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INADVERTENT WAIVER OF THE ATTORNEY- CLIENT PRIVILEGE BY DISCLOSURE OF DOCUMENTS: AN ECONOMIC ANALYSIS

ALAN J. MEESE*

"Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."¹

INTRODUCTION

Like all evidentiary privileges, the attorney-client privilege exists in derogation of the truth.² The protection of communications between attorney and client produces general and intangible benefits at the expense of concrete and specific harms.³ This tension between the specific and the general, the known and the unknown, has produced hostility toward the privilege among judges and scholars.⁴ This hostility towards the privilege manifests itself in several ways, including expansive definitions of waiver.⁵ Recent case law abounds

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1. *Pearse v. Pearse*, 63 Eng. Rep. 950, 957 (Ch. 1846) (discussing the marriage privilege), quoted in Note, *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450 (1985).

2. *United States v. Nixon*, 418 U.S. 683, 710 (1974). The Court stated that "[w]hatever their origins, these exceptions to the demand for everyman's evidence . . . are in derogation of the search for truth." *Id.*

3. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2291, at 554 (McNaughton rev. ed. 1961). The treatise stated that "[i]ts benefits [of the privilege] are all indirect and speculative; its obstruction [of truthfinding] is plain and concrete." *Id.*

4. See Frankel, *The Search for Truth Continued; More Disclosure, Less Privilege*, 54 COL. L. REV. 51 (1982); M. FRANKEL, *PARTISAN JUSTICE* 64 (1980), cited in Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or Categorical Imperative?* 52 U. COLO. L. REV. 349, 350-51 (1981); C. MCCORMICK, *LAW OF EVIDENCE* 176 (E. Cleary 2d ed. 1972) (stating that "[i]f one were legislating for a new commonwealth . . . it might be hard to maintain that [the privilege] would facilitate more than it would obstruct the administration of justice."); 8 J. WIGMORE, *supra* note 3, at § 2292, at 554 (recommending "[the privilege] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."); Note, 98 HARV. L. REV. at 1478-79; *Eigenheim Bank v. Halpurn*, 598 F. Supp. 988, 991-92 (S.D.N.Y. 1984) (urging "[a] need to limit the scope of the privilege").

5. See Note, *Permian Corp. v. United States & The Attorney-Client Privilege for Corporations: Unjustified Severity on the Issue of Waiver*, 77 NW. L. REV. 223, 231-32 (1982) (noting that hostility towards privilege contributes to an expansive notion of

with judicial constructions of the waiver prong of the privilege analysis.⁶ Perhaps the most common form of contested waiver relates to privileged documents produced during the pretrial discovery process. To be precise, some courts have held that parties who voluntarily produce privileged documents during the discovery process waive the privilege, regardless of whether they intend to do so.⁷ Other courts take less extreme views, holding that the privilege is waived only in the absence of reasonable precautions to guard against production.⁸ Still others hold that a subjective intent to waive is necessary.⁹

This Article explores the doctrine of inadvertent waiver and the three standards governing it: strict responsibility, conduct, and subjective intent. First, the Article takes a brief look at the privilege and the purpose which it serves, concluding that a narrow focus upon privacy or confidentiality is misguided.¹⁰ Instead, the attorney-client privilege is a sort of property right in information which encourages the flow of information between attorney and client.¹¹

This Article then analyzes the case law surrounding inadvertent disclosure, providing examples of the three standards mentioned above.¹² After analyzing the standards applied, the Article examines the effect of the doctrine upon the policies which the privilege seeks to implement.¹³ The Article questions whether there is any reason to apply standards of waiver in the document production context which are different than those applied in other property rights contexts.¹⁴ An economic analysis shows that there is no reason for departing from the traditional requirement that a waiver be knowing and intentional. The Article then analyzes the effect of the conduct and strict responsibility standards upon the values facilitated by the privilege as well as the parties to litigation, again using conventional tools of economic analysis. This analysis reveals that both the conduct and

waiver with respect to communications disclosed to the SEC); Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1654 (1986) (concluding that the judicial attitude toward waiver depends upon attitude toward privilege); Gripando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511, 525 (1985) (saying that too often courts fail to acknowledge the benefits of the privilege, leading to an expansive definition of waiver). See Davidson & Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 640-66 (1986) (surveying various forms of waiver).

6. See *infra* note 50 and accompanying text.

7. See *infra* notes 54-115 and accompanying text.

8. See *infra* notes 80-115 and accompanying text.

9. See *infra* notes 116-130 and accompanying text.

10. See *infra* notes 15-48 and accompanying text.

11. See *infra* note 33 and accompanying text.

12. See *infra* notes 49-130 and accompanying text.

13. See *infra* notes 131-160 and accompanying text.

14. See *infra* notes 162-179 and accompanying text.

strict responsibility approaches impose unwarranted social costs on attorneys, clients, and society at large.

BACKGROUND AND PURPOSE OF THE PRIVILEGE

The attorney-client privilege is the oldest of the testimonial privileges, dating from the late sixteenth century.¹⁵ It remains the most entrenched of the evidentiary privileges.¹⁶ Congress has not explicitly adopted this privilege for federal courts; rather, it has directed the courts to develop various privileges "in light of reason and experience" in those cases in which federal law provides the rule of decision.¹⁷ Pursuant to this mandate, federal courts have adopted a common law relating to attorney-client privilege.¹⁸

Federal courts have followed the approach of Dean Wigmore who stated that the privilege is obtained when eight conditions are met:¹⁹

- (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 [the client's] instance permanently protected (7) from disclosure by [the client] or by the legal advisor, (8) except the protection be waived.²⁰

Invocation of the privilege conceals information from the tribunal. Yet, there are offsetting benefits of the privilege.²¹ Specifically, there are two possible purposes for withholding such information from the court: protecting *privacy*²² and encouraging *information*

15. Note, *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450, 1456 (1985); Note, *The Attorney-Client Privilege*, 19 U. RICH. L. REV. 559, 560 (1985); *Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580).

16. E. GREEN & C. NESSON, EVIDENCE 535 (1983).

17. FED. R. EVID. 501. When state law provides the rule of decision, as in diversity cases, federal courts apply state privilege law. *Id.* See *Eigenheim Bank v. Halpern*, 598 F. Supp. 988 (S.D.N.Y. 1984) (applying New York privilege law in diversity action).

18. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403-14 (1976).

19. *E.g.*, *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986); *United States v. Keplinger*, 776 F.2d 678, 700 (7th Cir. 1985).

20. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961).

21. See *infra* notes 22 and 23 and accompanying text.

22. Note, 98 HARV. L. REV. at 1501-08; Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 651-52 (1976); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956); Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or Categorical Imperative?*, 52 U. COLO. L. REV. 349, 353-54 (1981); Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary*

production.²³

Under a privacy rationale, the purpose of the privilege is to provide the client with a small sphere of autonomy, free from the intervention of an overreaching state.²⁴ Such an approach ignores any possible benefits to the legal system from the invocation of the privilege. Instead, a privacy rationale considers the invocation of the privilege as almost a categorical imperative.²⁵

Courts have rejected the privacy rationale, focusing on the utilitarian, information production approach.²⁶ Under this approach, the privilege, which conceals truth from the tribunal, is adopted and protected only insofar as adoption and protection provides independent benefits to the legal system.²⁷ Specifically, the privilege is a sort of property right which encourages the generation of information which in turn serves the goals of the justice system. By maintaining the confidentiality of communications between client and attorney, the privilege encourages clients to tell all to their attorneys.²⁸ This pro-

System, and the Corporate Client's SEC Disclosure Obligations, 33 HASTINGS L.J. 495, 499-513 (1982).

23. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 356-57; Kaplow & Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 570 (1989); Rosenfeld, 33 HASTINGS L.J. at 508-09; Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123, 131-34 (1988); J. WIGMORE, *supra* note 20, at § 2291, at 554; Note, *The Fifth Amendment, The Attorney-Client Privilege, and the Prosecution of White-Collar Crime*, 75 VA. L. REV. 1179, 1198 (1989).

24. C. MCCORMICK, *LAW OF EVIDENCE* § 77, at 157 (E. Cleary 2d ed. 1972). The treatise states that:

[I]t is evident that for many people, judges, lawyers, and laymen, the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to relinquish to the convenience of litigants. Growing concern in recent times with the increase in official prying and snooping into the lives of private individuals has reinforced support for the traditional privileges and no doubt aided in the creation of new ones.

Id.

25. Alschuler, 52 U. COLO. L. REV. at 353-54.

26. See Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 476-81 (1987) (arguing that application of the privilege to corporations necessarily rejects the privacy rationale).

27. Note, 98 HARV. L. REV. at 1503-05; *State v. 62.96247 Acres of Land*, 193 A.2d 799 (Del. Super. Ct. 1963). The court stated that "[e]ncouraging these communications is desirable because the communications are necessary for the maintenance of certain relationships. It is socially desirable to foster the protected relationships because other beneficial results are achieved, such as the promotion of justice." *Id.* at 807.

28. The United States Supreme Court has stated that "If such communications were required to be made the subject of examinations and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States v. Louisville & N.R.R.*, 236 U.S. 318, 336 (1915); J. WIGMORE, *supra* note 20, at § 2290, at 545; C. MCCORMICK, *supra* note 24, § 87, at 175. The Supreme Court has stated that "[a]s a practical matter, if the client knows that damaging information

vides the legal system with two discrete benefits, depending upon when the communication is made.²⁹ Chief Justice Shaw recognized these benefits over a century ago when he wrote:

This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of [attorneys] both in ascertaining their rights in the country, and maintaining them most safely in courts . . . that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney should be for ever sealed.³⁰

Communications made before an alleged wrong allow attorneys to properly counsel clients in their attempts to obey the law "out in the country."³¹ Communications made after the alleged wrongdoing, during litigation, help the lawyer guide the client through the labyrinth of the legal system.³² At common law, courts feared that if they did not protect such confidences, parties would not even retain attorneys but would come into court themselves and wreak havoc on the legal system.³³

Some scholars have suggested that the pre-litigation or planning justification is a stronger rationale.³⁴ Specifically, they note that the generation of such information may not be as useful during litigation as it is beforehand. Inadvertently produced documents generally fall into this second, planning category.³⁵ They are generally letters from clients to attorneys or other documents produced well before litigation

could be more readily obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer." *Fisher*, 425 U.S. at 403.

29. Note, 98 HARV. L. REV. at 1505.

30. *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833).

31. *Upjohn*, 449 U.S. at 389. The Court stated that the attorney-client privilege "promotes broader public interests in the observance of law and the administration of justice." *Id.* (emphasis added).

32. One court has stated that "[t]he layman's course through litigation must at least be evened by the assurance that he may, without penalty, invest his confidence and confidences in a professional counselor." *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381, 388 (S.D.N.Y. 1975).

33. *Rochester City Bank v. Suydam, Sage & Co.*, 5 How. Pr. 254, 258-59 (N.Y. Sup. Ct. 1851). The court stated that "[i]f the facts thus communicated were liable to be extorted from the attorney or counsel, suitors would hesitate to employ them, to the great inconvenience of the court, and obstruction of judicial business." *Id.* at 258.

34. *Kaplow & Shavell*, 102 HARV. L. REV. at 568-88; Easterbrook, 1981 SUP. CT. REV. at 360-65.

35. See, e.g., *Parkway Gallery v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 48 (M.D.N.C. 1987) (containing letter from general counsel describing current state of antitrust resale price maintenance enforcement). See also *Manufacturers & Traders Trust v. Servotronics, Inc.* 132 A.D.2d 392, —, 522 N.Y.S.2d 999, 1002 (1987); *O'Leary v. Purcell Co.*, 108 F.R.D. 641, 643 (M.D.N.C. 1985); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464 (E.D. Mich. 1954). But see *Lois Sportswear, U.S.A., Inc. v. Levi*

tion has begun. Hence, they fall under the strongest justification for the privilege, a justification upon which this article will now focus.

FOSTERING THE RULE OF LAW

Encouraging open and frank discussion between attorney and client during planning stages fosters the rule of law.³⁶ The rule of law requires that individuals be able to understand their rights and duties and order their lives accordingly.³⁷ When the rule of law does not obtain, parties are unable to order their behavior and are thus less likely to engage in a legally protected activity.³⁸ Such analysis applies to any society governed by laws.³⁹ Yet, it has taken on increasing importance for corporations in an administrative state whose rules are ever-expanding in both reach and complexity. In *Upjohn Co. v. United States*,⁴⁰ the United States Supreme Court explicitly recognized this importance, stating that "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law' particularly since compliance with the law in this area is hardly an instinctive matter."⁴¹

Without the confidentiality assured by the privilege, clients face a difficult dilemma. If they reveal damaging information to their attorney, they increase their chances of future legal battles. Yet, if they fail to come clean to their advisor, they risk violating the law and increase the possibility of initiating such a battle in the first place. Faced with such a choice, clients will certainly provide less in-

Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985) (discussing some documents which had been generated during litigation).

36. Note, *Developments in the Law of Privileged Communications*, 98 HARV. L. REV. 1450, 1505-08 (1985); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309, 354.

37. F. HAYEK, *THE ROAD TO SERFDOM*, 72-87 (1944); J. LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 136-37 (2d ed. 1970); J. RAWLS, *A THEORY OF JUSTICE* 238 (1971); L. FULLER, *THE MORALITY OF LAW* 63-64 (1965).

38. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* 156-57 (1960); T. RAWLS, *supra* note 37, at 235.

39. Over a century before the rise of the modern welfare state with all its attendant complexities, Jeremy Bentham remarked: "The multitude have not leisure for profoundly studying the laws: they do not possess the capacity for connecting together distant regulations—they do not understand the technical terms of arbitrary and artificial methods." Bentham, *A General View of a Complete Code of Laws*, in 3 *THE WORKS OF JEREMY BENTHAM* 155, 161 (J. Bowring ed. 1843) cited in Note, 98 HARV. L. REV. at 1506.

40. 449 U.S. 383 (1981).

41. *Id.* at 392 (citations omitted). For earlier statements of similar principles in the federal courts, see *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977) (discussing the increased use by a business in seeking advice as to future conduct); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 320-24 (7th Cir. 1963) (describing the increased use of attorneys by corporate clients).

formation to their legal advisor than they would given the existence of the privilege. As a result, individuals and corporations will be less able to order their lives, engage in legally-protected activity, and will violate the law more often.⁴² Of course, these costs will be offset by increased truth reaching the tribunal in the case that clients still choose to consult with attorneys. Yet, less such truth will exist without the privilege than with it. Specifically, in those cases in which clients refuse to consult an attorney, there will be no story for the attorney to tell.⁴³ A small table making this comparison may help illustrate.

	Truth to Tribunal	Consultations with Attorney
Privilege Exists:	Zero	X
No Privilege:	$T: + (f)Y$	$Y = X = Z^{44}$

Thus, in deciding whether to protect such communications, society must decide whether the loss in communications (Z) and thus the rule of law, is of lesser or greater value than the increased truth reaching the tribunal (T). More formally, society should adopt the privilege if:

$$+dT(\text{Value of truth}) > -dZ(L) (\text{Value of Law Obedience}).^{45}$$

Here, support for or opposition to the privilege depends upon an impossible empirical guess as to whether, absent the privilege, clients will still consult their attorneys, provide them with incriminating information, and receive legal advice.⁴⁶ History has struck such a balance in favor of the privilege, a judgment reaffirmed by the *Upjohn*

42. Note, 98 HARV. L. REV. at 1506-07 (discussing social benefits of increased client awareness of legal rights).

43. One commentator has stated that "[b]ecause the same information might not exist were it not for the privilege, any loss of information when the privilege is upheld may be more imagined than real." Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597,610 (1980). See also *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

44. Where X is the number of conversations which would take place with the privilege, Z is the number of conversations which would be forgone without the privilege, T is the amount of truth which would reach the tribunal, and T is a positive function of Y and thus a negative function of Z.

45. Where L is the increase in social welfare resulting from an increase in obedience and understanding of the law derived from a consultation. See generally Note, 98 HARV. L. REV. at 1506-07 (discussing these social benefits).

46. Easterbrook, 1981 SUP. CT. REV. at 361 (describing such analysis as a "stupifying task"); Saltzburg, *Corporate Privilege In Shareholder Litigation and Similar Cases: Garrow revisited*, 12 HOFSTRA L. REV. 817, 822 (1984) (stating that "the adoption of the privilege represents an educational guess about behavior"); Note 98 HARV. L. REV. at 1474-1480.

majority.⁴⁷ The Court in *Upjohn* decided that failure to adopt the privilege would so hinder the rule of law that any loss in truth is justified.⁴⁸

CASE LAW DEALING WITH INADVERTENT WAIVER

In the case of document production, several courts have held that once a document is produced it loses its privileged status, regardless of whether the client intended the production to take place.⁴⁹ These doctrines force the client to bear the burden of disclosure, regardless of whether he intended to waive the privilege. Many times such "waiver" waives more than the privilege with respect to the documents in question. Courts often hold that the waiver of the privilege with respect to the document also waives the privilege as to other matters dealing with the same subject matter.⁵⁰ Hence, the inadvertent production of one document may waive the privilege as to all documents or conversations dealing with a particular subject matter, greatly increasing the cost of disclosure.

In recent years, federal and state courts have dealt with the issue of inadvertent waiver with increasing frequency. Typically, a party has inadvertently produced a document or allowed the opposition to view it during discovery and is now either seeking its return or refusing to answer a question founded on the document.⁵¹ Unfortunately, the facts of the cases do not admit of a single generalization in one crucial respect. To be precise, producing parties do not always allege that they took reasonable precautions to guard against release of the document. The lack of such factual uniformity often makes it difficult to determine which standard the court has applied. Specifically, in those cases in which there are no allegations of care, courts are able to reach the same result by applying either of two approaches.⁵² In such cases, there are no clear holdings; courts often appear to be applying a mesh of the approaches. Commentators, however, have divided these approaches into three categories: strict responsibility, conduct, and subjective intent.⁵³

47. *Upjohn*, 449 U.S. at 402.

48. *Id.* at 395.

49. See *supra* notes 54-115 and accompanying text.

50. See *Chubb Integrated Sys. Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 63 (D.D.C. 1984); *Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, —, 763 P.2d 1144, 1152-53 (N.M. 1988).

51. See, e.g., *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 446 (D. Mass. 1988) (dealing with production during discovery); *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 547 (D.D.C. 1970).

52. See, e.g., *W.R. Grace v. Pullman*, 446 F. Supp. 771 (W.D. Okla. 1976); *Underwater Storage*, 314 F. Supp. at 546.

53. Note, *Inadvertent Disclosure of Documents Subject to the Attorney Client*

STRICT RESPONSIBILITY APPROACH

The traditional approach,⁵⁴ favored by Dean Wigmore, is the so-called strict responsibility approach.⁵⁵ Under this approach, any production of documents waives the privilege, whether or not that production is inadvertent. Some courts purport to apply such a test. For instance, in *Underwater Storage, Inc. v. United States Rubber Co.*,⁵⁶ the plaintiff's attorney inadvertently turned over a privileged letter to the defendant.⁵⁷ Defendant questioned plaintiff's attorney about material contained in the letter.⁵⁸ The attorney refused to answer the questions, citing the attorney-client privilege.⁵⁹ The defendant sought an order compelling an answer.⁶⁰

The court ordered the attorney to answer the question.⁶¹ Holding that the privilege was waived, the court appeared to follow a strict approach, stating that "the plaintiff turned over to his attorney the documents to be produced. This letter was among them. The Court will not look behind this objective fact to determine whether the plaintiff really intended to have the letter examined."⁶²

A few courts have followed the rule of *Underwater Storage*. For instance, in *W.R. Grace & Co. v. Pullman, Inc.*,⁶³ the plaintiff produced privileged documents during discovery.⁶⁴ Later the plaintiff sought an order returning the documents.⁶⁵ The court refused to issue the order.⁶⁶ In so doing, the court cited *Underwater Storage*, stating that "[o]ne cannot produce documents and later assert a privilege which ceases to exist because of the production."⁶⁷

Privilege, 82 MICH. L. REV. 598, 607-19 (1983) (discussing "traditional," "reasonable precautions," and "voluntary disclosure approaches"); Davidson & Voth, *Waiver of the Attorney Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 PAC. L.J. 59, 70-83 (1986) (discussing strict responsibility, analysis of the circumstances, and intent approaches).

54. Some commentators have referred to this approach as the traditional approach. See Note, 82 MICH. L. REV. at 607. See also *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, —, 522 N.Y.S.2d 999, 1004 (1987). Note, however, that the earliest case to deal with the issue adopted a conduct approach. See *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464 (E.D. Mich. 1954).

55. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2290, at 636 (McNaughton rev. ed. 1961).

56. 314 F. Supp. 546 (D.D.C. 1970).

57. *Id.* at 547-48.

58. *Id.* at 547.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 549.

63. 446 F. Supp. 771 (W.D. Okla. 1976).

64. *Id.* at 773.

65. *Id.*

66. *Id.* at 775.

67. *Id.* (citing *Underwater Storage*, 314 F. Supp. at 549).

Both *Underwater Storage* and *Grace* are generally treated as strict responsibility cases, i.e. relying on the so-called traditional approach.⁶⁸ Yet, as some commentators have noted, these two cases are not strong precedents for such a proposition.⁶⁹ Specifically, neither case contained an allegation of reasonable care on the part of the producing party. These two cases mirror others in which the courts used the language of strict responsibility, but faced no allegation of reasonable care.⁷⁰ In fact, the *Grace* court relied upon the lack of precautions in reaching its decision stating, "[i]n the instant case, Defendant Pullman voluntarily produced the documents almost four months after a Request for Production was served on it. Notwithstanding the apparently voluminous amount of discovery involved, said Defendant could have taken necessary steps to remove purportedly privileged documents prior to permitting discovery."⁷¹

Indeed, in *In re Grand Jury Investigation of Ocean Transport*,⁷² the United States Court of Appeals for the District of Columbia Circuit cast some doubt on the strict responsibility approach of *Underwater Storage*. Specifically, the court noted that "[p]erhaps this latter rule [the traditional approach] should not be strictly applied to all cases of unknown or inadvertent disclosure; this, however, is not a case where any such exception would be appropriate. Here, the disclosure cannot be viewed as having been [totally] inadvertent in all cases."⁷³ Hence, these two cases, as well as others, are in a sort of twilight zone.⁷⁴ While these courts purport to use a traditional, strict approach, their results could be achieved by means of a reasonable care standard.

There is one true strict responsibility case: *International Digital Systems Corp. v. Digital Equipment Corp.*⁷⁵ In this case, the court considered a claim of inadvertent waiver.⁷⁶ In the opinion, the magistrate considered all possible standards.⁷⁷ After carefully examining the precautions taken by the producing party and pointing out inadequacies, the court rejected such an approach. Magistrate Callings stated, "I do not find application of this doctrine to 'inadvertent' dis-

68. See, e.g., Note, 82 MICH. L. REV. at 607.

69. See, e.g., Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511, 519-21 (1985).

70. See *Chubb*, 103 F.R.D. at 63-64; *Rockland Indus., Inc. v. Frank Kasmir Assoc's.*, 470 F. Supp. 1176 (N.D. Tex. 1979); *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 773 (Tex. Ct. App. 1985).

71. *Grace*, 446 F. Supp. at 775.

72. 604 F.2d 672 (D.C. Cir. 1979).

73. *Id.* at 675.

74. See, e.g., *Chubb*, 103 F.R.D. at 63-64; *Rockland Indus.*, 470 F. Supp. at 1176.

75. 120 F.R.D. 445 (D. Mass. 1988).

76. *Id.* at 446.

77. *Id.* at 448-49.

closure . . . particularly useful. . . . I see little benefit to doing a painstaking evaluation of the precautions taken by plaintiff's counsel when it is noted that the whole basis for the privilege is to maintain the *confidentiality* of the document."⁷⁸ The court, citing *Underwater Storage*, then rejected the producing party's privilege request.⁷⁹

CONDUCT APPROACH

The earliest modern case to deal with the inadvertent waiver problem was *United States v. Kelsey-Hayes Wheel Co.*⁸⁰ In *Kelsey*, the corporation in an antitrust action allowed the government to inspect its files, which contained privileged documents.⁸¹ Later, when the government sought an admission that certain documents were genuine, the defendant refused, citing the privilege.⁸² The court ordered the production of the documents, holding that the privilege had been waived by production.⁸³

In ordering the production of the documents, the court emphasized that they were no longer confidential because of the initial inspection by the government, stating that "the context in which the rule is intended to serve, the protection of confidential communications, is no longer present."⁸⁴ The court also questioned the intent to maintain confidentiality by noting that the defendant had made "no special effort to preserve them in segregated files with special protections. . . . One measure of their continuing confidentiality is the degree of care exhibited in their keeping."⁸⁵

Several courts have built upon the idea of using precautions to measure intent.⁸⁶ Others have adopted the so-called "conduct" standard without claiming that conduct is an indicium of intent.⁸⁷ These courts have adopted what one commentator has referred to as a conduct standard.⁸⁸ Under this standard, courts treat a party's conduct

78. *Id.* at 449.

79. *Id.* at 449-50 (citing *Underwater Storage*, 314 F. Supp. at 549).

80. 15 F.R.D. 461 (E.D. Mich. 1954).

81. *Id.* at 462.

82. *Id.*

83. *Id.* at 464-65.

84. *Id.* at 465.

85. *Id.*

86. See, e.g., *Eigenheim Bank v. Halpern*, 598 F. Supp. 988, 991 (S.D.N.Y. 1984). *Kansas-Nebraska Natural Gas v. Marathon Oil Co.*, 109 F.R.D. 12, 21 (D. Neb. 1985) (finding that the procedural screening involved showed production was not a deliberate act); *Parkway v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 46 (M.D.N.C. 1987) (holding that "failure to take action and precautions will be imputed to the client in determining his intent or understanding with respect to confidentiality").

87. See, e.g., *Hartman*, 107 N.M. at 679, 763 P.2d at 1144.

88. Grippando, 39 U. MIAMI L. REV. at 513.

as the best indicator of whether there was intent to waive.⁸⁹ In *Eigenheim Bank v. Halpern*,⁹⁰ for instance, the court noted that "mere inadvertence" would not constitute a waiver.⁹¹ The corporate defendants had accidentally produced a document in response to a discovery request.⁹² In determining whether the document should have been returned, the court looked closely at the reason for the "inadvertent" production.⁹³ After finding that the document was only one of thirty requested and that it had been identified as privilege in earlier litigation, the judge held the privilege to be waived, stating "I simply cannot agree with defendants that their conduct constituted mere inadvertence. The procedure followed by defendants with regard to maintaining the confidentiality of this document was 'so lax, careless, inadequate or indifferent to consequences as to constitute a waiver.'"⁹⁴

While *Eigenheim* appears to adopt a conduct standard, it did little to clarify the criteria used to determine if the standard is met. Other cases have done so.⁹⁵ For instance, in *Hartman v. El Paso Natural Gas Co.*,⁹⁶ the Supreme Court of New Mexico considered and adopted a conduct standard.⁹⁷ In so doing, the court listed five factors which should assist a court in determining whether an inadvertently produced document should retain its privilege.⁹⁸ In the court's words:

[There are] five factors which should assist a court in determining whether a document has lost its privilege: (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; (5) whether the overriding interests of justice would be served by relieving a party of its error.⁹⁹

The court went on to note that "when measuring El Paso's conduct by these factors, we find its conduct lacking."¹⁰⁰ Several courts have adopted a similar approach, looking at the conduct of the producing

89. *Id.* at 513-15.

90. 598 F. Supp. 988 (S.D.N.Y. 1984) (interpreting New York privilege law pursuant to a diversity action).

91. *Id.* at 991-92.

92. *Id.* at 989.

93. *Id.* at 990-91.

94. *Id.* at 991.

95. See *infra* notes 96-116 and accompanying text.

96. 107 N.M. 679, 763 P.2d 1144 (1988).

97. *Id.* at —, 763 P.2d at 1152.

98. *Id.* at —, 763 P.2d at 1152.

99. *Id.* (citing *Parkway*, 116 F.R.D. at 50).

100. *Hartman*, 107 N.M. at —, 763 P.2d 1152.

party as an indicator of the party's intent to maintain confidentiality.¹⁰¹

The conduct standard has two broad components. Courts first look to the reasonableness of the precautions taken to prevent disclosure in the first place.¹⁰² This initial inquiry is three-pronged. The first prong examines actions taken before litigation. Clients themselves can segregate privileged and non-privileged documents at the document generation stage before litigation actually takes place.¹⁰³ The second prong of analysis applies once litigation begins. Parties may take care at this production stage so that privileged documents are not produced.¹⁰⁴ In determining whether parties have taken proper precautions during the production stage, courts look to several factors.¹⁰⁵ Courts usually examine the screening procedure used.¹⁰⁶ Parties may screen documents one by one, removing those privileged from the discovery process.¹⁰⁷ Alternatively, parties can prepare documents for production, compiling an index as they go and removing privileged documents after all the documents have been prepared.¹⁰⁸ Parties may also adopt more than one level of review.¹⁰⁹ Courts often examine the competence of the screeners, asking whether they were capable of distinguishing privileged from non-privileged documents.¹¹⁰ Precautions are more likely to be found reasonable if an

101. *Prebilt Corp. v. Preway, Inc.*, No. 87-7132 (E.D. Pa. Sept. 23, 1988) (LEXIS, Genfed library, Dist file); *Kanter v. Superior Court*, 206 Cal. App. 3d 803, 253 Cal. Rptr. 810 (1988); *Servotronics*, 132 A.D.2d at 392, 522 N.Y.S.2d at 999; *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 116 F.R.D. 205 (M.D.N.C. 1986); *Marathon Oil*, 109 F.R.D. at 12.

102. *See, e.g., Lois Sportswear, U.S.A. Inc. v. Levi Corp.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (stating "Levi apparently had no practice of designation of confidential documents at the time of origination").

103. *Prebilt*, No. 87-7132 at 7-8; *Ranney-Brown Distribs., Inc. v. E.T. Barwick Indus., Inc.*, 75 F.R.D. 3, 5-6 (S.D. Ohio 1977); *Kelsey-Hayes*, 15 F.R.D. at 465.

104. *Lois Sportswear*, 104 F.R.D. at 105; *Marathon Oil*, 109 F.R.D. at 21; *National Helium v. United States*, 219 Ct. Cl. 612, 615 (1979); *Hartman*, 107 N.M. at —, 763 P.2d at 1152.

105. For a discussion of these factors, *see* Note, 82 MICH. L. REV. at 619-23. *See also* Developments in the Law, *New York Recognizes an Exception to Waiver of Attorney-Client Privilege for Fraudulent Voluntary Disclosure of Privileged Documents*, 62 ST. JOHN'S L. REV. 752, 757-58 (1985) (discussing factors courts should consider in evaluating reasonableness of precautions).

106. One court has formulated the test as "a good faith, sufficiently careful, effort to winnow a relatively small volume of privileged materials from a very large number of documents." *National Helium*, 219 Ct. Cl. at 615.

107. *Servotronics*, 132 A.D.2d at —, 522 N.Y.S.2d at 1004-1005; *Lois Sportswear*, 104 F.R.D. at 105.

108. *International Digital Sys.*, 120 F.R.D. at 446-47.

109. *See Transamerica Computer Co. v. IBM*, 573 F.2d 646, 649 (9th Cir. 1978) (discussing IBM's use of two levels of screening during massive expedited discovery); *Parkway*, 116 F.R.D. at 51 (stating that "when large numbers of documents are involved, a post-designation review may be necessary").

110. *Kanter*, 206 Cal. App. 3d at —, 253 Cal. Rptr. at 819; *Servotronics*, 132 A.D.2d

attorney, rather than a paralegal, did the screening.¹¹¹ In the third step to determine "reasonableness," courts ask how many documents were actually produced.¹¹² If a large percentage of those produced are privileged, the courts are likely to find that the precautions were unreasonable.¹¹³

The second component of the conduct analysis deals with actions taken once documents have been released. Specifically, courts often ask how long an interval existed between the time of release and the time when the releasing party sought return of the documents.¹¹⁴ Such an inquiry says nothing about the care taken before the release; instead, it looks at action taken afterwards. When producing parties have waited a substantial period before attempting to retrieve a document, courts are more hostile to claims that there was no intent to waive.¹¹⁵

SUBJECTIVE INTENT APPROACH¹¹⁶

Some courts have rejected the conduct and strict responsibility approaches, adopting the so-called subjective intent approach.¹¹⁷ The

at —, 522 N.Y.S.2d at 1005. *Cf. Parkway*, 116 F.R.D. at 51 (suggesting that counsel, not independent copier service, copy documents).

111. See *supra* note 110 and accompanying text.

112. See *Parkway*, 116 F.R.D. at 51 (stating that "[a] large number of inadvertent disclosures in comparison to the number of disclosures shows lax, careless, and inadequate procedures"); *Lois Sportswear*, 104 F.R.D. at 105 (finding no waiver when only 22 of 16,000 requested documents were privileged).

113. *Marathon Oil*, 109 F.R.D. at 21; *Kanter*, 206 Cal. App. 3d at —, 253 Cal. Rptr. at 819; *Prebilt*, No. 87-7132 at 7.

114. *Servotronics*, 132 A.D.2d at —, 522 N.Y.S.2d at 1005; *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 674 (D.C. Cir. 1979); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

115. See *Ocean Transportation*, 604 F.2d at 674; *Hartford*, 109 F.R.D. at 332 (suggesting a quick rectification of error militates against waiver); *Parkway*, 116 F.R.D. at 51.

116. The term "subjective intent" is taken from the opinion in *Kanter*, 206 Cal. App. 3d at —, 253 Cal. Rptr. at 815-16, which used this term to describe the standard adopted in *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982). In *Comment, Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 PAC. L.J. 59 (1986), the author refused to adopt the term "subjective intent," fearing that such a term would refer to intent at the time of the controversy, as opposed to the time of the release. In both theory and practice, it is not difficult to distinguish between subjective intent at the time of release and subjective intent at the time of controversy. This article uses the term in the former sense.

117. Commentators are split as to whether there is a difference between a conduct approach and an intent approach. Compare, Grippando, 39 U. MIAMI L. REV. at 513-15 (placing cases such as *Mendenhall* under the conduct rubric) with *Comment*, 18 PAC. L.J. at 83 (placing cases such as *Mendenhall* in a separate "intent" category). The *Mendenhall* case is clearly distinguishable in a real sense from so-called conduct cases. In *Mendenhall*, the court explicitly noted that negligence by an attorney could not waive the privilege. *Mendenhall*, 531 F. Supp. at 955.

most prominent subjective intent case is *Mendenhall v. Barber-Greene Co.*¹¹⁸ In *Mendenhall*, the producing party's attorney provided the opponent's counsel with several files.¹¹⁹ No action was taken to cull privileged documents from these files.¹²⁰ The receiving party then moved for production of four privileged documents, claiming that the allowance of inspection had waived the privilege.¹²¹ The court denied the motion, despite a belief that the producing attorney may have been negligent.¹²² In so holding, the court adopted unusually strong language against a conduct approach:

We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.' Inadvertent production is the antithesis of that concept. . . . *Mendenhall's* lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if 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.¹²³

Several courts dealing with the problem of inadvertent waiver have cited *Mendenhall*,¹²⁴ producing parties have sought its support.¹²⁵ Yet, few courts have adopted its reasoning. At least one court has misinterpreted *Mendenhall*;¹²⁶ most have explicitly rejected it.¹²⁷ Indeed, only two opinions have adopted *Mendenhall's* logic.¹²⁸ One opinion came from a magistrate in the northern district of Illinois, the same court which decided *Mendenhall*.¹²⁹ The other opinion came from an appeals court in Michigan, which was apparently unaware of the *Mendenhall* decision.¹³⁰

118. 531 F. Supp. 951 (N.D. Ill. 1982).

119. *Id.* at 952.

120. *Id.* at 954.

121. *Id.* at 955.

122. *Id.*

123. *Id.* (citations omitted).

124. *Hartman*, 107 N.M. at —, 763 P.2d at 1152; *Hartford*, 109 F.R.D. at 329; *Kanter*, 206 Cal. App. 3d at 803, 253 Cal. Rptr. at 816; *Prebilt*, No. 87-7132 at 11; *O'Leary v. Purcell Co.*, 108 F.R.D. 641, 646 (M.D.N.C. 1985); *Marathon Oil*, 109 F.R.D. at 21.

125. See, e.g., *Hartman*, 107 N.M. at —, 763 P.2d at 1152; *Hartford*, 109 F.R.D. at 329.

126. See *O'Leary*, 108 F.R.D. at 646 (stating that *Mendenhall* adopts conduct analysis); *Marathon Oil*, 109 F.R.D. at 21 (purporting to adopt *Mendenhall* but still engaging in conduct analysis).

127. See *Hartman*, 107 N.M. at —, 763 P.2d at 1152; *Hartford*, 109 F.R.D. at 329; *Kanter*, 206 Cal. App. 3d at 803, 253 Cal. Rptr. at 816.

128. See *infra* notes 129-30 and accompanying text.

129. *In re Sealed Case*, 120 F.R.D. 66 (N.D. Ill. 1988) (holding that the privilege is not waived by inadvertent production).

130. *Sterling v. Keidan*, 162 Mich. App. 88, 412 N.W.2d 255 (1987) (finding waiver

AN EVALUATION OF THE CASE LAW

There are three anomalies apparent in the case law. The first is its reliance upon the confidentiality (privacy) component of the privilege. As noted earlier,¹³¹ the United States Supreme Court has adopted the information production justification of the privilege and has said nothing about privacy. Several courts, especially those that have adopted a form of the strict responsibility approach, have rejected the information production justification approach and adopted a privacy rationale in the waiver context.¹³² When parties have inadvertently released documents (or disclosed their contents), these courts place great emphasis upon the fact that the documents no longer possess their confidentiality. This is why some courts have held that the question of waiver will be decided with reference to whether the receiving party has learned the "gist" of their contents.¹³³

The second anomaly in this context is the various definitions of waiver and intent applied to these cases. As noted earlier, the Supreme Court has adopted the information production rationale for the privilege.¹³⁴ Such a rationale creates a property right in information in order to foster the production of such information. It seems that, in a property rights context, the doctrine of inadvertent waiver is a misnomer. The court in *Mendenhall v. Barber-Greene Co.*,¹³⁵ of course, took the traditional approach to waiver; in order to waive the privilege, a party must intend to do so.¹³⁶ Many courts pay lip service to such a standard. However, as we have seen, these courts have adopted a strange definition of intent.¹³⁷ Specifically, the majority of

only when producing party consciously releases a document which it knows might be privileged, deciding to take the risk). The court stated that the law requires that, "an implied waiver be judged by standards as stringent as for a 'true waiver.'" *Id.* at 162 —, 412 N.W.2d at 260.

131. See *supra* note 47 and accompanying text.

132. *Prebilt Corp. v. Preway, Inc.*, No. 87-7132 at 5-6 (E.D. Pa. Sept. 23, 1988) (LEXIS, Genfed library, Dist file); *International Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988); *Chubb Integrated Sys. Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 63, 67 (D.D.C. 1984); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954); *Ranney-Brown Distribs., Inc. v. E.T. Barwick Indus., Inc.*, 75 F.R.D. 3, 6, (S.D. Ohio 1977); *Underwater Storage Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970).

133. *Prebilt*, No. 87-7132 at 6; *Chubb*, 103 F.R.D. at 63; *Ranney-Brown*, 75 F.R.D. at 7 (scheduling a hearing to determine if confidentiality was lost). See also *Parkway Gallery v. Kittinger/Pennsylvania House Group*, 116 F.R.D. 46, 51-52 (M.D.N.C. 1987) (holding when an opponent has learned contents of the documents, a very strong showing with regard to other factors is required to defeat waiver).

134. See *supra* note 47.

135. 531 F. Supp. 951 (N.D. Ill. 1982).

136. *Id.* at 955.

137. See *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D. Ill. 1981) (holding that failure to shred the documents before disposing of them consti-

courts infer intent from the precautions taken by the producing party.¹³⁸ As the court in *Prebilt Corp. v. Preway, Inc.*¹³⁹ noted, courts should ask whether the "precautions taken by [the producing party] were . . . sufficient to protect their interest."¹⁴⁰ At first glance, this may seem sensible. However, it must be recalled that it does not answer the central question, to wit, why should producing parties have to protect their interest in the first place, when their interest could be protected just as easily by requiring the receiving party to return inadvertently produced documents?

The third anomaly within these cases is the tri-level of standards applied. These three standards, of course, correspond to the three standards of care which may or may not impose liability in tort: intent, negligence, and strict liability. While commentators split over the utility of the reasonable precautions and the intent test,¹⁴¹ no commentator, save Wigmore,¹⁴² supports the strict responsibility approach.¹⁴³ Those commentators who favor a conduct approach over a strict responsibility approach provide little basis for their preferences.¹⁴⁴ One commentator simply notes that precautions are a good indicator of intent.¹⁴⁵ Another commentator claims that a conduct approach is more predictable than the strict responsibility approach.¹⁴⁶ No commentator has explained the effect of the possible standards upon the production of information sought by the privi-

tuted an intent to waive), cited in Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1618 n.70 (1986).

138. See, e.g., *Prebilt*, No. 87-7132 at 7.

139. No. 87-7132 at 5-6 (E.D. Pa. Sept. 23, 1988) (LEXIS, Genfed library, dist file).

140. *Id.* at 7.

141. See Comment, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 PAC. L.J. 59, 81-82 (1986) (advocating subjective intent standard); Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511, 523-25 (1984) (advocating conduct approach); Davidson & Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 651 (1986) (favoring subjective intent standard, except in cases in which the receiving party changes position based upon reliance on privileged document); Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598, 616 (1983) (favoring reasonable precautions approach).

142. See *supra* note 53 and accompanying text.

143. Note, 82 MICH. L. REV. at 598 (conduct standard); Grippando, 39 U. MIAMI L. REV. at 511 (conduct standard); Developments in the Law, *New York Recognizes an Exception to Waiver of Attorney-Client Privilege for Fraudulent Voluntary Disclosure of Privileged Documents*, 62 ST. JOHN'S L. REV. 752, 758 n.33 (1985) (appearing to reject conduct standard except in cases of reliance by receiving party); Comment, 18 PAC. L. REV. at 93 (subjective intent); Davidson & Voth, 64 OR. L. REV. at 644-45 (arguing waiver should be limited to cases in which adverse party changes position in reliance).

144. See *infra* notes 145-47 and accompanying text.

145. Note, 82 MICH. L. REV. at 624.

146. Grippando, 39 U. MIAMI L. REV. at 524. Such an assertion is but a canard. Surely a strict responsibility approach is more predictable than a conduct approach. If you produce, you lose.

lege.¹⁴⁷ More important, no court has explained why courts should import tort liability standards into the law of waiver. The court in *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*¹⁴⁸ provided some insight for this reasoning:

We reject the traditional approach, however, because it rests on the faulty and unrealistic premise that the only interest protected by the attorney-client privilege is secrecy. . . . The fact that information is publicly available does not necessarily make it admissible in evidence. Moreover, although confidentiality can never be restored to a document already disclosed, a court can repair much of the damage done by disclosure by preventing or restricting the use of the document at trial.¹⁴⁹

From the client's perspective, there is more damage to disclosure than the breach of confidentiality. Disclosure before the tribunal will have adverse effects on litigation. Clients who face this possibility are less likely to consult their attorneys in the first place.¹⁵⁰

The first anomaly should not be of concern. The court in *Upjohn Co. v. United States*¹⁵¹ necessarily rejected a privacy approach,¹⁵² and courts invoking such an approach fly in the face of that decision. The last two anomalies are of concern, and a brief analogy will highlight the reason for such concern. Suppose that Ed leaves his house and negligently leaves his door unlocked. Sally enters his house and removes Ed's collection of baseball cards.¹⁵³ Ed returns but does not realize that his cards are missing. Once he realizes that they are missing, he brings suit against Sally alleging tortious conversion of his cards. At trial, Sally admits the conversion but pleads a defense of contributory negligence. By leaving the door unlocked, she says,

147. See generally Marcus, 84 MICH. L. REV. at 1609-17 (noting some effects of the traditional (strict responsibility) approach, without discussing conduct approach).

148. 132 A.D.2d 392, 522 N.Y.S.2d 999 (1987).

149. *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, —, 522 N.Y.S.2d 999, 1004 (1987).

150. See *supra* note 28 and accompanying text.

151. 449 U.S. 383 (1981).

152. See Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 476-81 (1987) (suggesting that the extension of privilege to corporations involves a rejection of the privacy approach).

153. Of course, parties who receive inadvertently produced documents are not burglars; they are more akin to "finders." This distinction is irrelevant to the analysis here. Suppose Ed had negligently left his baseball cards at Sally's house. Under the law of finders, Sally would be liable for conversion if she did not return the cards. See J. DUKEMINIER & J. KRIER, *PROPERTY* 4, 6 (2d ed. 1988); P. GOLDSTEIN, *REAL PROPERTY* 23 (1984). Indeed, knowing retention of a chattel without reasonable efforts to contact the true owner subjects one to penal sanctions in some states. See, e.g., CAL. PENAL CODE § 485 (West 1988).

Ed manifested an intent to waive the right to his baseball cards. What result?

Sally loses, of course. Negligent failure to guard against theft does not waive a property right. It is hornbook law that contributory negligence is not a defense to an intentional tort.¹⁵⁴ Allowing such a defense would make little sense as it would shift the burden of precautions onto the party least able to bear them. It is certainly less expensive for Sally to fail to enter Ed's house than it is for Ed to make sure that he always locks his door.¹⁵⁵ As the United States Court of Appeals for the Seventh Circuit recently noted in a related context:

The best solution is for people not to harm others intentionally, not for potential victims to take elaborate precautions against such depredations. If the victims' failure to take precautions were a defense, they would incur costs to take more precautions (and these costs are a form of loss these victims would feel in every case, even if the tort does not occur).¹⁵⁶

The burglar cannot escape because the victim left his door unlocked. Nor can a finder refuse to return a lost watch because the loser was careless.¹⁵⁷ So too, a party should not be able to retain privileged documents because their owner was careless in producing them. Absent subjective intent to waive, parties should retain their property right in information. At first glance, determining such intent is difficult.¹⁵⁸ Who knows what the party was thinking at the moment of production? Who wants to waste judicial resources finding out?

Such criticisms miss the mark. A subjective intent test should not focus on a person's state of mind at the time of production. Because production is inadvertent, *ex hypothesi*, a party can have no intent about the document in question.¹⁵⁹ Instead, such a test should focus upon the party's intent at the time he is alerted to the fact of production. In the same way that rules of tort law force parties into

154. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS § 65, at 462 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 481, 482 (1965).

155. See generally W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 162-65 (1987).

156. Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522, 528 (7th Cir. 1985) (holding that under the Federal Securities Laws, contributory negligence is no defense in an action under Rule 10(B)(5)).

157. See *supra* note 153 and accompanying text.

158. Comment, 18 PAC. L. J. at 83 (arguing that the definition of intent used in these cases is unclear).

159. Marcus, 84 MICH. L. REV. at 1634 (pointing out that "[in such cases] there was probably not only no intent to waive, but not even an intent to deliver the materials to the opponent").

voluntary exchange transactions,¹⁶⁰ so too should the law of inadvertent waiver force the receiving party to alert the producer to the fact of production and obtain a waiver at that time.¹⁶¹

This analogy points to a more basic problem with requiring precautions for document releases. Specifically, what harm is there to releasing a document? At first glance, there appears to be none. Yet, the courts apparently contemplate two types of harm: frustrated reliance by the opposition and loss of truth in the adversary process. Both of these *harms* may justify departing from a subjective intent standard. This Article now examines each justification in turn.

RELIANCE

Some courts have suggested that a release of privileged documents may result in reliance by adverse parties.¹⁶² According to these courts, requiring a return of documents after such reliance takes place frustrates the expectations of the opposing party.¹⁶³ Routine return of documents which have been produced and relied upon will do more than frustrate reliance, it will create uncertainty in the litigation process, forcing parties to overinvest in the production of information.¹⁶⁴ A party who does not know which documents he may introduce at trial is likely to spend extra resources seeking information which he would not need if the privileged documents were available. For this reason, courts look to the interval of time between when a document is produced and when its return is sought in determining whether the privilege has been waived.

An example of such a problem may be helpful. Suppose that the producing party (a defendant) inadvertently produces a privileged document in January. The document contains information useful to the plaintiff's case, obviating the need for further investigation of a particular matter. The plaintiff thus plans to use the document at trial and concentrates on seeking evidence to prove other elements. Eight months later, defendant seeks to introduce the document at trial. Plaintiff objects, claiming that it is protected by privilege. What result?

It seems clear that the privilege should be lost. Plaintiff has re-

160. W. Landes and R. Posner, *An Economic Theory of Intentional Torts*, 1981 *International Review of Law and Economics* 127, 142-43.

161. See *infra* note 176 and accompanying text.

162. *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 675 (D.C. Cir. 1979); *Servotronics*, 132 A.D.2d at —, 522 N.Y.S.2d at 1004.

163. Davidson & Voth, 64 OR. L. REV. at 644-45; Note, 82 MICH. L. REV. at 623.

164. *Cf. First Wisconsin Mortgage v. First Wisconsin Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980) (holding privilege not waived when producing party gained no advantage from production).

lied upon the availability of the document and has made his information investment decisions accordingly. Refusal to admit the document now can only result in unfair surprise, or a further delay, as plaintiff seeks information elsewhere. Indeed, it seems possible that the defendant has used the disclosure strategically.¹⁶⁵ By releasing the document and seeking to recall it, defendant could be hoping to induce such reliance in hopes of frustrating it later. As the court noted in *In re Grand Jury Investigation of Ocean Transportation*:¹⁶⁶

[I]t 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. The Government attorneys' minds cannot be expunged, the grand jury is familiar with the documents, and various witnesses' testimony regarding the papers has been heard.¹⁶⁷

The law contains an analogy for such a situation. Specifically, one thinks of property law and the law of adverse possession. One illustration is a variation on the above hypothetical. Assume that instead of taking Ed's baseball cards, Sally simply moves into the house. Ed stays away for twenty years. Sally's possession of the house is (1) actual, (2) open and notorious, (3) exclusive, (4) continuous, and (5) hostile and under claim of right.¹⁶⁸ Upon his return, Ed seeks to eject Sally from the land. What result? Most probably Ed's suit would be barred by a statute of limitations, a statute designed to implement the law of adverse possession.¹⁶⁹ This result would obtain regardless of Sally's subjective state of mind.¹⁷⁰ Such a result serves two purposes.¹⁷¹ First, it protects Sally's reliance interest; second, it encourages the productive activities in which she is engaged.¹⁷² In

165. See Marcus, 84 MICH. L. REV. at 1636 (stating that "if unintended delivery of privileged material could always be taken back . . . there could be continual uncertainty about whether privilege would actually be asserted as to items produced in discovery, a prospect that could disrupt trial preparation").

166. 604 F.2d 672 (D.C. Cir. 1979).

167. *Id.* at 675 (citations omitted).

168. J. DUKEMINIER & J. KRIER, *supra* note 153, at 100 (2d ed. 1988).

169. *Id.* at 87. The law of adverse possession rarely exists as such. Instead, it takes the form of limitations of actions for ejectment. See *id.*

170. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1123 n.8 (1984).

171. See, Comment, *Compensation for the Involuntary Transfer of Property Between Private Parties: Application of a Liability Rule to the Law of Adverse Possession*, 79 NW. U. L. REV. 758, (1984). Two other purposes served by the doctrine of adverse possession, "the development of otherwise idle property and to grant title in the equitable owner of the land . . . [derive from] the principles of economic efficiency and fairness." *Id.* at 772.

172. For example, as the court stated in *LaFrombois v. Jackson*, 8 Law. 589 (N.Y. 1826):

But for the intervention of the statute, [barring an action for ejectment] there

the same way, the receiving party in document production claims a sort of adverse possession in the privileged document. Hence, there seems to be some sense in courts looking at the length of time between production and the time when return is sought. Some commentators, otherwise hostile to the doctrine of inadvertent waiver, have supported such a test.¹⁷³

Closer analysis reveals that these commentators, and the courts with which they agree, are wrong. First, the example probably misstates the law of adverse possession. Contrary to conventional statements of hornbook law, courts do look to the possessing party's state of mind in determining whether to bar an action by an actual owner.¹⁷⁴ It is true that defendants in ejectment actions need not specifically plead and prove subjective good faith.¹⁷⁵ Yet, one commentator noted that "the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law."¹⁷⁶ This examination of subjective intent may make little sense in many adverse possession cases. Take our example above. Even if Sally knew that the land was not hers, the cost (to her) of determining ownership of the land was quite high. Further, Ed is probably in a good position to know whether someone else is occupying his land. Hence, placing the loss on Ed seems to make sense, because he is better able to notify Sally that her reliance will be for naught.

Whatever the merits of examining subjective intent under the law of adverse possession, such an approach is eminently sound in our cases of claimed reliance upon a document. If a receiving party knows that the document is privileged, the cost of notifying the producing party and inquiring about subjective waiver is nearly zero. This differs greatly from the case of adverse possession in which Sally, though knowing she is trespassing, has no idea who owns the land. Conversely, in document production, once the document leaves the hands of the producing party, that party has no means of deter-

would be no end to the revival of dormant and antiquated titles, and many an honest citizen, who now, by its benignant operation, enjoys in security the few acres his industry has acquired, and which have been improved by his labour, and enriched by the "sweat of his brow," would be driven from his home by an enemy, more insidious and more destructive to the peace of the community than an invading army.

Id. at 616.

173. Davidson & Voth, 64 OR. L. REV. at 644-45 (advocating that the principle of waiver be limited to cases in which adversaries have changed their position in reliance upon the evidentiary availability of a privileged document). *See also* Developments, 62 ST. JOHN'S L. REV. at 758 n. 33.

174. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331, 332 (1983).

175. *See* J. DUKEMINIER & J. KRIER, *supra* note 153, at 94-95; RESTATEMENT (2D) OF PROPERTY § 458 (1944); Helmholz, 61 WASH. U.L.Q. at 332.

176. Helmholz, 61 WASH. U.L.Q. at 332.

mining that it has been lost. Put another way, the receiving party is in a much better position to avoid a loss from reliance, once the document has been produced.¹⁷⁷ Further, the receiving party will always subjectively know that the document is privileged. It is difficult to see how a party can claim to have relied upon a document without carefully scrutinizing it. Reliance itself is certain to reveal the privileged nature of the document. Once such a revelation occurs, the receiving party is in an excellent position to notify the producing party about the privileged nature of the document and seek a knowing waiver. At the time such a notification takes place, the receiving party has yet to rely upon the availability of the document in deciding whether to gather more information. Hence, prompt notification of the producing party will not frustrate any reliance on the part of the receiving party.

LOSS OF TRUTH

The second form of harm against which departure from an intent standard guards is the loss of truth suffered by the adversary process. By failing to take proper precautions, divulging parties allow documents to come into the adversary process. Then, after the truth has come out, the document returns to the owner, essentially destroying truth. Adopting a strict responsibility approach causes parties to take care, generating fewer documents in the first place.¹⁷⁸ This also reduces the number of *false productions*. Further, when such documents are produced, the documents remain before the tribunal, greasing the wheels of the judicial process. Adopting a conduct approach forces parties to take care, reducing the amount of documents originally produced.¹⁷⁹

There is, of course, something wrong with this view. The fact that a document has changed hands twice does not reduce the amount of truth reaching the tribunal any more than the failure to release it in the first place. Further, the very existence of the attorney-client privilege contemplates the concealment of truth. As noted earlier,¹⁸⁰ the attorney-client privilege exists because of an empirical estimate that its benefits outweigh its costs, i.e., that a failure to protect the privilege will result in greater harm than that which results from the reduction of truth flowing to the tribunal. There is no doubt that the loss of truth is a harm, but the existence of the privi-

177. See *Ocean Transportation*, 604 F.2d at 674 (discussing that upon receipt of privileged documents Antitrust Division promptly notified producing party which explicitly stated that it intended to disclose documents).

178. See *supra* notes 54-79 and accompanying text.

179. See *supra* notes 80-116 and accompanying text.

180. See *supra* notes 42-45 and accompanying text.

lege manifests a decision that this harm cannot be eliminated without creating more. Is there any reason to believe that a strict responsibility or conduct approach to the inadvertent production of documents will eliminate this harm without eliminating the benefits of the privilege? It would seem not; documents are simply another form of communication covered by the privilege. Their protection follows simply from principles established long ago at common law. Failure to protect documents by adopting loose standards of waiver would seem to violate the solid support of the privilege established in *Upjohn*.

EFFECT UPON VALUES BEHIND THE PRIVILEGE

Thus far, this Article has suggested that the inadvertent production of a document causes no harm to the legal system above and beyond that already contemplated by the attorney-client privilege. Further, the Article has suggested that there is no reason to adopt a standard of intent different from that employed in other property rights contexts. Yet, as already noted, most courts do not use a subjective intent approach. Instead, they use either a conduct or a strict responsibility standard. Below, this Article examines the effect which each of these standards will have upon the values supporting the privilege.

STRICT RESPONSIBILITY APPROACH

Under a strict responsibility approach, the privilege is conclusively waived with respect to all privileged documents which are produced.¹⁸¹ Hence, a party who wishes to communicate with his attorney in writing faces some chance that such communications, if they survive until the discovery stage, will find their way into the litigation process. Indeed, absent any precautions, this probability seems quite high, especially given the existence of an opponent skillful at manipulating the discovery process.

Here, a producing party is akin to an individual facing the prospect of strict liability for injuries that he causes. Such a party could react in two ways. The client could take care that such documents, once generated, never reach the other party.¹⁸² As noted earlier, there are two ways of preventing these documents from being circulated. Clients may either segregate privileged and nonprivileged documents in their own files before litigation actually begins or they may take care at the document production stage to prevent the divul-

181. See *supra* notes 54-79 and accompanying text.

182. See R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 161 (3d ed. 1986); W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 66-67 (1987); S. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 23 (1987).

gence of privileged documents.¹⁸³ Unlike a negligence standard, which will produce only those sorts of care that courts examine,¹⁸⁴ a strict responsibility standard will produce the proper balance between the various levels of care available.¹⁸⁵ Further, it will encourage parties to innovate, to discover more effective ways of protecting documents from disclosure.¹⁸⁶ Hence, parties will invest resources in all cost-effective methods of care, including *research and development* of new ones. The relative amounts of such care will depend upon their effectiveness and relative costs.¹⁸⁷ These costs will include both out-of-pocket costs and agency costs. As agency costs between attorney and client rise, parties will take proportionately more care at the segregation and generation stage, where no such costs exist.

A client could also react to the possibility of strict liability by reducing the overall activity level.¹⁸⁸ To be precise, a client could reduce the actual number of documents produced. Such a reduction could be accomplished in several ways. The client could simply seek less legal advice, seek legal advice only in oral, rather than in written form,¹⁸⁹ or destroy relevant documents once the legal advice has been received.

Hence, the rule of strict responsibility will have several discrete effects upon the behavior of clients and their attorneys, all of which represent social costs. First, parties will spend real resources at the pre-discovery and post-discovery stages, both segregating documents when they are generated and screening them during production. Second, both parties will invest real resources developing new ways to protect documents from disclosure. Third, parties may destroy relevant documents after the documents have been generated and have served their purpose. Such destruction represents both an out-of-pocket and an administrative cost. Firms must pay the actual cost of destruction and disposal; the firms must devise a system of institutional memory which operates without documents. This will make it more difficult for firms to hire employees for short periods of

183. See *supra* notes 102-03 and accompanying text.

184. See *supra* notes 141, 145-47 and accompanying text.

185. See S. SHAVELL, *supra* note 182, at 17.

186. R. COOTER & T. ULEN, *LAW AND ECONOMICS* 367 (1988).

187. S. SHAVELL, *supra* note 182, at 9.

188. See R. POSNER, *supra* note 182, at 161; W. LANDES & R. POSNER, *supra* note 181, at 66; S. SHAVELL, *supra* note 182, at 21-26.

189. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309, 362 (stating that "[i]f certain writings are discoverable, people may find ways to carry on their business orally or in code").

time.¹⁹⁰ Firms will be forced to prefer long-term workers who "know the score" without the need to consult documents produced by their predecessors.

Fourth, parties will reduce the number of documents produced and reduce the amount of legal advice sought or shift their communications to an oral form. Such a shift will result in more legal violations and more litigation as parties receive less exact legal advice.¹⁹¹ Reliance on oral communications will again bias the labor market toward long-term employees as firms rely on human institutional memories. The use of oral communications may also make parties take fewer risks. Fifth, such a rule will certainly encourage the opponents of producing parties to increase the size of their discovery requests, because such requests will impose even greater costs than usual upon producing parties.¹⁹²

CONDUCT APPROACH

Effects of a Well-Defined Standard

The effect of a reasonable precautions approach upon clients invoking the privilege depends pivotally upon the way in which the standard is administered.¹⁹³ Under a properly administered reasonable precautions approach, courts examine each and every contemplated decision by a firm and determine whether it is cost justified.¹⁹⁴ Such a system would involve examining both the amount of activity conducted and the care taken given such conduct.¹⁹⁵ However, courts are generally not competent to evaluate activity levels.¹⁹⁶ Hence, in asking whether a car driver was negligent, courts do not ask whether the driver drove the car too much in comparison to the benefits derived from that driving. Instead, courts ask, given that the driver drove, did the driver do so reasonably.¹⁹⁷ Similarly, courts in the implied waiver context do not consider activity level; they do not ask whether the producing party generated too many documents while consulting its attorney before litigation. Instead, courts take the activity level as given and examine the level of care. In this context,

190. I owe this idea to Nancy Goodman, a student at the University of Chicago Law School.

191. See *supra* note 42 and accompanying text.

192. See Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U.L. REV. 569, 581-84 (1989).

193. S. SHAVELL, *supra* note 182, at 83.

194. W. LANDES & R. POSNER, *supra* note 182, at 66-67; S. SHAVELL, *supra* note 182, at 9, 17.

195. See *infra* note 206 and accompanying text.

196. R. POSNER, *supra* note 182, at 161.

197. W. LANDES & R. POSNER, *supra* note 182, at 66-67 n.22; S. SHAVELL, *supra* note 182, at 6; R. POSNER, *supra* note 182, at 161.

courts ask whether parties took reasonable care. As noted above, such a determination involves comparing the cost of precautions (B) with the reduction in harm which the precautions bring about. More precisely, courts ask whether, at the margin, the cost of additional care equals the reduction in expected accident costs ($P \cdot L$).¹⁹⁸ Hence, parties take due care when:

$$+dB = -dPL$$

Any more care would be inefficient, because it would induce too small a decrease in the expected value of accidents. Less care would be inefficient. Society could reduce accidents by more than the cost of additional care.¹⁹⁹

To apply this formula, a court needs some idea of what the potential harm is. As the earlier discussion shows, the benefits of care are unclear.²⁰⁰ Or, to put it another way, what type of injury does the producing party hope to avoid by taking care? There is no external injury to society from the release of a document. The only *harm* caused by such a release is the harm to the producing party itself. Such harm is represented by the increased expected value of a judgment (J) against the producing party which results from the new evidence which the producing party has inadvertently placed before the tribunal. Given this analysis, the above formula for determining whether the producing party took due care evolves into:

$$+dB = -d(PJ)D.²⁰¹$$

To determine whether a party has taken due care, a court must balance the marginal cost of that care against the marginal increase in the expected value of a judgment against the producing party.

Assuming that a court is able to gather the information necessary to determine the proper level of care to be taken in the docu-

198. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Judge Learned Hand wrote:

[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P.

Id. See *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949); *United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022 (7th Cir. 1982). See generally W. LANDES & R. POSNER, *supra* note 182, at 96-107 (arguing [with copious citations and analysis] that courts have traditionally applied "the Hand formula" to negligence problems).

199. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972).

200. See *supra* note 3 and accompanying text.

201. Where PJ is the Probability of Judgment and D is the amount of damages flowing from that judgment.

ment production and generation process, what effects will such a rule have? First, parties will spend real resources at the generation and production stage in an attempt to meet the standard set by the court. This will involve document segregation programs and various screening procedures at the production stage. Second, unlike a rule of strict responsibility, a reasonable precautions approach will not encourage the development of new screening procedures.²⁰² Courts will merely define *reasonable precautions* in terms of known technology and methods. Third, a properly defined negligence rule will have no direct effect upon the activity level of the firm.²⁰³ The client will produce the same number of privileged documents as he would have produced under a subjective intent rule. Hence, a negligence standard will not directly decrease the information flow between attorney and client. Therefore, the rule of law values behind the privilege will not suffer. Such a rule, however, may have small wealth effects. Specifically, when parties spend real resources on care, their aggregate wealth will drop when compared to that which would exist under a subjective intent regime. When such wealth drops, we can expect a corresponding decrease in document generation. While this effect is real, it will probably be quite small, because the costs of segregating and screening documents are quite small compared to the aggregate wealth of firms.

Effects of a Poorly-Defined Standard

In our imperfect world, of course, the application of such a standard is exceptionally difficult. Specifically, courts are probably quite unable to determine the costs and benefits of relevant care. This problem may take several forms.

One problem is that of *sequential care*. As noted several times, parties can take care at both the generation and production stages. Given these two loci of care, one would expect a court to examine the care taken at both levels in order to determine whether the producing party took reasonable precautions. Some courts examine such precautions,²⁰⁴ but this is not always the case. As is the case in negligence law generally,²⁰⁵ courts very often ignore care taken at the generation level, instead focusing upon the amount of care taken at

202. See *supra* note 54-79 and accompanying text.

203. Recall that we have assumed that courts take activity levels as given.

204. *Prebilt Corp. v. Preway, Inc.*, No. 87-7132 at 7 (E.D. Pa. Sept. 23, 1988) (LEXIS, Genfed library, Dist file); *Ranney-Brown Distribs., Inc. v. E.T. Barwick Indus., Inc.*, 75 F.R.D. 3, 5-6 (S.D. Ohio 1977); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954).

205. S. Shavell, *supra* note 182, at 9, 17.

the production level.²⁰⁶ If parties know that courts will ignore the care taken at the generation level, they will cease taking care at that level.²⁰⁷ Instead, they will focus all their energy upon taking the legally-mandated precautions at the production level. At first glance this does not seem right. Surely the first unit of care at the generation level will yield greater benefits (in the form of fewer releases) than the last unit of care employed at the production stage.²⁰⁸ A party seeking to protect its interests would certainly invest some of its limited resources in pre-production segregation, instead of using all those resources at the production screening stage.

True, proper precautions would involve care at both levels. Yet, if a court only scrutinizes one level, requiring a particular level of care, a party would be wasting its resources by taking care earlier. In other words, it would be in a party's best interest to meet the production level standard and ignore care at the generation level.²⁰⁹ Once it has met the production level standard, a party will never be said to have waived the privilege, and hence care at the earlier level would be duplicative.

A second similar problem is a misdefinition of the proper amount of care at either level. For instance, courts may set the standard too low, requiring too little screening at the production level, or too little segregation at the production level. When this is the case, parties will simply reduce their expenditures on care accordingly. They will take no more care than is necessary to satisfy the rule, knowing that satisfaction of the rule will nullify all chance of potential waiver.²¹⁰ Given the conclusion that there is no reason for any care in the first place, such a result would be a happy one, at least compared to a "properly-designed" standard of care because such a standard would involve a smaller waste of real resources.

On the other side of the coin, courts may set the standard of care too high. They may require all sorts of precautions which, from the perspective of the producing party, only marginally reduce the ex-

206. *Kanter v. Superior Court*, 206 Cal App. 3d 803, 253 Cal. Rptr. 810 (1988); *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12 (D. Neb. 1985); *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999 (1987).

207. S. SHAVELL, *supra* note 182, at 9.

208. This is simply an application of the principle of diminishing marginal productivity. See P. WONNACOTT & R. WONNACOTT, *ECONOMICS* 665-66 (2d ed. 1982).

209. S. SHAVELL, *supra* note 182, at 9, 17. Cf. *Developments in the Law, New York Recognizes an Exception to Waiver of Attorney-Client Privilege for Fraudulent Voluntary Disclosure of Privileged Documents*, 62 ST. JOHN'S L. REV. 752, 758 (1985) (suggesting that factors considered in any reasonable precautions test will, in effect, become a standard of conduct for the bar).

210. S. SHAVELL, *supra* note 182, at 83; W. LANDES & R. POSNER, *supra* note 182, at 124.

pected values of judgments. Such an outcome will produce results which mimic those obtained under a strict responsibility approach.²¹¹ Because the cost of reaching the standard would be too high, parties will react by taking only a cost-justified level of care. Even given this level of care, parties will still be found lacking from a precautions standpoint. Hence, they will waive the privilege with respect to any document produced. Given this situation, parties will move to a lower activity level, reducing the number of documents generated in the first place. Such a reduction will have the same negative consequences for the production of information and the rule of law as the adoption of a strict responsibility standard.

Strategic Behavior

A final by-product of a conduct standard is strategic behavior. Earlier we noted that a strict liability rule would encourage *receiving* parties to abuse the discovery process.²¹² Specifically, such a rule would encourage receiving parties to make large discovery requests upon the producing party, in the hope of imposing costs in the form of released documents and screening costs. A negligence rule will have similar but more expansive effects. Not only will receiving parties have an incentive to *request* more documents, producing parties will want to *produce* more. As noted earlier,²¹³ courts often measure the reasonableness of precautions indirectly, to wit, by counting the number of documents actually produced. Hence, the higher the proportion of privileged to non-privileged documents produced, the greater the chance that precautions will be said to be unreasonable. A producing party facing such a rule has an obvious incentive to overproduce non-privileged documents so as to decrease this ratio. Such overproduction imposes costs on the adversary process, as producing parties spend time amassing irrelevant, non-privileged documents and receiving parties wade through those documents.

CONCLUSION

The attorney-client privilege is a type of property right which encourages the production of useful information, facilitating the rule of law. The privilege is especially important at the planning stage, before litigation takes place. At this stage, parties must have the liberty of exchanging information with their attorneys in order to know the law and abide by it. This is especially so for a large corporation

211. See W. LANDER & R. POSNER, *supra* note 182, at 124-25 (setting negligence standard too high is equivalent to a strict liability standard).

212. See *supra* note 190 and accompanying text.

213. See *supra* note 110 and accompanying text.

governed by complex rules in the pervasively regulated administrative state.

Against this background, the doctrine of inadvertent waiver makes little sense. As in other areas of property law, the waiver of a right should be reserved for those cases in which a party makes a knowing, objective decision to do so. Most courts, however, have not adopted this approach. Instead, most courts have adopted either a strict responsibility approach or a conduct approach.

This Article has demonstrated that the adoption of such standards is misguided. Specifically, these standards impose social costs without corresponding benefits. Under a strict responsibility standard, parties will both take care and reduce their level of document generation. This will create two sorts of social costs: resources will be spent on care and parties will receive less effective legal advice. The first result is simply wasteful; the second is in direct derogation of the purposes of the privilege. A conduct standard which forces parties to make prompt objections to released documents is misguided. It forces the producing party to guard against unjustified reliance which the receiving party could easily avoid. A properly defined and administered conduct standard will force parties to spend real resources to guard against the production of documents and result in strategic behavior. Unlike a strict responsibility standard, which reduces the flow of information between attorney and client, the conduct approach does not impact adversely on the rule of law; it is simply wasteful. Producing parties spend real resources to guard against production without any corresponding social benefit. A legal system which seeks to minimize social costs and facilitate the flow of information between attorney and client, fostering the rule of law, should not stray from the traditional notion of waiver.