documents were intended to remain confidential . . . . One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege.").
and take steps to preserve it, only to have his communications disclosed through electronic surveillance, theft, or erroneously compelled disclosure. Thus, disclosure in itself is not an accurate indication of a lack of intent to retain confidentiality.

The second rationale for the traditional approach argues that even if disclosure in some cases does not evidence a lack of confidential intent, in all cases it does make achievement of the privilege's purpose impossible. The privilege is designed to encourage attorney-client communication by maintaining the confidentiality of those communications. Absent that confidentiality, assertion of the privilege would "amount to no more than mechanical obedience to a formula" with no real benefit conferred on the client.

It is true that confidentiality can never be restored to a communication that has been disclosed. This loss of confidentiality can be particularly harmful when disclosure of documents is made to one who is an adversary outside the context of the litigation, such as a business competitor. But the damage need not extend to the litigation at hand. Litigation takes place in a controlled environment where lack of confidentiality outside the courtroom is irrelevant to the proceedings within. For all practical purposes, a court can repair the damage done by disclosure of a confidential document by preventing use of that document at trial. Indeed, recipients of disclosed materials can be prohibited even from basing questions on

40. Cases such as these, where disclosure is caused by a force beyond the control of clients and their attorneys, have prompted some courts to modify the traditional approach. This modification, the voluntary disclosure test, is explored in Part III-A infra.

41. See note 15 supra and accompanying text.


43. In the context of litigation, the opposition is by definition an adversary. But the adversarial relationship may not persist once litigation has ended, and disclosure that was damaging in litigation may not be harmful thereafter. However, when litigation occurs between business competitors, for example, the disclosure can be damaging even after the litigation has ended. Within this context, courts are particularly sensitive to the potential harm a litigant may suffer when it inadvertently discloses privileged information. See, e.g., Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651-52 (9th Cir. 1978); Champion Intl. v. International Paper Co., 486 F. Supp. 1328, 1332-33 (N.D. Ga. 1980); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 519 (D.C. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976); Dunn Chem. Co. v. Sybron Corp., 1975-2 Trade Cas. 0 7,463 (S.D.N.Y.).

44. See note 43 supra and cases cited therein; see also 2 J. Weisbein, supra note 14, Standard 512 advisory committee note, at 512-1, 512-2. Restoring confidentiality to previously disclosed documents has the same effect as excluding evidence under the exclusionary rule: evidence known to all involved in the litigation is removed entirely from the consideration of the court. Compare Weeks v. United States, 232 U.S. 383 (1914) (fourth amendment bars the use of evidence secured through an illegal search and seizure), with Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978) (restoration of confidentiality to inadvertently disclosed documents removes such documents from court's consideration).
them. Thus, courts can insure that the inadvertent disclosure does not affect the outcome of the litigation. It appears, then, that maintenance of the privilege despite disclosure can be a significant benefit to the client.

The value of maintaining the attorney-client privilege despite disclosure extends beyond the litigation at hand. The client may become involved in future lawsuits where adversaries will seek discovery of arguably privileged materials. If the attorney-client privilege covering specific documents was waived in prior litigation, the client will be unable to assert the privilege with regard to those documents. Thus, maintaining the attorney-client privilege despite disclosure in one lawsuit preserves the privilege for future lawsuits.

The behavior of many clients and attorneys also reinforces the conclusion that clients benefit from maintaining the privilege despite disclosure. Certainly the client who expends time and money contesting the issue perceives such a benefit. Moreover, parties to litigation will often stipulate at discovery that inadvertent disclosure of materials otherwise subject to the attorney-client privilege will not waive the privilege. Underlying this procedure is the assumption

45. Few courts discuss what procedure to use in permitting assertion of the privilege despite inadvertent disclosure. The logical procedure would be to treat the documents in question as if they had never been disclosed. See Data Sys. v. Philips Business Sys., No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. Jan. 8, 1981) (available on LEXIS, Genfed library, Dist file) (defendant may not "[b]ase[ ][q]uestions] on the information obtained from previous examination of that document"). There are, however, complications which attach to this procedure. Most notably, it may be difficult to determine whether a question was based upon a document now deemed to be privileged or on a non-privileged document. Perhaps because of such difficulties, it is hard to determine the scope and applicability of the rule barring questions based on inadvertently disclosed material. See 2 J. Weinstein, supra note 14, ¶ 512[02], at 512-5 ("The extent to which Standard 512 will bar the fruits of revealed matters is not clear."); SEC v. OKC Corp., 474 F. Supp. 1031, 1039-40 (N.D. Tex. 1979) (court allowed SEC to use a privileged document it had obtained as a basis for making demands for unprivileged information).

46. There are costs associated with allowing assertion of the privilege after disclosure. In many cases those costs are the same as those normally associated with a privilege asserted before disclosure: adversaries are barred from using materials that would otherwise facilitate the search for truth at trial. See notes 20-21 supra and accompanying text. In other instances, though, the costs may be greater. For example, a party might not promptly assert the privilege for inadvertently disclosed documents, and the opposing party might have reasonably relied on the availability of the documents for the trial. In such cases, the court should find the privilege waived. See notes 109-12 infra and accompanying text.

47. When the privilege has been waived during one litigation, it cannot be asserted in subsequent suits. See Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others . . . "); see also In re Penn Cent. Commercial Paper Litigation, 61 F.R.D. 453, 464 (S.D.N.Y. 1973) (holding that waiver in early proceeding with SEC prevents assertion of privilege in instant case).

48. This is not to deny the possibility of other client motivations for contesting the issue. It is possible, for example, that a client contests the issue simply as a means of delaying litigation. See note 88 infra for a more extensive discussion.

49. Parties can either stipulate by agreement that inadvertent disclosure during the document production will not waive the privilege, or obtain a court order to that effect. See Permian Corp. v. United States, 665 F.2d 1214, 1216 (D.C. Cir. 1981) (stipulation); Transamerica
that assertion of the privilege despite disclosure can have positive effects.

Even proponents of the traditional view have accepted the notion that assertion of the privilege despite disclosure can sometimes be beneficial. These courts generally allow assertion of the privilege when disclosure has resulted from bad faith on the part of the attorney.50 Thus, one can reasonably conclude that the second rationale for the traditional approach is invalid, since maintenance of the privilege despite disclosure can significantly benefit the client.

The foregoing discussion makes it no surprise that most courts and commentators have abandoned the traditional approach.51 Modern courts agree that the test should focus on the client's intent to maintain confidentiality, but disagree on how this is best accomplished. Part III examines judicial formulations of intent-based tests.

III. TESTS OF INTENT TO MAINTAIN CONFIDENTIALITY

Courts could try to ascertain a client's intent regarding the confidentiality of disclosed documents subjectively. Under this test, the client would testify that he did or did not intend the inadvertently disclosed documents to remain private, and the court would accordingly deem the privilege waived or preserved. Unfortunately, the cli-
ent’s strong interest in preventing use of formerly privileged documents at trial precludes a court from reasonably relying on the client’s assertions. Thus, a subjective test cannot be used. For this reason, courts and commentators rejecting the traditional approach advocate objective tests.

A satisfactory objective test employs factors that are reasonably connected to the actual intent of the client, and as a result, the test is more reliable than one based upon self-serving assertions of the client. The traditional allocation of the burden of proof also enhances the reliability of an objective test. Rather than requiring a court to evaluate a client’s bald claim of intent, it requires the client to bring forth evidence which demonstrates his intent. In addition to offering reliability, an objective test makes waiver of the privilege predictable. An objective test informs the client of the precautions

53. The fact that the client is contesting the issue in court suggests that the client has a strong interest in preventing the opposing party from using the documents. See note 48 supra and accompanying text.

54. The problems inherent in making subjective determinations of intent are recognized in diverse areas of law. In criminal law, courts have recognized that “except in extraordinary circumstances, criminal intent cannot be proved by direct evidence.” United States v. Haldeman, 559 F.2d 31, 115 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 933 (1977). In the area of intentional torts, courts have similarly not relied upon subjective intent. Intent there has meant “that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he would be dealt with by the jury, or even by the court, as though he had intended it.” Prosser On Torts, § 8, at 30 (2d ed. 1955); see also United States v. Andrews, 612 F.2d 235, 251 (6th Cir. 1979) (prosecutorial vindictiveness case noting the “difficulty of showing actual vindictiveness, which involves a determination of the prosecutor's state of mind”), reheg. en banc, 633 F.2d 449 (1980), cert. denied, 450 U.S. 927 (1981); Note, Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection After United States v. Goodwin, 81 Mich. L. Rev. 194, 206 n.61 (1982).

55. This reliance upon a reasonable connection between the factors employed and the actual intent of the client is as widespread in the law as the reluctance to employ subjective tests of intent, explored at note 54 supra. See United States v. Haldeman, 559 F.2d 31, 115-16 (D.C. Cir.) (en banc) (“it is . . . not only appropriate but also necessary for the jury to look at "all of the circumstances' in determining specific intent") (footnote omitted), cert. denied, 431 U.S. 933 (1977); W. LaFave & A. Scott, Handbook on Criminal Law, § 28, at 203 (1972) (“So of course [the criminal's] thoughts must be gathered from his words (if any) and actions in light of all the surrounding circumstances.”).

56. E.g., Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981) (“As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it.”) (citations omitted).

57. Predictability is generally considered a virtue in administration of the attorney-client privilege. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (“But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.”); Note, The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach, 69 Mich. L. Rev. 360, 372 (1970) (“[C]ourts have subjectively viewed situations after communications have been made, and have then retrospectively determined whether the privilege should apply. In so
he must take to prevent waiver despite disclosure. This is particularly useful to a client concerned about the potential of inadvertent disclosure in the context of a large document production.

The major disadvantage of an objective test is the possibility of inaccuracy in individual cases. Inevitably, an objective test becomes a standard of conduct that must be met rather than an inquiry into a particular client's intent. As a result, there will be cases in which the objective factors mandate one result while the client's actual intent dictates another. Thus, the preferred test will be the one in which the objective factors most closely match actual client intent. Courts and commentators have proposed two objective tests.

A. The Voluntary Disclosure Test

Some scholars and jurists have adopted a test which focuses on the voluntariness of a disclosure of privileged documents. Any voluntary disclosure waives the attorney-client privilege, while an involuntary disclosure does not.

58. Of the two objective tests discussed in this Note, the reasonable precautions test provides the client who wishes to preserve the attorney-client privilege with more guidance. It furnishes the client with a standard of conduct to which he may conform and thus avoid waiver. See notes 87-89 infra and accompanying text. The voluntary disclosure test is less helpful. However, it does assure the client that he will be protected against inadvertent disclosure which is caused by an outside force. See notes 63-68 infra and accompanying text.

59. Because the voluntary disclosure test does not apply to inadvertent disclosures at document productions, this benefit pertains only to the reasonable precautions test. See note 72 infra and accompanying text.

60. Oliver Wendell Holmes, in reference to determination of intent in fraud cases, said: “The standard of what is called intent is thus really an external standard of conduct under the known circumstances . . . .” O. HOLMES, THE COMMON LAW 107 (1963 ed.).

61. For a discussion of the possible inaccurate results which the reasonable precautions test might yield, see note 92 infra and accompanying text.

62. See Supreme Court Standard 511:

WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

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

2 J. WEINSTEIN, supra note 14, Standard 511, at 511-1.

The Supreme Court Standards were approved by the Court as Rules of Evidence for the Federal Courts. Though not accepted by the Congress (see note 1 supra for the text of the rule adopted), the standards are considered a guide to the federal rules of evidence as they now stand. Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978).

For cases using the voluntary disclosure test, see, e.g., In re Grand Jury Proceedings Involving Berkeley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979) (theft of privileged documents by a third party would not result in waiver), affd. as modified, 629 F.2d 548 (8th Cir. 1980); In re Penn Cent. Commercial Paper Litigation, 61 F.R.D. 453 (S.D.N.Y. 1973) (testimony of attorney at SEC proceeding about privileged information; held, privilege waived); see also
The test defines a voluntary disclosure as one made by the client's own act, regardless of whether or not that disclosure was intentional. Because this test presumes that clients possess the means to maintain secrecy, it concludes that any inadvertent disclosure by the client is due to negligence. The client's negligence implies a


In Champion, the court was asked to rule on the scope of waiver once disclosure occurred. The court notes that this case was not an involuntary disclosure case "where the information is acquired by third parties in spite of all possible precautions" because disclosure could have been "prevented by destroying the documents or rendering them unintelligible before placing them in a trash dumpster," 91 F.R.D. at 260. The court concedes that "this degree of precaution may seem extreme" but that it was within the power of the parties "to protect against disclosure." On these grounds, the court ruled the privilege waived.

One could argue that Suburban Sew 'N Sweep applies a reasonable precautions test, as the court examines the precautions taken by the client to prevent disclosure. However, the court examines these precautions primarily to determine whether the client or the outside force caused the disclosure. The court's emphasis on the client's presumed power to prevent the disclosure, rather than on the reasonableness of the client's actions, places this case in the voluntary disclosure category. For a detailed discussion of this case, see Comment, Applicability of the Attorney-Client Privilege to Communications Intercepted by Third Parties, 69 Iowa L. Rev. 263 (1983).

63. An intentional disclosure is different from a voluntary disclosure. The Supreme Court Standards recognize this distinction. The Standards examine the client's intent toward confidentiality only in determining whether the privilege initially applied to a document. See 2 J. WEINSTEIN, supra note 14, Standard 503 advisory committee note (a)(4), at 503-5 ("[T]he requisite confidentiality of communication is defined in terms of intent."). In determining whether disclosure of a document to which the privilege initially applied constitutes waiver, the Standards shift from an analysis of intent to an analysis of voluntariness. The inquiry is whether the disclosure was the result of the client's own act. Thus, in determining waiver, the Standards do not take into account whether the client intended to maintain confidentiality. So long as the act was voluntary, the privilege is waived. See 2 J. WEINSTEIN, supra note 14, Standard 511 advisory committee note, at 511-1, 511-2 (noting that the privilege is waived when disclosure occurs by the client's own act but not otherwise); cf. 2 J. WEINSTEIN, supra note 14, Standard 512, at 512-1 (no waiver if disclosure is compelled erroneously or made without opportunity to claim the privilege); see also Ladd, Privileges, 1969 LAW & Soc. ORD. 555, 588; Comment, Federal Rules of Evidence and the Law of Privileges, 15 WAYNE L. Rev. 1286, 1364, 1368 (1969).

64. Courts adopting the voluntary disclosure test retain this presumption from Wigmore's traditional approach, described at note 38 supra and accompanying text. See, e.g., Suburban Sew 'N Sweep, 91 F.R.D. 254, 261 (N.D. Ill. 1981). In ruling that the privilege was waived when a third party obtained documents from a trash dumpster, the court stated that "it is within [the client's] power to decide what precautions to take, and so to protect against disclosure."

65. This approach is essentially the same as that reflected in the first rationale of the traditional test: if a client desires secrecy, he can maintain it. See notes 38-40 supra and accompanying text. Under this rationale, waiver arises from the "lack of confidential intent implied from the negligence of the parties in not assuring privacy." Comment, supra note 63, at 1368. The voluntary disclosure test also implies negligence in these circumstances, but narrows its definition to exclude outside forces. Thus these two tests produce identical results in cases of inadvertent disclosure which do not involve an outside force: the client is deemed negligent and waiver of the privilege results.
lack of intent to preserve confidentiality and results in a waiver of the privilege.66

An involuntary disclosure, on the other hand, is defined narrowly as one caused by the intervention of an outside force.67 This intervention negates any inference of negligence, for the client cannot be held responsible for a disclosure caused exclusively by a force outside his control.68 Thus, the attorney-client privilege remains intact.

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66. Although the focus of the voluntary disclosure test is on whether or not an outside force caused the disclosure, courts applying the test sometimes consider the actions taken by the client to prevent disclosure. They examine the conduct of the client to determine whether the client or the outside force caused the disclosure. If a client has taken "all possible precautions," and disclosure nevertheless occurs, then an outside force is presumed responsible. See the discussion of Suburban Sew 'N Sweep, at note 62 supra.

In general, though, only disclosures caused by distinct outside forces preserve the attorney-client privilege under the voluntary disclosure test. This test is unsatisfactory when there is an outside force because it measures the client's intent too broadly. For example, consider a client who takes absolutely no disclosure precautions and who does not care about confidentiality. Disclosure occurs, but as a result of sophisticated electronic surveillance. Despite the client's demonstrated lack of interest in maintaining confidentiality, the privilege would not be waived under the voluntary disclosure test.

In contrast, the reasonable precautions test examines only the client's behavior. See Parts III-B and IV infra. Thus, in the preceding hypothetical, the reasonable precautions test would focus on objective manifestations of the client's indifference toward confidentiality and would deem the privilege waived.

As a practical matter, however, most disclosures involving an indifferent client will be caused by that indifference rather than by an unrelated outside force. The voluntary disclosure test would then correctly reflect the client's lack of intent and waive the privilege. The foregoing hypothetical, however, demonstrates that the reasonable precautions test would reach the correct result in either case, while the voluntary disclosure test would not.

67. Courts and commentators utilizing the voluntary disclosure test recognize a variety of outside forces. See, e.g., Supreme Court Standard 512:

PRIVILEGED MATTER DISCLOSED UNDER COMPELLUSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

2 J. Weinstein, supra note 14, Standard 512, at 512-1; see also In re Grand Jury Proceedings Involving Berkeley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979), affd. as modified, 629 F.2d 548 (8th Cir. 1980), where the court observed that "the modern trend appears to be away from Wigmore and toward a principle that the privileged status is not lost when the attorney and client take reasonable precautions to ensure confidentiality but nonetheless are overheard by a surreptitious eavesdropper." The court applied this general principle to documents stolen from the client.

68. See Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978); Suburban Sew 'N Sweep, 91 F.R.D. 254, 260 (N.D. Ill. 1981) ("[W]hile it may perhaps have been tolerable in Wigmore's day to penalize a client for failing to achieve secrecy, such a position is outmoded in an era of sophisticated eavesdropping devices against which no easily available protection exists . . . . "); In re Grand Jury Proceedings Involving Berkeley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979) (court notes that there is no waiver specifically in the case of a surreptitious eavesdropper, but the logic of the decision applies to all involuntary disclosures), affd. as modified, 629 F.2d 548 (8th Cir. 1980); Ladd, supra note 63, at 588 ("If for any reason not the holder's fault a disclosure is wrongfully obtained, it may not be used against him."); Comment, supra note 63, at 1368 (1969) (discussing the eavesdropper case) ("In such situations confidentiality is lost through no fault of the participants; they intended the matter to be confidential and the privilege should not be lost through the accident of a third party disclosure.").
The voluntary disclosure test produces the correct outcome in cases which involve an outside force. In cases of disclosure through eavesdropping or theft, it is clear that the client has not demonstrated a lack of intent to maintain confidentiality. Thus, the test correctly preserves the attorney-client privilege for the disclosed material.

The accuracy of the voluntary disclosure test in determining intent to disclose, however, does not extend to cases in which no outside force is involved. Theoretically, a client could maintain confidentiality in all cases not involving an outside force, as the test assumes. Nevertheless, as a practical matter, even the client who genuinely intends confidentiality can mistakenly disclose privileged documents. In such a case, the voluntary disclosure test incorrectly waives the attorney-client privilege.

The problem of inadvertent disclosure during document productions illustrates this shortcoming of the voluntary disclosure test. Here the test would always find the privilege waived, since the client himself, rather than an outside force, made the disclosure. This result fails to differentiate between the client who does not care about confidentiality and who does nothing to preserve it, and the client who carefully sets up a reasonable screening procedure which fails to protect some privileged documents. In the latter case, the

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71. See, e.g., the cases cited at note 73 infra.

72. This conclusion is based on the definition of a voluntary disclosure as one made by the client's own act, whether or not intentional. See note 65 supra and accompanying text. It should be noted that the only case which explicitly applies the voluntary disclosure test to a document production takes a different approach. See Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978), discussed at notes 74-76 infra and accompanying text. However, the voluntary disclosure test produces results identical to those of the traditional approach in cases which do not involve an outside force. See note 65 supra and accompanying text. Thus, some courts may appear to use the traditional approach for document production cases simply because they assign responsibility to the client for the disclosure, rather than to an outside force. Cf. W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976) ("The defendant could have taken necessary steps to remove purportedly privileged documents prior to permitting discovery . . . ."); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954) ("The risk of insufficient precautions must rest with the party claiming the privilege."). The test applied in such cases, as well as the outcome reached, might have been different had an outside force caused the disclosure. These cases thus could be taken to support the notion that in document productions, the voluntary disclosure test automatically waives the attorney-client privilege for all disclosed documents.

73. This is a significant problem. For cases in which privileged documents have been disclosed despite the existence of a screening procedure, see Data Sys. v. Philips Business Sys.,
voluntary disclosure test inaccurately reflects the client’s state of mind and waives the attorney-client privilege.

The Ninth Circuit Court of Appeals modified the voluntary disclosure test in *Transamerica Computer Co. v. International Business Machines Corp.* 74 There the court examined a claim that IBM’s inadvertent disclosure of a limited number of documents in prior litigation waived the attorney-client privilege for those documents. The inadvertent disclosure had occurred in an accelerated discovery proceeding in which seventeen million pages were reviewed in three months. The court held that the production of the documents during the accelerated discovery was a compelled disclosure which did not waive the attorney-client privilege. 75

Even if one accepts the *Transamerica* approach, 76 the voluntary disclosure test remains inadequate in most document production cases. The client who takes great pains to preserve confidentiality during the document production is protected against waiver of the privilege only when the discovery procedure is sufficiently accelerated. A test which more accurately reflects the client’s state of mind is needed.

**B. The Reasonable Precautions Test**

A better test of the client’s intent to maintain confidentiality focuses on the precautions taken to prevent disclosure of privileged communications. 77 In the context of a document production, 78 it is

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74. 573 F.2d 646 (9th Cir. 1978).
75. 573 F.2d at 648-51.
76. A strong argument can be made that the court applied the compulsion theory improperly. Compulsion implies that the production of the privileged documents was not the client’s own act. That is not the case in *Transamerica*, where the client made its own decision about what to disclose and what to retain. One suspects that the court characterized *Transamerica* as a compulsion case to avoid dealing with the difficult and controversial inadvertent disclosure issue. The problem with this approach is that it muddies the analysis; the court came to the right result for the wrong reason and thus failed to provide any insight into the inadvertent disclosure problem.
One could argue that *Horowitz* is not a reasonable precautions case. The court quotes *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954), a case using the
fair to expect a client who intends to maintain confidentiality to take precautions to do so.\textsuperscript{79} Moreover, the test provides the best possible reflection of the client’s intent by requiring that the precautions be “reasonable.” A less stringent test would respect token efforts to protect privileged documents which were made without a genuine intent to prevent disclosure.\textsuperscript{80} Similarly, a stricter test would be unacceptable. Stricter tests, such as the traditional approach and the volun-

traditional approach, and the Proposed Federal Rules of Evidence (the Supreme Court Standards discussed in note 62 supra), which employ the voluntary disclosure test. Nevertheless, the court emphasized the client’s failure to take any precautions: “It is not asking too much to insist that if a client wishes to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality.” 482 F.2d at 82. This emphasis indicates that the court applied a reasonable precautions test.

Alternatively, Horowitz may be considered a scope of waiver case. The court assumes that the third party saw some, but not all, of the privileged documents he was given. 482 F.2d at 81. Arguably, then, the issue before the court is whether the privilege is waived for the undisclosed documents because other privileged documents have been revealed. The court, however, does not explicitly consider the connection between the revealed and the undisclosed documents. Instead, the court focused on the lack of precautions taken to prevent disclosure. 482 F.2d at 82.

Cities Serv. Helex, Inc., 214 Ct. Cl. 765 (1977), arguably adopts the reasonable precautions test also. In Cities Service, the court found the privilege to be intact. The client, the U.S. Government, had made a list of documents to be withheld. However, a government attorney inadvertently released some of the documents on the list. The court stated that it knew “of no case in which an attorney was held to have been able to waive the privilege of a client who had previously indicated that he wanted to assert the privilege.” 214 Ct. Cl. at 768. Thus, the issue in this case may simply be the lack of the attorney’s authority to waive the client’s privilege. Cf. note 27 supra. Alternatively, the case can be viewed as one in which the client took reasonable precautions to prevent disclosure by compiling a list of documents to be withheld, and thus preserved the privilege. Perhaps the case is best seen as a hybrid: the court emphasized both that the attorney was without authority to waive the privilege and that the client had taken steps to ensure that disclosure would not occur.

78. The reasonable precautions test could also apply outside the setting of a document production. See In re Grand Jury Subpoena Served Upon Simon Horowitz, 482 F.2d 72, 81 (2d Cir.) (documents left in care of client’s accountant; reasonable precautions test applied), cert. denied, 414 U.S. 867 (1973); cf. United States v. Aronoff, 466 F. Supp. 855, 861 (S.D.N.Y. 1979) (suggesting that the parties could have avoided waiving the attorney-client privilege during pre-indictment negotiations by agreeing in advance that any disclosures would be without prejudice).

79. See In re Grand Jury Subpoena Served Upon Simon Horowitz, 482 F.2d 72, 82 (2d Cir.) (“It is not asking too much to insist that if a client wishes to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality.”), cert. denied, 414 U.S. 867 (1973); Suburban Sew ‘N Sweep v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981) (“[S]ince the theoretical predicate of the privilege is to protect confidentiality, when the parties to the communication themselves . . . do not take reasonable steps to insure and maintain its confidentiality, the privilege does not apply or is vitiated.”).

80. The test proposed by the court in National Helium Corp. v. United States, 219 Ct. Cl. 612 (1979), might be viewed as a less stringent test. The court stated the test as “whether the procedure followed by the plaintiff was so lax, careless or inadequate that plaintiff must objectively be considered as indifferent to disclosure of anything . . . .” 219 Ct. Cl. at 614. This statement, taken in isolation, sanctions a test that favors the client, i.e., the client simply does something and the privilege is retained. However, the court later described the precautions taken as a “good faith, sufficiently careful, effort to winnow a relatively small number of privileged materials from a large number of documents to be produced . . . .” 219 Ct. Cl. at 615. Clearly, the court required more than a token effort, and thus National Helium is appropriately characterized as a reasonable precautions test. See note 77 supra.
tary disclosure test, do not always protect clients who have demonstrated a genuine intent to maintain confidentiality. 81

The reasonable precautions test, like the voluntary disclosure test, can be seen as turning upon a determination of negligence. However, the two tests differ over when negligence has occurred. The voluntary disclosure test assumes that client negligence is responsible for all disclosures except those caused by an outside force, 82 while the reasonable precautions test finds negligence only if the client fails to take reasonable precautions. 83 The two tests reach the same result when the client has taken reasonable precautions, and an outside force causes disclosure. 84 However, the tests reach different results when no outside force is involved. In such cases, the voluntary disclosure test waives the privilege without further inquiry into client intent. 85 The reasonable precautions test examines more directly the client's intent by evaluating the procedures instituted to prevent disclosure. 86

While the main advantage of the reasonable precautions test is its accurate reflection of client intent, in practice the test becomes a standard of conduct which clients must meet to retain the privilege. 87 This standard could significantly reduce the costs of discovery for clients who care about confidentiality. 88 Once the client has taken "reasonable precautions," no additional expenditures would be nec-

81. See notes 40, 71-73 supra and accompanying text.
82. See notes 63-66 supra and accompanying text.
83. See National Helium Corp. v. United States, 219 Ct. Cl. 612, 616 (1979) ("[T]he fundamental questions always are: did the client wish to keep back the privileged materials and did he take adequate steps in the circumstances to prevent disclosure of such documents?"); see also Data Sys. v. Philips Business Sys., No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. Jan. 8, 1981) (available on LEXIS, Genfed library, Dist file) (concluding that the precautions taken by the client to prevent disclosure were not so "lax, careless, or inadequate" as to constitute waiver) (quoting National Helium, 219 Ct. Cl. at 614).
84. See note 66 supra.
85. See note 72 supra and accompanying text.
86. See note 83 supra and accompanying text.
87. See note 60 supra and accompanying text.
88. This is consistent with the interest of the Federal Rules of Civil Procedure in securing "the just, speedy and inexpensive determination of every action." FED. R. CIV. P. 1.

Some may argue that the reasonable precautions test will increase discovery costs. By forcing courts to evaluate the reasonableness of the client's actions, the test might prolong the discovery process. By contrast, the traditional approach and the voluntary disclosure standard would not require extensive hearings. This criticism may be valid during the initial period when courts struggle to define "reasonable precautions." However, once they have settled on a definition, less deliberation should be necessary. Even if the reasonable precautions test does increase discovery costs, the test's more accurate reflection of client intent justifies the expense.

A more troubling argument is that the reasonable precautions test will be misused. Clients indifferent to confidentiality could use the test to challenge waiver in order to delay litigation and to put the opposition to greater expense. Such abuses are unlikely. Delay and harassment in discovery is generally initiated by those requesting documents, not those asked to produce documents. Cf. Perlman, The Federal Discovery Rules: A Look at New Proposals, 15 NEW ENG. L. REV. 57 (1979-80). If the document producer wanted to delay, he would be more likely to do so by making a request for documents or by simply slowing down his own produc-
essary to preserve the privilege. In contrast, the traditional approach and the voluntary disclosure test provide no safe harbor for the client. Under these tests, any inadvertent disclosure in a document production waives the attorney-client privilege. Thus, the client desiring confidentiality must do everything in his power to prevent any disclosure, rather than simply taking reasonable precautions against disclosure. This strict standard adds significantly to the burdens of discovery.

The reasonable precautions approach, however, is not perfect. One can imagine the case of a client who genuinely intends confidentiality but fails to take reasonable precautions to prevent disclosure. The test would deny the protection of the privilege despite the client's intent to maintain confidentiality. Alternatively, the test might allow the client who did not intend confidentiality to assert the privilege because he has taken reasonable precautions. However, these problems with the reasonable precautions test are not significant. While the test would produce undesirable results in the two situations described above, neither situation is likely to occur with any frequency.

The accuracy of the reasonable precautions test depends, in large part, on how "reasonable precautions" is defined. Part IV addresses this problem.

IV. Determination of Reasonable Precautions

The precise extent of precautions that will be considered reasonable will necessarily vary according to the circumstances surrounding a particular document production. Nevertheless, there are certain features common to document productions which can help courts decide whether reasonable precautions have been taken.
These basic features, along with the issues they raise, are considered here.

A. The Screening Procedure Used

The reasonable precautions test generally requires the client to adopt a screening procedure which is reasonably likely to separate privileged from nonprivileged documents. Clearly, it is difficult to prescribe a standard of care applicable to all cases. In some instances, a client’s files may be so well-organized that a screening of the contents of the files is unnecessary. In others, it may be necessary to screen each individual document. Generally, however, the more thorough a screening procedure, the more likely it is that a disclosure was inadvertent.

The thoroughness of a screening procedure relates not only to the manner in which each document is scrutinized, but also to the number of screeners reviewing each document. Some screening procedures put documents through several tiers of review before production. The use of a multi-tiered approach is particularly appropriate when the screener himself must classify the documents as privileged or nonprivileged. In these cases, a second or even third review of each document enhances the likelihood that classifi-

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94. As stated in National Helium v. United States, 219 Ct. Cl. 612, 615 (1979), the test is whether the client has made “a good faith, sufficiently careful, effort to winnow a relatively small number of privileged materials from a very large number of documents.”

95. This was the situation in National Helium v. United States, where only files that “normally contain” attorney-client materials were reviewed. 219 Ct. Cl. 612, 615 (1979).

96. This raises the question of whether a court can reasonably require the examination of every relevant document in order to find that the client has taken reasonable precautions. Arguably, a court must require such a rigorous form of review by the client if it is the only way to segregate the privileged material. One court, however, has expressed the concern that such a requirement would make the discovery process too expensive. “A flat requirement of document-by-document screening would probably help avoid some camouflaged changes of mind by the document-possessor, but the price of such across-the-board preventive hygiene seems to us too high . . . .” National Helium v. United States, 219 Ct. Cl. 612, 615 n.5 (1979).

97. The client certainly should introduce any evidence which suggests that the organization of its files made an extensive review unnecessary, or that its screening procedure was itself thorough.

98. See, e.g., Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978). IBM’s initial screening removed potentially privileged documents from the files. These documents were then reviewed by experienced attorneys to determine whether they were actually privileged and whether they should be disclosed. In addition, IBM attempted to employ an “interceptor” whose function was to review each document which opposing counsel requested to ensure that no privileged documents were disclosed. However, the trial judge upheld an objection to the use of the interceptor. 573 F.2d at 649.

99. This situation is likely to arise when a client is faced with a general request for production and has no idea of the number of privileged documents that exist nor the location of those documents.
cation errors will be detected. In other circumstances, a multi-tiered approach may be unnecessary. If the screener has a list of all the privileged documents, and is merely separating them from the others, there may be less need for review of his decisions.\textsuperscript{100}

Any judgment of the quality of the screening procedure should take into account external factors affecting the client's performance. A prominent example is court-imposed time constraints. If the client is forced to screen a large number of documents very quickly,\textsuperscript{101} the precautions taken by that client cannot be as extensive as those taken by clients operating without time constraints. The test of reasonableness should be adjusted accordingly.

B. Competence of the Screeners

If the screener employed could not reasonably be expected to differentiate between privileged and nonprivileged documents, then reasonable precautions have not been taken. On the other hand, disclosure caused by a screener's clerical error does not evidence a lack of precautions.

The necessary level of competence of a screener will vary according to the responsibility given that screener.\textsuperscript{102} If the screener must simply consult a list to determine whether to withhold a document or not, no expertise is required for the job.\textsuperscript{103} On the other hand, advanced legal expertise may be required if the screener must determine whether the privilege applies to particular documents.\textsuperscript{104} In

\textsuperscript{100} A previously prepared list of privileged documents is a particularly good indication of an intent to maintain confidentiality. \textit{See}, e.g., Cities Serv. Helex, Inc. v. United States, 214 Ct. Cl. 765 (1977), where the client prepared three lists of privileged documents for the screener to consult during the document production. The screener failed to consult two of the lists, and as a result produced some documents that he should not have. Because the list demonstrated the inadvertent nature of the disclosure, the court held that the attorney-client privilege remained intact. 214 Ct. Cl. at 766-67. An alternative view of the holding is presented at note 77 supra.

\textsuperscript{101} \textit{See}, e.g., the accelerated discovery procedure of the \textit{Transamerica} case, discussed at notes 74-76 supra and accompanying text.

\textsuperscript{102} Courts have not explicitly dealt with this problem. However, several cases suggest that the standards for screener competence are not high. In Data Sys. v. Philips Business Sys., No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. Jan. 8, 1981) (available on LEXIS, Genfed library, Dist file), two paralegals were responsible for the screening disclosure. In two other cases, "assistants" handled the screening. \textit{See} National Helium Corp. v. United States, 219 Ct. Cl. 612 (1979); Cities Serv. Helex, Inc. v. United States, 214 Ct. Cl. 765 (1977). In each case, the precautions were considered sufficient to indicate an intent to maintain confidentiality. It is true that factors other than the competence of the screeners may have elicited these results. \textit{See}, e.g., note 100 supra. One can conclude, however, that reasonable precautions can be found in cases where the screeners did not possess a high level of expertise.

\textsuperscript{103} \textit{Cf.} note 100 supra and accompanying text.

\textsuperscript{104} Sometimes the screener may be able to decide whether or not the privilege applies simply by identifying the author and recipient of the communication. This task would require no legal expertise. In other cases, detailed knowledge of the privilege and the facts of the case may be necessary to classify the documents. This sort of classification job would be best handled by an attorney.
other cases, technical or scientific knowledge may be a prerequisite for a screener to do an adequate job.105 A screener's past performance is also relevant to a determination of his competence. If possible, the client should select a screener who has demonstrated the capacity to handle a document production, rather than one with a history of carelessness.106

C. Results of the Screening

The extent of disclosure can help determine the adequacy of the precautions previously taken. Any consideration of the extent of disclosure should take into account the total number of documents reviewed, the number of these documents which were privileged, and the number of privileged documents actually disclosed. For example, if one of one hundred privileged documents is disclosed out of one million documents reviewed, this suggests that the precautions employed were reasonable. If, however, one of five privileged documents is disclosed out of twenty documents reviewed, the precautions taken are suspect.107

The nature of the privileged documents disclosed may also provide evidence of the suitability of the precautions taken. A screening procedure which allows disclosure of a privileged document of tremendous importance to the client in the litigation at hand has failed significantly. Disclosure of privileged documents that relate only tangentially to the litigation at hand is less indicative of a lack of reasonable precautions. In addition to content, the physical condition of the documents can be considered. If the document was unrecognizable at the time of the inadvertent disclosure, it is difficult to fault the screening procedure.108


106. As noted before, courts have not looked carefully at the competence of the screeners. See note 102 supra.

107. Courts have emphasized the proportion of documents reviewed to documents disclosed. See Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978) (seventeen million pages reviewed, fifty-eight hundred pages of privileged documents inadvertently produced); National Helium v. United States, 219 Ct. Cl. 612 (1979) (review of one hundred and fifty storage cartons of files, ten privileged documents produced); Data Sys. v. Philips Business Sys., No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. Jan. 8, 1981) (available on LEXIS, Genfed library, Dist file) (review of nine transfiles containing thousands of documents, only one document was inadvertently disclosed).

108. See, e.g., Data Sys. v. Philips Business Sys., No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. Jan. 8, 1981) (available on LEXIS, Genfed library, Dist file). There a paralegal disclosed part of a privileged document which had become detached from the rest of the document and as a result was not recognized as privileged. This fact may have influenced the court's decision that the attorney-client privilege remained intact.
D. Prompt Objection to the Use of Privileged Documents That Have Been Disclosed

The reasonable precautions test should include consideration of objections made by the client to the use of privileged documents that have been disclosed. The client, by immediately objecting to the use of a privileged document upon learning of its disclosure, indicates that his intent was to keep the document secret. Thus, a prompt objection by the client can encourage a court to uphold the attorney-client privilege. On the other hand, the client who delays filing an objection despite knowledge of the disclosure evinces a lack of intent to preserve the confidentiality of the document. In addition, the longer the delay prior to objection, the more likely it is that the client's adversary has begun to rely upon the documents disclosed to build his case. Considerations of fairness dictate that reliance of this type not be undermined by a client whose objections could have been made earlier. Therefore, a long delay by the client in contesting the use of privileged documents can waive the attorney-client privilege.

V. CONCLUSION

Inadvertent disclosure alone is not an adequate justification for waiver: disclosure does not necessarily indicate a lack of intent to maintain confidentiality, nor does it make achievement of the benefits of the privilege impossible.

Any alternative approach should focus on the intent of the client to preserve the confidentiality of communications subject to the priv-

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109. Technically, the client's conduct after disclosure cannot be considered a "precaution" against such disclosure. This conduct is nevertheless a useful indicator of the client's intent at the time of disclosure. An objection entered promptly upon learning of a disclosure suggests that a genuine intent to preserve confidentiality existed before disclosure. Cf. notes 79-81 supra and accompanying text.

110. See, e.g., Data Sys. v. Philips Business Sys., No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. Jan. 8, 1981) (available on LEXIS, Genfed library, Dist file), where the client's attorney became aware of the disclosure of materials subject to the attorney-client privilege during a deposition. He objected to the use of the document immediately upon seeing it. The court weighed this objection heavily in deciding to uphold the privilege: "[T]he assertion of privilege cannot be deemed waived by inaction nor can it be regarded as an afterthought; plaintiffs' counsel raised the claim as soon as the matter was brought to his attention."

111. In deeming the attorney-client privilege waived, courts have relied on the client's delay in objecting to the use of the formerly privileged documents. See Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981) ("Even after [the disclosing party] was specifically informed... that the privileged documents had been submitted, [the disclosing party] did not request that they be returned unread."); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 674 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979) (mistaken disclosure discovered in December 1977; demand for their return not made until early 1978).

112. See, e.g., In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979) ("Most importantly, it would be unfair and unrealistic now to permit the privilege's assertion as to these documents which have been thoroughly examined and used by the Government for several years.").
ilege. Because clients who intend to maintain confidentiality are likely to take precautions to do so, the reasonable precautions test is an accurate indicator of intent. Implementation of this test provides results consistent with the purposes of the privilege, and avoids results that are "harsh" and "out of all proportion to the mistake of inadvertent disclosure."\footnote{Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982).}