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Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents

JAMES M. GRIPPANDO*

I. CURRENT JUDICIAL APPROACHES 512
A. *The Conduct Analysis Approach* 513
B. *The Strict Responsibility Standard* 515
II. RECOMMENDED JUDICIAL APPROACH 523
III. RECOMMENDED RESPONSE OF LAWYERS TO INADVERTENT DISCLOSURE 525
IV. CONCLUSION 527

The Federal Rules of Civil Procedure expressly provide that privileged information is beyond the scope of discovery.[1] Therefore, in response to an adversary's request for production,[2] an attorney need not surrender a document that satisfies the requirements of the attorney-client privilege.[3] Problems may arise, however, if an attorney accidentally produces a privileged document. These problems occur because one of the elements necessary to assert the attorney-client privilege is proof that neither the at-

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1. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged . . . .").

2. Rule 34 of the Federal Rules of Civil Procedure governs requests for production.

3. Judge Wyzanski, in his often-quoted language in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), sets out these requirements:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

89 F. Supp. at 358-59. An equally well established statement of the requirements for the privilege is Dean Wigmore's eight part test, 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (rev. ed. 1961), which four circuits have adopted. *See* United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 319 (7th Cir. 1963); United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964); Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357, 1360 (S.D.N.Y. 1983) (citing Second Circuit Court of Appeals decisions).

torney nor the client has waived the privilege.[4] Because a waiver may be effected by implication,[5] inadvertent production of a privileged document may constitute an implied waiver of the privilege.

This article addresses the problem of implied waiver through inadvertent disclosure from two perspectives. First, the article discusses relevant case law and recommends an approach courts should take to the problem. Second, in order to prevent a court from finding an implied waiver,[6] this article suggests procedures a lawyer should follow when he receives a privileged document, and when a privileged party inadvertently discloses the contents of a privileged document.

I. CURRENT JUDICIAL APPROACHES

Two schools of thought exist on implied waiver of the attorney-client privilege through inadvertent disclosure of privileged documents. Some courts examine the conduct of the disclosing lawyer to determine whether an implied waiver has occurred. This "conduct analysis" approach is a recent trend. Other courts invoke a standard of strict responsibility, finding an implied waiver where "fairness," both to the party asserting the privilege and to the

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4. *See* Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981) (citations omitted); *In re* Grand Jury Proceedings, 517 F.2d 666, 670 (5th Cir. 1975) (citation omitted).

5. *See* Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975); United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970) (citing 8 J. WIGMORE, EVIDENCE § 2327, at 637-38 (rev. ed. 1961)), *cert. denied*, 403 U.S. 933 (1971); United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (citing IBM v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968)); *In re* Grand Jury Proceedings, 73 F.R.D. 647, 652 (M.D. Fla. 1977).

6. This article addresses only the problems presented by inadvertent disclosure and does not consider the separate and distinct problem of involuntary disclosure. Inadvertent disclosure involves divulgence of privileged information due to unilateral error by the party asserting the privilege. Involuntary disclosure, however, involves compelled or otherwise wrongfully obtained disclosure of privileged information due to the actions of a third party. *See* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981) (distinguishing between inadvertent and involuntary disclosure). Although cases sometimes contain elements of both inadvertent and involuntary disclosure, *see, e.g.*, Transamerica Computer Co. v. IBM, 573 F.2d 646 (9th Cir. 1978) (characterizing counsel's accidental disclosure of privileged documents as involuntary because, in effect, the court's unduly rigid discovery schedule compelled disclosure), in most cases these concepts are distinguishable. *Compare* Donovan v. Robbins, No. 78-C-4075, slip op. at 1 (N.D. Ill. Nov. 14, 1983) (privileged memorandum inadvertently included among documents produced due to miscommunication between co-counsel) *with* United States v. New Wrinkle, Inc., Trade Cas. (CCH) ¶ 67,883 (S.D. Ohio 1954) (where government agents came on defendant's premises demanding to inspect files and defendant permitted inspection, there was no voluntary waiver of the attorney-client privilege; "[t]here [was] at least implied coercion . . . .").

party seeking discovery, requires this result. In practice, the "strict responsibility standard" is beginning to resemble the conduct analysis approach.

A. *The Conduct Analysis Approach*

The most cogent line of cases using the conduct analysis approach comes from the United States District Court for the Northern District of Illinois. In *Donovan v. Robbins,*[7] the court faced a clear case of inadvertent disclosure. Due to a miscommunication between defense counsel, a memorandum memorializing certain communications between a defendant and his lawyer was inadvertently included among the documents produced to the plaintiff. Defense counsel discovered this error when the plaintiff subsequently attached a copy of the memorandum to a deposition as an exhibit. Defense counsel immediately terminated the deposition and obtained a protective order that sealed the memorandum and required the return of all copies pending the district court's ruling on the implied waiver issue.

The defendant then moved the district court for a protective order to continue the seal on the memorandum. The court resoundingly rejected plaintiff's contention that inadvertent disclosure of the memorandum destroyed its privileged status and granted defendant's motion for a protective order. The court stated:

> [W]e have no hesitation in concluding that, where disclosure of an otherwise privileged communicatin [sic] was obviously accidental and occurred in a setting where appropriate precautions had been taken and where prompt objection was made after the disclosure, there has been no waiver of the attorney-client privilege with respect to the disclosed document. This is the only position consistent with the hornbook notion that a waiver is a voluntary relinquishment of a known right.[8]

The voluntariness requirement was the basis of an earlier decision from the same judicial district, which expressly held that inadvertent disclosure was not "the 'intentional relinquishment or abandonment of a known right.' "[9] In *Mendenhall v. Barber-*

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7. No. 78-C-4075, slip op. at 1 (N.D. Ill. Nov. 14, 1983).
8. *Id.* at 6-8.
9. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

Greene Co., [10] plaintiff's counsel accidentally permitted defense counsel to review privileged letters while defense counsel was examining documents in the offices of plaintiff's counsel. When defendant's counsel requested copies of the letters, plaintiff's counsel realized his mistake and refused to release them. Defense counsel then moved to compel production of the letters,[11] arguing that the plaintiff had impliedly waived the attorney-client privilege. The court rejected defendant's argument and found that accidental disclosure was insufficient to satisfy the generally accepted requirements for an effective waiver. The court stated: "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."[12] The court, therefore, found that the plaintiff had not waived the attorney-client privilege and denied defense counsel's motion to compel.[13]

An analysis of the *Donovan* and *Mendenhall* decisions, and the cases upon which they rely, reveals the three key factors that a court considers under the conduct analysis approach. First, the court determines whether the disclosure was actually accidental.[14] Presumably, a court would not deem any deliberate attempt to gain an advantage through full or partial disclosure[15] to be "acci-

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10. 531 F. Supp. 951.

11. FED. R. CIV. P. 37(a) governs motions to compel.

12. 531 F. Supp. at 955 (footnote omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

13. *Id.*

14. *Donovan*, No. 78-C-4075, slip op. at 2-3; *see* SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 519 (D. Conn. 1976) (where counsel had excised the privileged portion of a communication from a document in the initial production, subsequent failure to edit later production due to en masse copying was clearly inadvertent; no implied waiver.

15. Partial disclosure refers to the disclosure of a selected portion of a privileged document or divulgence of a single privileged document where a group of privileged documents exist on the same subject matter. Under these circumstances partial disclosure may misrepresent the true character of the privileged communication. This danger of misrepresentation is the basis for the rule that voluntary disclosure of a portion of a privileged communication constitutes a waiver with respect to the rest of the communication on the same subject. *See* R. J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980) (citing Securities & Exch. Comm'n v. Dresser Indus., 453 F. Supp. 573 (D.D.C. 1978); *see also* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976); International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177 (M.D. Fla. 1973). The purpose of this rule "is to prevent a litigant from 'insisting upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving.' " Marshall v. United States Postal Serv., 88 F.R.D. 348, 350 (D.D.C. 1980); *cf.* Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970) (where deponent disclosed that he conferred with counsel regarding a specific subject matter on certain occasions, fairness required him to disclose all other instances when that subject matter was discussed with counsel).

dental."[16] Second, if the disclosure is deemed accidental, the court examines the precautions the attorney took to assert and protect the privilege.[17] For example, distinguishing the document from non-privileged documents by marking it,[18] separating it from the bulk of materials,[19] or creating a list of privileged documents[20] evidences some attempt to protect the privilege. Finally, the court considers the steps the attorney took to reassert and protect the privilege upon discovery of the inadvertent disclosure.[21] An attorney's delay in reasserting the privilege and seeking the document's return can be fatal. The cases indicate that immediate remedial action is necessary to avoid an implied waiver of the privilege. If each of these three criteria is met, the court will not imply a waiver of the privilege and may issue a protective order that requires the opposing party to return the document and all copies of the document, and prevents the opposing party from disclosing the contents of the document or using the document at trial.[22]

B. *The Strict Responsibility Standard*

Professor Wigmore, a leading authority in this area, advocates

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16. *See, e.g., In re* Grand Jury Proceedings Investigation of Ocean Transp., 1980-1 Trade Cas. (CCH) ¶ 63,195 (D.D.C. May 2, 1979) (distinguishing inadvertent disclosure from the situation "where an attorney is attempting, through partial disclosure, to use the privilege offensively"); *see also* Eigenheim Bank v. Halpern, 598 F. Supp. 988, 992 (S.D.N.Y. 1984) ("[T]his Court will not countenance defendants' attempt to affirmatively use their carelessness to recover a privilege once lost.").

17. *Donovan*, No. 78-C-4075, slip op. at 2-3; *see* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981) ("[T]he relevant consideration is the intent of the [parties asserting the privilege] to maintain the confidentiality of the documents as manifested in the precautions they took." Thus the privilege will not be applied to documents found in a garbage can.); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984) (quoting *In re* Horowitz, 482 F.2d 72, 82 & n.10 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973) ("[I]f a client wishes to preserve the privilege . . . he must take some affirmative action to preserve confidentiality. . . . Taking or failing to take precautions may be considered as bearing on intent to preserve confidentiality"); *see also* Eigenheim Bank v. Halpern, 598 F. Supp. 988, 991 (S.D.N.Y. 1984) (quoting United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954)) ("One measure of [a document's] continuing confidentiality is the degree of care exhibited in [its] keeping, and the risk of insufficient precautions must rest with the party claiming the privilege.").

18. *E.g., In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C. Cir.) (privileged documents marked with the letter "p"), *cert. denied*, 444 U.S. 915 (1979).

19. *E.g., Donovan*, No. 78-C-4075, slip op. at 2-3.

20. *E.g.*, Cities Serv. Helex, Inc. v. United States, 214 Ct. Cl. 765 (1977) (materials claimed to be privileged were listed on separate document).

21. *See Donovan*, No. 78-C-4075, slip op. at 3-4.

22. *See* Cities Serv. Helex, Inc. v. United States, 214 Ct. Cl. 765 (1977) (granting motion for protective order requiring the return, non-disclosure, and non-use in evidence of privileged documents inadvertently disclosed).

the strict responsibility standard for implied waiver through inadvertent disclosure. He maintains a rigid standard for accidental actions:

> A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.[23]

Although Professor Wigmore's position has influenced some decisions in this area,[24] the trend is for courts to retreat from the strict responsibility standard.[25] The most scathing attack on the Wigmore view came from the *Mendenhall* court which relied on a Supreme Court approved proposed Federal Rule of Evidence.[26] The proposed rule provided that a communication was confidential unless "intended to be disclosed."[27] Although Congress did not adopt this Rule, the court found the Rule's intent test more instructive than the strict responsibility standard[28] and concluded that "[f]or

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23. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327, at 636 (rev. ed. 1961); *see also* E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 93, at 194 (2d ed. 1972).

24. Numerous courts have quoted this passage when discussing this area of the law. *See, e.g.*, Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981); *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979); First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 173-74 (E.D. Wis. 1980); Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1333 (N.D. Ga. 1980).

25. *See, e.g.*, Report of Committee of Department of Justice at 23 (1971), *quoted in* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 511[01] (1982) (recommending amendment to FED. R. EVID. 511) ("The proper test [for implied waiver of the attorney-client privilege] should grant the judge flexibility to assess all the circumstances surrounding the disclosure; in that way he can evaluate the primary issue whether disclosure is compatible with the existence of the privilege."). *Id.* at 511-13.

26. 531 F. Supp. at 955 n.8.

27. Rule 503(a)(4) of the Proposed Federal Rules of Evidence provides in full:

> A communication is "confidential" if not *intended* to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

FED. R. EVID. 503(a)(4) (emphasis added). Curiously, the *Mendenhall* court relied only on Rule 503 and did not even mention Rule 511. *See* 531 F. Supp. at 955. Proposed Rule 511, which was also approved by the Supreme Court but not enacted by Congress, provides that a privilege is waived if the holder "voluntarily discloses or consents to disclose any significant part of the matter." FED. R. EVID. 511. At least one commentator has stated that "[s]tandard 511 does not limit waiver to those instances where the holder intentionally relinquishes a known right." 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 511[02] (1982). *See infra* note 50.

28. The court relied upon an earlier decision from the same judicial district, Suburban

this Court the Wigmore doctrine is atavistic, generating (in much the same way as a flawed pleading in the era of common law pleading) harsh results out of proportion to the mistake of inadvertent disclosure."[29]

Despite the *Mendenhall* court's strong language, the conduct analysis approach and strict responsibility standard do not differ significantly in practice. The Fifth Circuit Court of Appeals in *United States v. Woodall*,[30] noted the components of the Wigmore standard:

> [W]aiver by implication involves two basic elements. The first is subjective—Does the person holding the right to claim the privilege intend to waive it? The second element is objective—Is it fair and consistent with the assertion of the claim or defense being made to allow the privilege to be invoked? This objective determination should be based upon whether . . . fairness requires the privilege shall cease even when, subjectively, he never intended that result.

The Fifth Circuit's bifurcation of the Wigmore test into subjective and objective elements helps to illuminate the similarity between the strict responsibility standard and the conduct analysis approach. First, by requiring the court to consider whether "the person holding the right to claim the privilege intend[ed] to waive it,"[31] the strict responsibility standard conforms to the first element of the conduct analysis approach—whether the disclosure

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Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981), in which "Judge Leighton accurately describes the Rule, though not ultimately adopted by Congress, as 'providing valuable standards for the courts.' " 531 F. Supp. at 955 n.8 (quoting *Suburban*, 91 F.R.D. at 259.

29. 531 F. Supp. at 955 n.8.

30. United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971). Although *Woodall* did not involve inadvertent disclosure, lower courts have extended its interpretation of Wigmore to inadvertent disclosure cases. *See, e.g.*, Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1333 (N.D. Ga. 1980); *see also In re* LTV Sec. Litig., 89 F.R.D. 595, 605 (N.D. Tex. 1981) (applying *Woodall* test to document production).

The Eighth Circuit has articulated a two-part inquiry similar to the *Woodall* formulation. *See* Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982) ("In determining whether there has been an implied waiver, two elements must be examined: (1) implied intention and (2) fairness and consistency.").

31. 438 F.2d at 1324. Other cases also indicate that the subjective intent of the party asserting the privilege is one factor to be considered pursuant to the Wigmore test. *See* Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981) (citing 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2327, at 636); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.S.C. 1974).

was truly accidental.[32] Second, the objective fairness element of the strict responsibility standard is comparable to the second and third components of the conduct analysis approach: whether "fairness requires the privilege shall cease"[33] is in many cases determined by whether "disclosure of an otherwise privileged communicatin [sic] . . . occurred in a setting where appropriate precautions had been taken and where prompt objection was made after the disclosure."[34]

The court's analysis in *In re Grand Jury Investigation of Ocean Transportation* demonstrates the similarity between the two approaches.[35] In that case, the defendant's original counsel responded to a government subpoena on September 30, 1976, by producing two groups of documents. Counsel did not assert a privilege as to the first group of documents. Counsel did, however, mark the second group of documents with a "P."[36] Suspecting that "P" meant "privileged" and that counsel had not intended to produce the marked documents, the government promptly asked counsel whether he had disclosed the documents by mistake. Counsel investigated and explicitly, though mistakenly, advised the government that he had intended to disclose the documents and that he did not claim any privilege.[37]

In March 1977, almost six months later, counsel realized the mistake and told the government that a formal demand for the documents' return would be forthcoming. No such demand was made, however, until early 1978—almost one and a half years after the inadvertent disclosure—after defendant retained new counsel.[38] During this period, the government used the documents in conjunction with the grand jury investigation and in questioning witnesses.[39]

The *Ocean Transportation* court applied the Wigmore standard and held that the defendant had waived the privilege. The court made clear, however, that its decision was grounded upon the facts of the particular case:

> Perhaps [the Wigmore] rule should not be strictly applied to all

32. *See supra* text accompanying note 16.
33. *Woodall*, 438 F.2d at 1324.
34. *Donovan*, No. 78-C-4075, slip op. at 6-7.
35. 604 F.2d 672 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979).
36. *Id.* at 674.
37. *Id.*
38. *Id.*
39. *Id.* at 674-75.

> 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 inadvertent in all respects. Original counsel knew that some papers marked "P" had been divulged. This production was brought to their attention on at least one occasion; each time, however, said counsel declined to assert the privilege. . . ; and there certainly was here an adequate opportunity in September 1976 [when the government first notified defense counsel] to claim the privilege.
>
> 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. 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. This is not a case of mere inadvertence where the breach of confidentiality can be easily remedied. Here, the disclosure cannot be cured simply by a return of the documents. The privilege has been permanently destroyed.[40]

In finding an implied waiver under the strict responsibility standard, the court in *Ocean Transportation* actually focused on the elements of the third requirement of the conduct analysis approach—whether counsel took prompt remedial action. The circumstances that made it "unfair and unrealistic . . . to permit the privilege's assertion"[41] flowed from counsel's delay in reasserting the privilege and from his failure to promptly seek the documents' return. Such conduct does not constitute prompt remedial action and would result in an implied waiver even under the conduct analysis approach.

An examination of a landmark strict responsibility case, *Underwater Storage, Inc. v. United States Rubber Co.*,[42] further demonstrates the similarity between the two approaches. In that case, the plaintiff corporation gave its attorney numerous documents to be produced. Among these documents was a privileged letter sent from a patent attorney to the president of the corporation. Pursuant to a consent order, plaintiff's counsel produced the privileged

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40. *Id.* at 675 (citations omitted). The court also observed that "the Government cannot be said in any way to have 'compelled' [defendant] or original counsel to produce privileged documents . . . ." *Id.* In noting that the government did not "compel" disclosure, the *Ocean Transportation* court appears to recognize the distinction between involuntary and inadvertent disclosure. *See supra* note 6.

41. *Id.* at 675.

42. 314 F. Supp. 546 (D.D.C. 1970).

letter for the defendant's examination. When the defendant attempted to depose the patent attorney concerning the letter, the attorney refused to respond, basing his refusal on the attorney-client privilege. The defendant then moved to compel answers to questions concerning the letter.

The plaintiff resisted the motion to compel, arguing that the production of the letter was inadvertent and involuntary. In sweeping language, the court found this position "untenable":

> 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. . . . 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.
>
> . . . Any privilege that may have attached to the document was destroyed by the voluntary act of disclosure.[43]

At first blush, the *Underwater* court appears to establish an absolute rule that inadvertent disclosure results in an implied waiver of the attorney-client privilege. A crucial fact, however, prevents one from drawing such a broad conclusion: neither the plaintiff nor the plaintiff's counsel made any pre-disclosure effort to assert and protect the privilege whatsoever. In terms of the conduct analysis approach, the plaintiff made no effort to assert the privilege prior to disclosure and took absolutely no precautions to prevent disclosure of the privileged information. Thus, the conduct analysis approach would yield the same result.

A subsequent case interpreting *Underwater* supports the view that the basis of the *Underwater* decision was the absence of any attempt to assert the privilege and the failure to take adequate precautions to protect the document's confidentiality. In *W. R. Grace & Co. v. Pullman, Inc.*,[44] the court cited the *Underwater* decision to support an implied waiver based on the pre-disclosure conduct of defendant's counsel.[45] Plaintiff had served a request for production of documents and in a written response accompanying the documents, defendant's counsel stated that he had produced all documents within the scope of the request and that he had attempted to remove all privileged documents. Defendant's counsel

43. *Id.* at 549 (citation omitted).
44. 446 F. Supp. 771 (W.D. Okla. 1976).
45. *See id.* at 775.

further stated, however, that "it is possible that some . . . privileged . . . documents remain among those which will be produced."[46] Defendant's counsel did, in fact, produce some privileged documents. He then attempted to assert the privilege as to the specific documents in question. He argued that his response to plaintiff's request reserved defendant's right to later assert the privilege with respect to any documents produced.[47]

The court found such a general reservation of rights inadequate to preserve the attorney-client privilege. The court found that defendant's counsel had over four months to review the requested documents and that defendant's counsel had in fact removed privileged documents from one of the four categories of documents involved in the case. Thus, the court deemed the reservation in defendant's response a nullity and held that the defendant had waived the privilege with respect to the documents he had produced.[48]

Although the *Underwater* and *W. R. Grace* decision purport to rely solely on the objective fact of disclosure, their true focus is on the objectively inadequate pre-disclosure precautions taken by the party that attempts to assert the attorney-client privilege. In *Underwater*, the plaintiff made no attempt to assert the privilege until after defendant's counsel attempted to depose the author of the privileged letter. Similarly, in *W. R. Grace*, the defendant made only the bald assertion that he had attempted to exclude privileged documents and that he had reserved the right to assert the privilege at a later time. In either case, there was no objective, competent evidence that indicated that, before disclosing the document, the party asserting the privilege recognized that the document was privileged and intended to withhold that specific document from production. As such, these cases are, on their facts, completely compatible with the conduct analysis approach requirements that the party asserting the privilege take pre-disclosure precautions to protect confidentiality and assert the privilege in a timely manner.[49] Thus, as the *Ocean Transportation*, *Underwater* and *W. R. Grace* decisions reveal, the conduct analysis approach and the strict responsibility standard, when applied properly and reasoned thoroughly, turn upon similar facts and produce similar

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46. *Id.* at 774 n.4.
47. *Id.* at 774.
48. *Id.* at 775.
49. *See supra* text accompanying notes 16-18.

results.[50]

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50. The similarity between the two approaches is further demonstrated by the district court's disposition of the *Ocean Transportation* case after remand. In determining the scope of the waiver, the court relied on the first factor of the conduct analysis approach: whether the disclosure was accidental. The inadvertency of the disclosure clearly influenced the court:

> The Court reiterates its finding that this is an instance of inadvertent disclosure and not a case where an attorney is attempting, through partial disclosure, to use the privilege offensively. Thus, the waiver must be construed as limited to the specific subject as it is a part of the particular documents previously disclosed. This narrow construction will best serve the objectives of the attorney client privilege and promote the fairness the subject matter waiver principle is designed to serve.

In re Grand Jury Proceedings of Ocean Transp., 1980-1 Trade Cas. (CCH) ¶ 63,195 (D.D.C. 1979). Thus, notwithstanding egregious neglect by defense counsel, the court fashioned a very narrow disclosure order. *See also* First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160 (E.D. Wis. 1980) (finding a waiver under the Wigmore test but limiting the scope of the waiver to documents already produced because the party asserting the privilege in no way benefited from disclosure).

While the conduct analysis approach and strict responsibility standard are clearly the predominate approaches, a third possible approach to the implied waiver problem is contained in Supreme Court Standard 511. Although this standard was not adopted by Congress and speaks in terms of "involuntary" rather than "inadvertent" disclosure, *see supra* note 6, it is arguably relevant to cases of inadvertent disclosure. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 511[02] n.15a (Supp. 1984) (noting parenthetically that the *Mendenhall* court failed to cite Standard 511 in an inadvertent disclosure case). As approved by the United States Supreme Court in 1969 and as amended in 1971, Standard 511 provides as follows:

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

FED. R. EVID. 511. One possible interpretation of Standard 511 is that any voluntary disclosure, regardless of the circumstances, results in a waiver of the privilege. Indeed, the United States Department of Justice apparently has adopted this view. *See* Report of Committee of Department of Justice 37-38 (1971), *quoted in* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 511[01] (1982). (Standard 511 "would necessitate the finding of waiver every time the holder of a privilege is shown to have voluntarily disclosed a significant part of the privileged matter, except when such disclosure is made during the communications that are also privileged.") Dissatisfied with what it considered to be an unduly harsh and narrow test, the Department recommended that Standard 511 be amended to limit waiver to situations where the involuntary disclosure occurred "under such circumstances that it would be inappropriate to allow the claim of privilege." *Id.* at 511-13. The Department believed that this amendment would give the courts a desirable degree of flexibility when ruling on implied waiver by permitting them to consider all of the circumstances surrounding the involuntary disclosure. *Id.*

While the proposed amendment was not adopted, Standard 511 may not be as strict a standard as the Justice Department assumed. At least one distinguished commentator has suggested that Standard 511 in its present form already grants the courts flexibility to consider the circumstances attending the disclosure. *Id.* at 511-14. The lack of judicial interpretation of Standard 511, however, leaves the matter open to speculation. In any event, Standard 511 is, at best, an attempt to codify the Wigmore fairness standard; at worst, it is a

II. Recommended Judicial Approach

Although the conduct analysis approach and the strict responsibility standard have significant similarities, the former approach contains distinct advantages. These advantages, clarity and ease of application, stem from two facts. First, the explicitness of the three-pronged test of the conduct analysis approach makes it a more precise approach than the strict responsibility standard's nebulous "fairness" test. Second, the conduct analysis approach is easier to apply because its three-part test is better suited to the problem of an attorney's inadvertent disclosure of a document during discovery than is the fairness test. This second point requires some explanation. Most of the cases cited by Wigmore in support of his strict responsibility theory involved oral assertions by a client that made his confidential communications a material issue in a judicial proceeding. As one court noted, this presents "circumstances in which it would be patently unfair to uphold a claim of privilege."[51] In cases involving disclosure by attorneys, however, the privileged information is usually divulged during discovery and is revealed only to opposing counsel.[52] Thus, the unfairness in finding no waiver in this situation is frequently not "patent." The conduct analysis approach serves as a useful analytical tool to determine what is fair based on the facts of a case.

Several benefits flow from the clarity and ease of application of the conduct analysis approach. The results under the conduct analysis approach are easier to predict than those under the strict responsibility standard. Under the former approach, counsel knows that he must satisfy three specific criteria to prevent the court from finding an implied waiver through inadvertent disclosure. By comparison, the strict responsibility standard contains objective and subjective components,[53] but the subjective "fairness" component is too vague to provide a standard by which counsel can confidently gauge the consequences of inadvertent disclosure. Considering the impact a single privileged document could have on a case, the ability to predict the court's ruling on the waiver issue is important, particularly in those cases where the parties are engaged

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harsh rule of strict responsibility permitting no inquiry into surrounding circumstances.

51. United States v. Aronoff, 466 F. Supp. 855, 862 & n.8 (S.D.N.Y. 1979) (citing Wigmore in support of the characterization of the implied waiver case law).

52. *See id.* at 862.

53. *See* United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971).

in settlement negotiations.[54]

The conduct analysis approach is more likely to produce fair and uniform judicial decisions because the results are easier to predict. Courts that do not employ the three-part test of the conduct analysis approach sometimes find an implied waiver without thoroughly analyzing the facts.[55] Such an approach may lead to arbitrary decisions and unfair results. By providing a concrete test to assist courts in their analysis of the problem, the conduct analysis approach helps minimize unfairness and arbitrariness. Any device that facilitates the courts' inquiry into the circumstances of the disclosure will promote fairness. Further, if courts employ the same precise standards to analyze the facts of each case, then the results in different cases will become more reconcilable.

Finally, the clarity and ease of application of the conduct analysis approach are likely to help courts strike a proper balance between the competing principles underlying the question of waiver of the attorney-client privilege. On the one hand, by recognizing the privilege, the courts promote trust and encourage open communication between the attorney and his client.[56] On the other

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54. In addition to the problems presented by disclosure of the document in question, the attorney must also consider the possibility that, if the court finds a waiver, the scope of the waiver may extend to related privileged documents not yet disclosed. *See, e.g.*, Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 & n.14 (9th Cir. 1981). The problems associated with the scope of the waiver make it even more important that an attorney be able to predict with some accuracy the court's ruling on the waiver question.

55. *E.g.*, Rockland Indus., Inc. v. Frank Kasmir Assoc., 470 F. Supp. 1176, 1181 (N.D. Tex. 1979) (finding that "the privilege was conclusively waived"). In this regard, however, the *Ocean Transportation* decision is a model exception. *See supra* notes 35-41 and accompanying text.

56. The United States Supreme Court has long recognized the importance of the attorney-client privilege:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915) (citations omitted). *See also* Seaboard Air Line R. Co. v. Timmons, 61 So. 2d 426, 428 (Fla. 1952) (confidential relationship of attorney and client is indispensable to the administration of justice and should not be lightly brushed aside). Courts continue to recognize the privilege as *essential* to the protection of the client's legal rights. *See* In re Horowitz, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Indeed, one court has suggested that the privilege may have constitutional underpinnings. *See* Martin v. Lauer, 686 F.2d 24, 32 n.36 (D.C. Cir. 1982) (citation omitted). The importance of the privilege stems from the fact that it is "designed not only to protect the individual client who may assert the privilege but also to

hand, the privilege often blocks access to relevant, highly probative evidence, thereby impeding the truth-seeking process.[57] A court must balance these factors in determining whether a party has waived the attorney-client privilege.[58] Too often, however, courts that invoke the strict responsibility standard recognize only the privilege's adverse impact on gathering evidence without acknowledging its invaluable contribution to the attorney-client relationship.[59] Consequently, the general rule that the privilege should be construed narrowly[60] overly influences courts, and result in inadequate consideration of the circumstances of the disclosure. By focusing the court's inquiry on three specific criteria, the conduct analysis approach helps prevent undue reliance on general rules of construction.[61] For these reasons, the conduct analysis is the preferable approach to the issue of implied waiver through inadvertent disclosure.

III. Recommended Response of Lawyers to Inadvertent Disclosure

Because the courts' focus under the conduct analysis approach

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promote free and open communication between clients and attorneys in all matters." Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

57. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963).

58. *See* United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) ("The principle of waiver by implication as a qualification on the attorney/client privilege 'should not be applied without reference both to the objectives of the privilege and the qualification.' ") (quoting IBM v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968)). *See also* Garner v. Wolfinbarger, 430 F.2d at 1102 (the interests served by the privilege "should properly be taken into account in any decision on the privilege").

59. *See, e.g.*, Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18 (9th Cir. 1981).

60. According to Wigmore, the attorney-client privilege should be strictly construed because it is "an obstacle to the investigation of the truth." 8 J. Wigmore, Evidence in Trials at Common Law § 2292, at 554 (rev. ed. 1961). Nearly every circuit has expressly adopted Wigmore's admonition. *See In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983); *In re* Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 278 (10th Cir. 1983); Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977); United States v. Pipkins, 528 F.2d 559, 562-63 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976); *In re* Grand Jury Subpoena, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964).

61. *See, e.g.*, *Donovan*, No. 78-C-4075, slip op. at 7-8 ("accepting that the attorney-client privilege does serve important and salutary objectives despite the fact that it impedes access to information, there is no justification for straining to find that the privilege was 'waived' [through inadvertent disclosure]").

and strict responsibility standards are so similar in practice,[62] a lawyer's approach to the problem of inadvertent disclosure of a privileged document should be the same regardless of the jurisdiction. Courts generally examine both the precautions taken to prevent disclosure and the remedial steps taken to minimize exposure once the disclosure has occurred. Lawyers, therefore, must take appropriate actions both before and after disclosure.

A lawyer can take several precautionary steps to reduce the likelihood that a court will find an implied waiver in the event inadvertent disclosure occurs. First, counsel should separate all privileged documents from nonprivileged matter, mark privileged documents as such, and identify them on a list that contains all privileged matter.[63] If these steps are taken for each privileged document, counsel should be able to demonstrate that he recognized and attempted to assert the privilege before the inadvertent disclosure occurred.

Once the court is satisfied that counsel took appropriate precautionary measures, its focus then shifts to post-disclosure conduct. Counsel's objective is to act swiftly to eliminate all doubt concerning whether the disclosure was truly inadvertent.[64] Counsel must also prevent any use or exposure of the document that would make it impossible to cure disclosure through return of the document.[65] These goals can be accomplished through a series of actions performed in rapid succession.

First, as soon as the disclosure is brought to his attention, counsel should unequivocally reassert the privilege. Next, counsel should take appropriate remedial steps to ensure that the breach of confidence occasioned by the inadvertent disclosure is kept to a minimum. The most expedient procedure is simply to ask that the document be returned.[66] If this fails, counsel should move for a

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62. *See supra* text accompanying notes 31-48.

63. *See supra* notes 18-20 and accompanying text.

64. *See In re* Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979) (noting that because counsel did not immediately reassert the privilege, "the disclosure cannot be viewed as having been inadvertent in all respects"); *see also* Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 n.13 (9th Cir. 1981) (where "the privileged communication is voluntarily disclosed without objection by the asserting party's counsel . . . it may be unnecessary to look beyond the objective fact of disclosure in ruling on the question of waiver").

65. *See In re* Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979).

66. While this route appears unlikely to succeed, it should be noted that in *Ocean Transportation* the Government offered to return the document. *See supra* text accompanying notes 36-38.

protective order.[67] This motion should request that the court issue an order that requires opposing counsel to return the document and all copies of the document, and prevents the opposing party from disclosing the contents of the document or using the document at trial.[68] At the time he files the motion, counsel should attempt to enter into an agreement with opposing counsel to the effect that the document will not be disclosed to anyone while counsel's motion for a protective order is pending. This approach promotes judicial economy because it spares the court needless involvement in an emergency hearing. In some cases, however, such an agreement may not be attainable or practicable, and in those instances, counsel should seek an emergency protective order to seal the document until the court rules on the implied waiver issue.[69]

IV. Conclusion

The courts have not agreed on the proper approach to the issue of implied waiver through inadvertent disclosure. Although the factors considered by the courts are somewhat uniform in practice, the conduct analysis approach provides a test that is more understandable and easier to apply than the strict responsibility standard. Regardless of the approach employed by the courts, however, counsel in all jurisdictions should take appropriate precautions to prevent disclosure and act swiftly to reassert the privilege and secure the privileged document's return if inadvertent disclosure occurs.

67. Rule 26(c) of the Federal Rules of Civil Procedure governs motions for a protective order.

68. *See supra* note 20 and accompanying text.

69. *See, e.g., Donovan*, No. 78-C-4075, slip op. at 3-4.