The Accidental Lawyer:

A Law and Economics Perspective on Inadvertent Waiver

Ido Baum[♣]

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This article first shows that courts treat IW as a type of accident without duly attending to the implications of the concept. Drawing on economic analysis of tort law, I identify how the liability regimes and unique harm rules applied by courts to determine whether IW has occurred undermine the objective of the privilege to encourage full and frank exchange of information between attorneys and clients.

The second part of this article asserts that imputing inadvertent disclosure of privileged evidence by attorneys to their clients contradicts the prevalent rationale of the attorney client privilege. Imputing IW by attorneys to their clients creates a moral hazard problem. This problem is not sufficiently mitigated by incentives such as the attorney's ethical duties, concerns about malpractice liability or professional reputation. I suggest that the practice should be eliminated or at least minimized.

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Content

Introduction

This article deals with those "oops!" moments in life, particularly in the life of the professional relationship between attorneys and their clients. For example, an unfortunate accident happened to an employee of a Baltimore law firm. She routinely removed a hard drive containing client information from her employer's office and took it home as a precaution against flood or fire. On an August evening, the employee forgot the hard drive on the train while on her way home, and was unable to find it when she returned to the train. Oops. The hard drive contained private medical records of the firms' clients involved in medical malpractice lawsuits and additional privileged attorney-client information. The information was password protected, but was not encrypted.[1] To be sure, this was a nightmarish experience for the firm's clients as well as the firm's lawyers. Aside from data privacy protection issues, a myriad of questions concerning the attorney client privilege spring to mind. Can one claim that the firm was negligent in protecting the privilege when it was actually taking precautions to protect the integrity of the electronic information stored on the hard drive? And should it be claimed that, the firm was negligent does this inadvertent loss result in the waiver of the attorney client privilege? And if so, does it make sense for the firm's clients to lose their attorney client privilege as a result of an incident over which they had no control?[2]

The attorney client privilege has been part of common law since days of yore. It shields the client against compelled disclosure of confidential communications between the client and his lawyer for the purpose of obtaining or rendering legal advice.[3] The aim of the privilege is to foster free and frank exchange of information and advice,[4] which is perceived to be a good thing. The downside is that by shielding confidential communications from exposure to opposing litigants, the privilege also

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[1] Tricia Bishop, *Law Firm Loses Hard Drive with Patients Records*, The Baltimore Sun, October 10, 2011, in: www.baltimoresun.com/news/maryland/bs-md-stent-hard-drive-20111010,0,599052.story (last visited on: 17/6/12).

[2] I will refer to the attorney client privilege also as the "privilege" or the "lawyer client privilege". When I refer to the "inadvertent waiver" doctrine I refer to accidental, unintentional disclosure of privileged attorney client communications as opposed to voluntary disclosure of privileged communications.

[3] See generally: 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2292, at 554 (McNaughton Rev. 1961); and the popular definition in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 357-358 (D. Mass. 1950).

[4] Fisher v. United States, 425 U.S. 391, 403 (1976). ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys").

withholds this information from the court.[5] Consequently, exercising the privilege may lead to inaccurate judgments.

Inadvertent waiver is part and parcel of the privilege. The gist of inadvertent waiver is that when confidentiality with regards to privileged communications is lost then the privilege can be stripped away by the court. Presumably, inadvertent waiver indicates that the client did not take sufficient precautions to protect the confidentiality of information communicated between himself and the lawyer in the process of seeking and receiving legal advice. It could happen at any time and place. Lack of care leading to the loss of the privilege may occur in the course of the communication with the lawyer or at some other point in time.[6] Sometimes clients invest in taking precautions but still disclose privileged communications by accident, since investment in precautions only reduce the probability of an accident but does not completely eliminate it.[7]

When an inadvertent waiver is detected by the rival party in litigation, a battle will often ensue. The rival party normally endeavors to submit into evidence the previously confidential information, if such evidence is in the party's possession. If it is not in the rival litigant's possession, a discovery motion to reveal the inadvertently disclosed evidence will probably be the next move. The client and his lawyer will usually have to prove that the privilege was not waived by the inadvertent disclosure and then try to dissuade the court from using, or ordering the revealing of previously confidential communications.

The judge must then determine whether the inadvertent disclosure of the confidential communications constitutes a waiver of the privilege. An affirmative answer would

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[5] *Id.*, at 403 ("However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose"); In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (Because the attorney-client privilege "stands in derogation of the public's right to every man's evidence, ... it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle") (Internal quotation marks and citation omitted).

[6] For example, there might be a lack of care if the client discusses confidential matters with the lawyer in a public place where the content of their communications may be overheard by third parties. But the client's inadvertent waiver can also be the result of sharing confidential documents covered by the attorney client privilege with a third party outside the scope of the privilege circle. Joyner v. Southeastern Pennsylvania Transp. Authority, 736 A.2d 35 (Pa. Commw. Ct. 1999) (Client mistakely left a voice message seeking legal advice on the voice-mailbox of opposing counsel thereby waiving the privilege).

[7] In fact, sometimes a precaution against one type of accident might increase the probability of another type of accident, as exeplified by the case of the Baltimore firm employee who lost the hard drive with client data. *Supra* note 1.

mean that the disclosed communications will no longer remain privileged. Otherwise, the court may forbid the rival party from submitting such evidence into trial.

The doctrine of inadvertent waiver is far from settled and is the cause of growing concern.

First of all, the application of the waiver doctrine in case law is characterized by significant lack of uniformity.[8] My initial assertion is that courts have treated inadvertent waiver as a form of accident, but have done so without a proper analysis of the concept. No analysis exists with respect to the implications of conceptualizing inadvertent waiver as an accident despite the fact that its application imposes a work-intensive judicial burden on already overburdened courts. By developing a stylized conception of inadvertent waiver I will therefore propose an optimal synchronization of the inadvertent waiver doctrine with the privilege.

The courts have adopted at least three regimes for determining whether an inadvertent disclosure of attorney client communications should be considered as a waiver. I will show that these regimes correspond to the three familiar regimes of tort law liability strict liability, negligence and no-liability.[9] The uncertainty stemming from the lack of a single clear regime does not end there. Those courts that adopted a negligence regime - the one most commonly used - employ different standards of care in order to assess whether a lawyer was indeed negligent in disclosing confidential attorney client communications. The most common standard is known as "the five factor test".[10]

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[8] John W. Gergacz, ATTORNEY-CORPORATE CLIENT PRIVILEGE, 1-16 (1987) ("The inadvertent disclosure issue is now as confused as any other issue raised under the privilege waiver doctrine").

[9] Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 Maryland L. Rev. 195, 213-214 (2010) (noting that "[H]istorically, federal and state courts have followed one of three tests to determine if an unintentional disclosure of privileged information results in waiver" and refering to the "strict", the "lenient" and the most commonly followed "balancing" approaches).

[10] According to the five-factor test determining whether disclosure of privileged communication waives the attorney client privilege or work-product protection requires the court to consider: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness. The five factors test can be traced to Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and later to Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626, 638 (W.D.N.Y. 1993) (asserting that the five factors test is the fairest approach). For applications of the test see for example Wallace v. Beech Aircraft Corp., 179 F.R.D. 313 (D. Kan. 1998); Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000), appeal dismissed, 2000 WL

Secondly, little attention has been given to the compatibility of the inadvertent waiver doctrine with the current dominant rationale of the attorney client privilege, which aims to promote compliance with the law by encouraging clients to seek legal advice about contemplated acts under the cloak of the privilege.[11] I will show that some of the applications of the inadvertent waiver doctrine are inconsistent with the current rationale of the privilege.

The following discussion utilizes familiar concepts from economic analysis of law to complete the missing parts of the inadvertent waiver jigsaw puzzle. The economic analysis perspective offers a fuller understanding of the existing inadvertent liability regimes. For this purpose I also identify the missing component in the conceptualization of inadvertent waiver as an accident: Harm.

By "harm" I mean that the client's case in litigation is weakened, regardless of whether the client is the plaintiff or the defendant. Courts have often used tort law terminology in their treatment of inadvertent waiver cases. However, I will claim that courts have not addressed the fact that inadvertent waiver is a unique form of accident. It is unique because of the harm suffered by the client in the context of inadvertent waiver. Unlike other accidents, the harm resulting from inadvertent waiver is not given exogenously for the court to assess. Rather, harm in the inadvertent waiver context is defined and inflicted by the court.[12] Therefore, it is essential to properly understand the manner in which courts determine the scope of

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290346 (Fed. Cir. 2000) and appeal dismissed, 2000 WL 290804 (Fed. Cir. 2000); Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc., 627 F. Supp. 2d 1069 (D.S.D. 2007); Ergo Licensing, LLC v. Carefusion 303, Inc., 263 F.R.D. 40 (D. Me. 2009); Alpert v. Riley, 267 F.R.D. 202 (S.D. Tex. 2010); United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483 (N.D. Miss. 2006). However, some courts adopted other criteria. See Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 80 Fed. R. Evid. Serv. 307 (N.D. Ill. 2009) (examining whether the party intended a privileged or protected document to be produced or whether the production was a mistake.)

[11] *Infra*, in section A.1. One notable exception is the economic analysis of inadvertent waiver during pretrial discovery proposed by Alan J. Meese, *Inadvertent Waiver of the Attorney Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 Creighton L. Rev., 513 (1990). Meese identifies and discusses the similarities between the inadvertent waiver case law and economic analysis of tort law but his analysis focuses on property rights. *Id*., 516 ("the privilege is a sort of property right which encourages the generation of information which in turn serves the goals of the justice system"). Additionaly, Meese does not differentiate between the application of the inadvertent waiver to clients and its application to lawyers; the development of different harm rules on top of the variety of liability rules; the different effects on repeat as opposed to one shot players. These issues are discussed here, *infra*.

[12] Gray v. Bicknell, 86 F.3d 1472, 1484 (8th Cir. 1996) (noting that the balanced approach gives the trial court "broad discretion as to whether waiver occurred and, if so, the scope of that waiver.")

the harm they inflict. I will show that courts formulated a number of rules for determining harm. Naturally, the application of the various rules in combination with other traits of the inadvertent waiver doctrine has implications for the behavior of clients and lawyers. I will proceed to utilize the accident framework in order to predict the implications of inadvertent waiver doctrine on different types of clients and on their overall incentive to seek legal advice.

Once a complete framework of the inadvertent waiver doctrine is established, including the harm component, its insights will be shown to support a re-examination of the disputed practice of applying the doctrine to lawyers' inadvertent disclosure of client communications. There is a wealth of academic literature concerning inadvertent waiver, some of which also discusses inadvertent waiver by lawyers.[13] However, scant attention has been given to the justifications of attributing inadvertent waiver by the attorney to the client in light of the dominant compliance rationale of the privilege. Attribution of the lawyer's inadvertent waiver to the client is often justified by the theory that the lawyer is the client's agent.[14] This justification is dubious because, as I will show, the symbiosis between the lawyer and his client in the framework of their agency relationship is far from perfect. Thus, learning about the client's confidentiality concerns from the lawyer's behavior could well be inefficient if not counterproductive given the purpose served by the privilege to date.

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[13] For example: Roberta Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 Cath. U. L. Rev. 465 (1993); Richard Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605 (1986); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 Fla. L. Rev. 159 (1995); Julie Cohen, *Note, Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 Iowa L. Rev. 627 (2008); John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2 Fed. Cts. L. Rev. 57, 59 (2007); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. Rev. 211 (2006); Joseph W. Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 Brook. L. Rev. 361 (2000).

[14] Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Nebraska L. Rev. 346, 349 (2007) (arguing that courts seek to protect clients from their own lawyers' actions at the expense of innocent third parties and the judicial system and claiming that "The attorney-client relationship needs no special rules that apply only to it... The wronged client has the protection of both the attorney discipline system and a malpractice action. One must also recognize that clients in today's legal services market are often sophisticated users of legal services and in control not only of global decisions relating to the representation, but also of more instrumental or ministerial decisions. These clients should be held accountable for their agent's actions. There is no unfairness in doing so."). This view might be true for corporate or repeat players in litigation but it is less obvious with respect to one shot clients. This is a dichotomy often overlooked when discussing the privilege, addressed here *infra* in Section A.4.

The problem of inadvertent waiver by lawyers due to disclosure of confidential communications is a very salient one.[15] It is compounded by the influence of and changes effected by technology upon the way lawyers perform their professional tasks. In particular, it has changed the way lawyers communicate with their clients, the way they maintain lawyer client confidential information, the methods they use to screen and analyze raw information provided by their clients and the way information is handed over to litigants in pretrial discovery.[16] Pretrial discovery is highly influenced by the growth of electronic information retention and sharing possibilities as well as the legal obligations to retain information.[17] Technological developments such as the possibility of sharing information online and "cloud computing" data retention possibilities have made confidential information more accessible to intruders. This reality amplifies the lawyer's need to protect lawyer client communications and to screen them for privileged material before producing documents in discovery proceedings.[18] Inadvertent waiver as a result of negligent protection or screening of documents may entail the disclosure of privileged material

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[15] The issue of confidentiality is central to the work and some of the recommendations made by the ABA Commission on Ethics 20/20 available in: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf (last visited: 20/6/2012). (Hereinafter "Ethics 20/20 Introduction and Overview"). Ethics 20/20 Report on outsourcing of legal activities "was particuarly interested in procedures to protect confidential information" and the methods used by outsourcing providers to safeguard the confidentiality of information. These methods include encryption, firewalls, biometric identification to prevent unauthoroized access to data, monitoring of employee computers, disabling the use of portable data storage devices, and periodic audits of these measures. *Id.*, at 3.

[16] *Id.*

[17] David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 Minn. Jour. of L. Sci & Tech., 151, 156 (2011) (observing that courts broadly interepret the Federal Rules of Civil Procedure as implying expansive presevation of documents). See also Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 Rich. J. L. & Tech. 8, 10 (2008) (same).

[18] Ethics 20/20 Introduction and Overview, *supra* note 15, at 8 (concluding with respect to the lawyer's duty to protect the confidences of the client "that technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language."). See also Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D. Md. 2005) (e-discovery may encompass millions of documents and impose non-proportional costs on the parties due to the need to conduct record by record pre-production review); Schaefer, *supra* note 9, at 199 ("[C]lients and their attorneys are creating and maintaining ever-increasing volumes of electronically stored information and have the means to communicate that information to third parties with great ease".); Emily Burns et al., *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. Ann. Surv. Am. L. 201, 201-02 (2008) (elaborating on the information explosion in creation and storage of data); Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 Rich. J.L. & Tech. 15, 3-6 (2006) (same, with respect to potentially discoverable business information); Rand, *supra* note 13, at 362 (observing that in the era of digital communications "lawyers have all sorts of new and exciting ways in which they can inadvertently breach their clients' confidences.")

to rival litigants. This is supposedly the lawyers' nightmare. In order to avoid the unfortunate consequences of inadvertent waiver, expensive pre-discovery screening costs are spent in litigation.[19] The combination of rising litigation costs and uncertainty with regards to the application of the inadvertent waiver doctrine did not go unnoticed by the legislature. Legislative amendments to the Federal Rules of Evidence ("FRE") attempted to mitigate the uncertainty surrounding the inadvertent liability regimes and the vague standards of care that were developed by the courts.[20] Yet, this has not inspired a re-evaluation of the inadvertent waiver doctrine as a whole. The amendment of the FRE and the numerous case law applications of the inadvertent waiver doctrine overlook the current rationale for the attorney client privilege and therefore miss its objective.

My discussion proceeds in two main parts. Part A presents a construction of the theoretical framework. In the first section of this part the current compliance-based rationale of the privilege is briefly explained - with its critique - before presenting the mechanics of the inadvertent waiver doctrine. The next section conceptualizes the way courts apply inadvertent waiver as an accident. First I analyze the liability regimes employed by the courts and then I describe the unique nature of harm in this context. I then present a simplified analysis of the client´s rational reaction to the inadvertent-waiver-as-an-accident concept. The concluding section of part A discusses the differentiation between individual and corporate clients. Although my discussion indicates that both types of clients end up receiving the optimal legal advice, I argue that they differ with respect to the costs they incur, which influences demand for legal advice.

Part B attends to inadvertent waiver by lawyers. It starts by explaining how the accident concept of the doctrine is similarly applied to inadvertent disclosure of confidential information by lawyers. I then set out to challenge the logic of the agency

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[19] For a general assessment of the costs of pre-production privilege review see Degnan, *supra* note 117. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, The Supreme Court Rev. 309, 360 (1981) (stating that "[A]s a rule, we would like to hold as low as possible the resources spent bickering over the distribution of a pile of money, when the distribution does not affect future conduct"); Schaefer, *supra* note 9, at 200 ("Inadvertent disclosure strikes fear and sometimes pain in the hearts of attorneys.")

[20] Rule 502 of the Fedral Rules of Evidence ("FRE") adopts a negligence regime and the same is true for Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure ("FRCP") both of which also describe some measures that must be taken to avoid the waiver of the privilege with respect to inadvertently dislosed evidence. Nevertheless, the implementation of the standard of care is left to the courts.

theory underlying the doctrine that imputes the lawyer´s level of care to the client. The first section describes the moral hazard problem which distorts the alignment of the lawyer´s care incentives with those of the client. The following sections assert that the lawyer´s ethical duties and his concerns about malpractice lawsuits and reputational threats fail to correct this misalignment. The fifth section adds another observation concerning the distortion attendant to attributing inadvertent waiver by lawyers to their clients. The concluding part offers policy recommendations.

A. The Attorney Client Privilege and the Inadvertent Waiver Doctrine: A Roadmap

1. Justifying the Privilege: The Compliance Rationale

Historically, justifications for the privilege have ranged from non-instrumental theories to instrumental efficiency-based rationales.[21] However, following the US Supreme Court's ruling in *Upjohn v. United States*,[22] the prevailing justification for the privilege is that encouraging free and frank exchange of information between the client and the lawyer increases the incentive to seek legal advice, which in turn generates socially desirable compliance with norms.[23] The underlying assumption is that once the client learns the legal consequences of his contemplated actions he will

[21] For a comparative and historical discussion of the rationales see Jonathan Auburn, LEGAL PROFESSIONAL PRIVILEGE – LAW & THEORY (Oxford, 2000), 16-55. See also Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061 (1978); Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 Cal. L. Rev. 487 (1928).

[22] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[23] *Id*., at 392 (discussing the application of the narrow "control group test" to corporate attorney-client privilege the court explained that "[T]he narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."); See also Giesel, *supra* note 14, at 380. ("The instrumental rational of the privilege is the one most often espoused by the courts"); Gergacz, *supra* note 8, at 1-16 (noting that the rationale "to encourage client law-abiding behavior seems almost designed for the modern business organization" and defines at "preventive law"); Richard Posner, ECONOMIC ANALYSIS OF LAW (8th Ed., 2011), 836-837 (claiming that without the privilege clients will be much more guarded about what they tell their lawyers and suggesting this might even increase the demand for studying law). For a different opinion, asserting that lawyers know what to ask the client and will stop him before he communicates detrimental information see Ronald J. Allen et al., *A Positive Theory of the Attorney Client Privilege and the Work Product Doctrine*, 19 J. of Legal Stud., 359 (1990).

choose a legal rather than an illegal course of action.[24] While it is consensual that the privilege enables free and frank exchange of information between the lawyer and the client and therefore it encourages clients to seek the advice of legal experts, some scholars have noted that clients who seek legal advice do not necessarily end up pursuing legally compliant or socially desirable courses of action.[25] Hence, it is not always true that the privilege is socially desirable.[26] Nevertheless, the compliance justification for the privilege persists in spite of the theoretical challenge to its validity. It is therefore reasonable to expect the compliance rationale to be served and advanced by other components of the privilege, including the inadvertent waiver doctrine.

A client may waive the privilege and allow the disclosure of privileged communications.[27] The waiver can be voluntary and intentional, but may also be the

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[24] This is a common assumption about the purpose of the privilege. It is underlined in Rule 1.6 cmt. 2 of the Model Rules of Professional Conduct (2006),which states that "[T]he client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld". See also Easterbrook, *supra* note 19, at 354. ("Justice Rehnquist's opinion for the Court observed that the attorney-client privilege exists to make people more willing to talk to their lawyers if they know that their words will remain confidential, they will provide more information; the more they say, the more effective the lawyer can be; the more effective the lawyer, the more likely the client to comply with the law.")

[25] Following professor Shavell, one should distinguish between advice about contemplated acts, also referred to as "*ex ante* legal advice", and advice about litigation which has no direct impact on the client's compliance decision because it is given *ex post*. For further discussion see Steven Shavell, *Legal Advice*, in Peter Newman (Ed.), THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (1998), Vol. 2, at 516 (herein: "Shavell, Legal Advice"). A critique of the assumption that protecting confidentiality promotes compliance can be found in Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. of Legal Stud., 123, 134 (1988). (Herein: "Shavell, Contemplated Acts") (showing that "[S]ince protection of confidentiality encourages parties to obtain legal advice, protection of confidentiality will result in socially desirable changes in behavior if expected sanctions equal the harm that results from sanctionable acts" but over all, the social desirability of legal advice about contemplated acts is ambiguous); Louis Kaplow and Steven Shavell, *Legal Advice about Information to Present in Litigation: Its Effects and Social Desirability*, 102 Harv. L. Rev. 567 (1989) (noting that the privilege might not be socially desirable in the litigation phase because legal advice helps individuals avoid errors in their selection of evidence presented to the court, which helps the client to anticipate lower sanctions and therefore the client will be more likely to commit acts that may result in sanctions); Easterbrook, *supra* note 19, at 363 ("It is wrong to suppose that a broad privilege is needed to ensure compliance with legal rules."). On the ambiguity of legal advice in promoting compliance see also Posner, *supra* note 23, at 808-809 (asserting that legal advice can prevent inadvertent incompliance with law but may also prevent inadvertent compliance).

[26] Perhaps the contrary is true. See Shavell, Legal Advice, *supra* note 25, at 519 (claiming that confidentiality matters especially "for those seeking advice subversive of the law.")

[27] Rule 502 of the FRE acknowledges that a client can disclose material otherwise protected by the attorney client privilege or the work product doctrine if the "waiver is intentional"; Dolin, Thomas &

result of inadvertent disclosure of privileged material on the part of the client, or the lawyer.[28] Due to the fact that privilege withholds information from the court it is granted grudgingly and is denied whenever it does not encourage the exchange of private information between the lawyer and the client.[29] The inadvertent waiver doctrine is supposed to serve this function. For example, if the client mistakenly communicates privileged documents to third parties outside the scope of the "privilege circle" this action may be considered as an inadvertent waiver of the privilege because it undermines the premise that the client intended the communication to be confidential.[30]

If privilege matters, why does the doctrine of inadvertent waiver make sense?

Courts resent the privilege. Therefore, they seek screening mechanisms that will justify unveiling cloaked information which may promote the court's ability to reach an accurate verdict. When the privilege is asserted at trial the judge has no way of knowing whether the client really valued the confidentiality of the information exchanged under the cloak of the privilege or whether the assertion was taking advantage of the privilege, ex-post, in order to suppress evidence that may bolster the opposing party's claims. When a judge observes that the client did not take sufficient precautions to maintain the confidentiality of the exchanged information, she can conclude that the client placed less importance on confidentiality at the time of the communication. It therefore follows that the absence of the privilege would not have

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Solomon LLP v. U.S. Dept. of Labor, 719 F. Supp. 2d 245 (W.D. N.Y. 2010) (the attorney-client privilege may be explicitly waived by the client); Alpert v. Riley, 267 F.R.D. 202 (S.D. Tex. 2010) (voluntary disclosure waives the attorney-client privilege); Schanfield v. Sojitz Corp. of America, 258 F.R.D. 211 (S.D.N.Y. 2009) (same); Giesel, *supra* note 14, at 384. ("Basic agency principles make clear that a client certainly should be able to expressly instruct the attorney to waive the privilege.")

[28] Rule 502(b) of the FRE holds that inadvertent disclosure will be protected as long as the following conditions apply: "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

[29] In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973) (holding that the privilege must be strictly confined to the narrowest possible limits consistent with the logic of its principle); *Henry v. Champlain Enterprises Inc.*, 202 F.R.D. 73, 83 (N.D.N.Y. 2003) (same).

[30] Shavell, Contemplated Acts, *supra* note 25, at 144 (noting that "a person's decision as to whether to obtain legal advice will be unlikely to be affected by the chance of his attorney's disclosure if he is willing to allow the presence of third parties who would not necessarily be expected to maintain confidentiality.")

chilled the flow of information between the client and the lawyer at that earlier point in time.[31]

2. Inadvertent Waiver as an Accident

Whether they do so consciously or unconsciously, courts treat inadvertent disclosure of privileged communications as a form of accident. This is easily observed since courts often use negligence terminology in the context of inadvertent waiver.[32] In this part I shall present a deeper analysis of the components of inadvertent waiver as an accident.

My purpose here is to construct a stylized conceptualization of the inadvertent waiver setting in order to incorporate insights from the economic analysis of law. Let us begin by looking at the client in this setting. The client is sometimes the injurer in the inadvertent waiver accident, when he is careless. The lawyer may also be the injurer in certain cases, a possibility which will be discussed later on, in part B. The important point is that the client is always the victim of the inadvertent waiver, regardless of the identity of the injurer and thus in many cases the careless client will bring on the demise of his own case.

Courts expect the client to take care in order to minimize the probability of an inadvertent waiver, if the client cares about the privilege. Otherwise, the client bears the harm once the judge determines the occurrence of an inadvertent waiver. I will address the nature of this harm promptly but first it is essential to clarify how courts determine the liability for this so called accident.

2.a. Determining Liability

When the court has to decide whether the client should be held "liable" for the inadvertent disclosure it will often apply one of the three fundamental liability

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[31] Gergacz, *supra* note 8, at 4-5.

[32] Ares-Serono, Inc v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994) ("mistake or inadvertence is, after all, merely a euphemism for negligence" quoting Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988)); see also P.T. Buntin, M.D., P.C. v. Becker, 727 N.E.2d 734 (Ind. Ct. App. 2000); and Giesel, *supra* note 14, at 386-387 ("In these inadvertent disclosure settings, the attorney discloses the privileged document as the result of all sorts of activities, most of which could be classified as varying degrees of negligence.")

regimes which are familiar from tort law: strict liability, no liability or negligence.[33] Clearly, these regimes correspond to the "strict", "lenient" and "balanced" (or "middle of the road") approaches as they are referred to in the case law.[34] However, in applying the inadvertent waiver doctrine courts use these regimes in a different way than in tort law. Namely, the liability regimes are used as a mechanism to determine whether harm occurred, whereas in tort law liability regimes are used as a mechanism to apportion the damage for an already existing harm.[35]

The assumption is that prior to actually communicating information to the lawyer the client is apprised of the need to maintain confidentiality and thus takes precautions to avoid inadvertent disclosure.[36] Given this assumption, the client's investment in precautionary measures will depend on the court's pre-existing choice of liability regime. Under a strict liability regime, any accidental disclosure is considered a waiver of the privilege,[37] whereas under a negligence regime a standard of care is

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[33] This is the fundamental choice offered to the social planner in tort law for the purpose of determining the distribution of compensatory damages for a given harm. See generally Posner, *supra* note 23, at 226; Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF TORT LAW (2004), 179-180 (herein: "Shavell, Foundations"); Steven Shavell, *Strict Liability versus Negligence*, 9 Journal of Legal Studies 1 (1980).

[34] Schaefer, s*upra* note 9 and the examples from the case law, *supra* note 10. There seems to be some confusion among the courts regarding whether the standards are applied in order to determine if a disclosure was "inadvertent" or whether an inadvertent disclosure should be considered a waiver of the privilege. This confusion is purely semantic and therefore has no implication on my discussion.

[35] By determining that an accidental disclosure did not waive the privilege the court de facto holds that the accident did not create harm.

[36] Admittedly, this supposition befits sophisticated corporate clients more than it does individual clients. However, in the case of individual clients it is sufficient to address a case in which the client learns about the need to protect the confidentiality of the communications once he begins the interaction with the lawyer.

[37] Meese, *supra* note 11, 521-523, explains that strict liability, also referred to as "strict responsibility", is the traditional approach attributed initially to Dean Wigmore and quoting the explicit example in Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) ("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"). There are some authorities supporting the placement of strict liability on the client for the loss of privilege, even if the loss is due to circumstances not entirely in the client's direct control such as theft of the documents or wire-tapping. See e.g., Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005) ("[I]f a client wished to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels--if not crown jewels." (quoting In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989))); Ares-Serono, Inc. v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994) ("In this district, disclosure of documents subject to an attorney client privilege operates as a waiver to any documents disclosed by inadvertence." (internal punctuation omitted) (quoting Int'l Digital Sys. Corp., *supra*)); Wichita Land & Cattle Co. v. American Fed. Bank, F.S.B., 148 F.R.D. 456, 457 (D.D.C. 1992) ("Disclosure of otherwise-privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege."); F.D.I.C. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) ("When a document is disclosed, even inadvertently, it is no longer held in confidence despite the intentions of the party" (also quoting In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989))). See also Gergacz, *supra* note 8, at 5-44. It should be noted that there may be a distinction between

defined and waiver of the privilege occurs only when the client fails to invest sufficiently in securing the confidentiality of the communications thereby failing to maintain the required standard of care.[38]

Drawing analogies from the economics of tort liability regimes to inadvertent waiver is quite straightforward, but nevertheless yields some important observations that have thus far escaped attention. Economic analysis shows that the application of a strict liability regime is relatively problem-free from a judge's perspective.[39] Accordingly, strict liability will be significantly more cost effective for courts.[40] Under strict liability, whenever the court observes an inadvertent disclosure it will assume that the client has waived the privilege regardless of the actual investment in precautions. When this is the case, the classical economics of tort law yields the conclusion that the client always chooses to invest the socially efficient investment in precaution. This is because under strict liability the client bears the full cost of the harm caused by inadvertent waiver.[41] On the other hand, applying a strict liability regime means that activity levels will be restricted. In other words, the free exchange

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"unintentional" disclosure and "involuntary" disclosure. The latter is caused by a third party and is perceived to be outside the control of the client or the lawyer. See generally Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich. L. Rev. 598, 612-614 (1983); Natalie A. Kanellis, *Comment, Applicability of the Attorney-Client Privilege to Communications Intercepted by Third Parties*, 69 Iowa L. Rev. 263 (1983). Meese seems to support this distinction by asserting that involuntary disclosure should not justify inadvertent waiver insofar as contributory negligence is not a defence against an intentional tort. Meese, *supra* note 11, at 531. In my view, this approach would eliminate the extension of the attorney's inadvertent disclosure to his client because from the client's perspective such a disclosure would be involuntary. Furthermore, this rationale does not fit technological developments which enable attorneys and clients to communicate large volumes of information easily over electronic networks and web-based storage facilities with higher risks of exposure to third parties and to leaks, thereby making it reasonable to expect the client and the attorney to take precautions against such risks.

[38] Suburban Sew & Sweep v. Swiss-Bernina, 91 F.R.D. 254 (N.D. Ill. 1981) (holding that the client was negligent for not destroying a draft document that was retrieved by the opponent from a trash-bin); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988) (holding that when confidentiality is lost through inadvertent waiver there is no need for the court to examine the adequacy of the precautions taken to avoid the waiver).

[39] Posner, *supra* note 23, at 229 (explaining that strict liability cases are simpler to try and therefore "we can expect litigation costs to be lower under strict liability than under negligence.")

[40] The court's costs are not a trivial matter. The original drafters of the FRCP did not include extensive rules for the court management of discovery proceedings because they assumed it would be a self-executing process that would not involve the court. See Steven S. Gensler, *Some Thoughts on the Lawyer's E-Volving Duties in Discovery*, 36 N. Ky. L. Rev., 521, 524 (2009).

[41] Posner, *supra* note 23, at 226; Shavell, Foundations, *supra* note 33, at 196. Strict liabiliy means that the victim bears the cost of any accident that could not be efficiently prevented.

of information between the client and the lawyer will be limited as if it were some environmentally hazardous activity such as electricity producing nuclear plants.[42]

As it turns out, however, the negligence regime is the most common among the courts in the application of the inadvertent waiver doctrine.[43] From an economic perspective this is at odds with the courts' interests. The negligence regime is costlier from a judge's perspective because it compels the court to develop a standard of care against which the behavior of the client will be measured.[44] Furthermore, where a dispute arises as to whether inadvertently disclosed information resulted in a waiver of the privilege, litigation on whether the standard of care has been met necessarily ensues. This entails increased engagement of judicial resources in adjudicating the waiver dispute under the negligence regime.[45] Nevertheless, if furthering communications between clients and their lawyers is perceived to be a socially desirable goal then negligence is superior to strict liability because it does not inhibit the activity level of client-lawyer communication.

Under the negligence regime much depends on the court's ability to set an accurate standard of care.[46] In addition, in order to produce efficient compliance, a standard of

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[42] Posner, *supra*, at 228; Shavell, *supra.*

[43] Schaefer, s*upra* note 9; case law in note 10, *supra*; Meese, *supra* note 11, at 523-526 (referring to the "conduct" approach).

[44] For example see Com. v. Allison, 751 N.E.2d 868 (2001) (the court developed a standard of care for office sharing attorneys by holding that they must maintain separate fax machines or install procedures to safeguard client confidentiality); U.S. Fidelity & Guar. Co. v. Liberty Surplus Ins. Corp., 630 F. Supp. 2d 1332 (M.D. Fla. 2007) (examining internal procedures in a law firm and holding that it inadvertently waived the privilege by sending documents to opposing counsel after a paralegal did not follow an attorney's instructions and another attorney at the firm signed off on the list of produced documents).

[45] Matter of Reorganization of Elec. Mut. Liability Ins. Co., Ltd. (Bermuda), 681 N.E.2d 838 (1997). (holding that the fact that a document was stolen suggests insufficient precautions were taken but the presumption can be contradicted if the party proves that sufficient precautions were taken); Atronic Intern., GMBH v. SAI Semispecialists of America, Inc., 232 F.R.D. 160 (ruling that there was no evidence of reasonable procedure for separating confidential from non-privileged communications). See also Gergacz, *supra* note 8, 5-35 ("It just takes those courts a little longer since the document-screening procedures are elaborately dissected and their failings laid bare.")

[46] If the court chooses a negligence regime, the rational client will try to minimize potential harm from inadvertent waiver by taking the precautions that meet the court-determined standard of care. Each court might do one of three things: (i) set an efficient standard of care from a social welfare calculus, (ii) set a suboptimal standard, or (iii) set a standard which is above the optimal level. If the court sets a socially efficient standard, the client will do his utmost to adhere to this standard and thereby avoid liability. If the court sets a standard above the socially efficient standard of care then the client's behavior depends on his expected total costs. These would consist of the client's precaution cost and his expected harm in the event that inadvertent waiver occurs. If the client's total costs at the efficient care level are higher than the cost of care under the court-determined standard, the client will choose the court's standard. However, if the cost of care under the court-determined standard of care is higher than the sum of the cost of socially efficient care and expected harm, then the client's best

care must be certain, easily identified and easily adhered to by its addressees (the courts and the clients). This is not the case with respect to inadvertent waiver. It is hard to discern a single standard of care from the multitude of cases applying the inadvertent waiver doctrine. Consequently, clients that face multiple litigation proceedings in various courts or in various jurisdictions or clients that do not know in advance in what jurisdiction they are likely to litigate, face a vague standard. This implies that clients will prefer to wastefully overinvest in precautions in order to make sure that they meet the standard of care.

The adoption of FRE 502 was an attempt to directly confront and resolve the confusion caused by the lack of a uniform liability regime.[47] FRE 502 adopted the "balanced" approach, namely, a negligence regime.[48] It then aims to enhance predictability by adopting standards for recognizing inadvertent waiver but it failed to achieve uniformity because different courts may still demand different precautions and thus may vary in their standards of care. Hence, the uncertainty with respect to the standard of care has not been solved by the legislature.[49]

2.b. Determining Harm

We are now ready to address the issue of harm, which is the last and least analyzed component of the inadvertent waiver mechanism. Here the economic analysis of the inadvertent waiver doctrine parts ways with the classic economic analysis of

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strategy would be to disregard the court's standard and opt for the socially efficient level of care. If the court sets a suboptimal standard of care the rational client will adhere to this low standard because this would be sufficient to avoid liability, but too many inadvertent waivers will occur.

[47] The legislative explanatory note points out that Rule 502 FRE "responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information". The note further explains that "[T]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection". See Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised 11/28/2007), Congessional Record – Senate, S1317 (February 27, 2008).

[48] *Id*. The Advisory Committee's note on Rule 502(b) FRE explained that "the rule opts for the middle ground" and that inadvertent disclosure would not constitute a waiver "if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error."

[49] Schaefer, *supra* note 9, at 214-219 ("many consider the balancing test the fairest approach" but also that "the standard creates substantial uncertainty regarding whether a court will ultimately determine that a particular disclosure waived the privilege" and further explaining that Rule 502(b) FRE "essentially adopts the "balancing" approach to determine waiver. Thus the new FRE 502(b) approach incorporates the same uncertainty and possibility of waiver that exists in balancing jurisdictions"). Indeed, the inclusion of the vague but overriding factor of fairness within the test significantly increases its uncertainty.

accidents. In tort law, the judge takes harm as given and then determines the level of compensation (the amount of damages imposed on the liable party) vis-à-vis that exogenously given harm. The court cannot influence the magnitude of the harm in an accident, but it can decide whether to fully compensate, undercompensate, or over-compensate the injured party. As opposed to regular tort law cases, inadvertent waiver is actually an accident only when the court makes a decision to that effect. Having established the occurrence of an inadvertent waiver the court is in a position to determine the magnitude of the harm. Hence, the court controls the scope of the damage caused by the waiver. In spite of the enormous implications of the harm decision on the behavior of potential litigants, this component of the doctrine has only been recognized recently by the newly added Rule 502(a) of the FRE, although this component was no less lacking in uniformity than its counterparts. Taxonomy of the case law reveals three major rules governing the level of harm that to which the courts impose on litigants pursuant to an inadvertent waiver of the privilege.

1. The *Lenient Harm Rule* adopted by some courts means that the scope of the waiver applies only to the specific information that was inadvertently disclosed whereas the rest of the privileged communications will remain shielded.[50]
2. The *Tough Harm Rule* has some variations, ofincreasing severity. In the mildest and most common case, even inadvertent disclosure of some of the privileged material will result in a waiver of the privilege with regards to all communications between the client and the lawyer pertaining to the subject matter of the disclosed information.[51] When accidental disclosure happens in

[50] This is mostly the case with respect to inadvertent disclosure of material protected by the work product privilege. See Cont'l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 773-74 (D. Md. 2008) (inadvertent disclosure of work product should not necessarily result in subject matter waiver). The work product privilege is closely related to the attorney client privilege and both privileges share similar, although not necessarily identical, rationales. Hence, it is likely that some of the conclusions of the analysis herein may be carefully extended to this privilege as well. However, the work product privilege may belong to the lawyer rather than the client and sometimes cannot be waived by the client at all. See: In re EchoStar Communications Corp., 448 F.3d 1294 (Fed. Cir. 2006). Therefore the work product privilege will remain outside the scope of my discussion.

[51] The mild version of the tough harm rule seems to be the prevalent rule in the case law. See for instance Duplan Corp. v. Deering Milliken, 397 F.supp 1146 (D.C.S.C., 1975); Texaco Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 883-84 (1st Cir. 1995); In re Natural Gas Commodity Litigation, 229 F.R.D. 82 (S.D.N.Y. 2005); Fort James Corp. v. Solo Cup Co., 412 F.3d 1340 (Fed. Cir. 2005) (holding that waiver extends beyond the document initially produced); In re EchoStar Communications Corp., 448 F.3d 1294, 1299 (Fed. Cir. 2006) (waiver applied to all subject matter communications); The Navajo Nation v. Peabody Holding Co., Inc., 255 F.R.D. 37 (D.D.C.

the course of ongoing litigation, this version of inadvertent waiver might be limited to the specific legal dispute within which it occurred. However, if the accidental disclosure of privileged ex-ante legal advice occurred before any litigation, the inadvertent waiver might apply to all potential litigation in which the discovery of the privileged communications will be ordered and thus result in a much harsher outcome for the client. Furthermore, in its most damaging variation, the inadvertent disclosure will entail the waiver of the privilege with regards to all the information communicated between the client and the lawyer covered by the same type of privilege.[52]

3. As opposed to the two rules above, some courts adopt a *No Harm Rule*, which in fact means that inadvertent waiver is not an accident at all.[53]

Courts can increase the harm inflicted by both the lenient and the tough rules if they determine that the disclosed information will be available to third parties who are not parties to the specific litigation at hand.[54] Especially under the tough harm rule, this might have significant repercussions for the client, extending beyond the scope of a specific litigation.

A numerical example can serve to clarify the rules. Assume that a client is required to communicate 100 documents to his lawyer for the purpose of preparing for litigation and that 30 of the documents satisfy the criteria of the attorney-client privilege and therefore should not be disclosed in pretrial discovery. Now assume that if the client complies with the socially efficient standard of care he will accidentally disclose 10% of the documents that he communicated to the lawyer. Hence, three of the privileged

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2009) (any disclosure of attorney-client material will apply to all communications relating to the same subject matter); E.I. Dupont de Nemours and Co. v. Kolon Industries, Inc., 269 F.R.D. 600 (E.D. Va. 2010) (same).

[52] No authorities were found to this effect, hence this is merely a theoretical possibility.

[53] There are very few such cases, and most of them concern waiver by attorneys, as discussed *infra*, in part B. An often cited example is Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust, 679 N.W.2d 794 (Wis., 2004) in which the court held that an attorney, without the consent or knowledge of a client, cannot voluntarily waive the privilege by producing privileged documents if the attorney does not recognize that the documents are privileged. In this case, the waiver occurred in the process of discovery prior to litigation over a real estate transaction. The attorney disclosed privileged material as he was unaware of the client's privilege with respect to the material. The client was not consulted prior to the disclosure. After the attorney resigned, a new attorney noticed the disclosure and petitioned the court to undo the disclosure. The court ordered the documents be returned to the client as privileged.

[54] See for example; Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005) (noting that a risk of waiver exists in subsequent litigation against a different party, even if current parties agreed that inadvertent disclosure would not result in waiver).

documents will be accidentally disclosed. When the opponent discovers the inadvertently disclosed documents he will assert inadvertent waiver with respect to all of the client's privileged attorney client communications. Under strict liability, the court will order the production of the privileged material regardless of the investment in care. If the court applies the tough harm rule the client will be compelled to disclose all 30 privileged documents whereas under a lenient harm rule the privilege will be lost only with respect to the three documents that were accidentally disclosed. If the negligence standard is applied, the client will try to prove that he abided by the requisite standard of care and should not be subjected to any of the consequences of the inadvertent waiver. The judge will have to rule whether an inadvertent waiver occurred and what are its consequences. Should the court find that the client complied with the standard of care it would rule that there was no waiver of privilege. Otherwise the court will apply one of the standards of harm.

Rule 502(a) of the FRE aimed to address the distressing uncertainty with respect to the harm component by adopting the Lenient Harm Rule. According to the FRE 502(a), "the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

1. the waiver is intentional;

2. the disclosed and undisclosed communications or information concern the same subject matter; and

3. they ought in fairness to be considered together."

The requirement of intention seems to restrict the defined scope of the waiver in FRE 502(a) to voluntary waivers rather than inadvertent waivers. This language conflicts with the legislative intention as expressed by the Senate Committee of the Judiciary which stated: "The bill provides a new Federal Rule of Evidence 502 to limit the consequences of inadvertent disclosure, thereby relieving litigants of the burden that a single mistake during the discovery process can cost them the protection of a privilege. It provides that if there is a waiver of privilege, it applies only to the

specific information disclosed and not the broader subject matter unless the holder has intentionally used the privileged information in a misleading fashion."[55]

On top of this ambiguity, the inclusion of a fairness consideration in FRE 502(a)(3) increases its vagueness. Furthermore, even if FRE 502(a) applies to inadvertent waiver it provides only a partial solution so long as it is not adopted by state courts.

Summing up, the courts have strong influence over the incentives of clients to invest in care against inadvertent waiver through their ability to determine the combined liability regime, standard of care, and scope of judicially imposed harm.

[55] Report by the Senate Judiciary Committee on S. 2450, Sen. Rep. No. 264, 110th Cong., 2d Sess., at p. 3 (2008).

3. An Analysis of Client Behavior under the Liability and Harm Rules

The previous part outlined the liability regimes and the rules governing the imposition of harm resulting from inadvertent waiver by the client. This framework enables a conceptualization of the rational reaction of clients who seek legal advice, in view of these rules.

When a client turns to his lawyer for legal advice when contemplating a certain course of action, i.e. ex-ante legal advice, he should supply the lawyer with information necessary for the lawyer to be able to render his advice on the basis of the relevant facts of the case. In potential future litigation, the information communicated to the lawyer may be either detrimental or favorable to the client's case. The interest of the client is that the attorney client privilege will shield against the requirement to disclose information which will be deemed harmful to the client's case in the event of future litigation. Similarly, when a client faces litigation and turns to his lawyer for legal representation he should supply the lawyer with information about the case, so that the lawyer will be able to mount the client's claim or defense on the one hand and be prepared for the counter argumentation of the opposing party, on the other hand. The facts supplied by the client to his lawyer may be detrimental or favorable to his case. If the facts are detrimental, the lawyer and the client will try to avoid disclosure of these facts in pretrial discovery by asserting the lawyer-client privilege.

In many cases the client does not know the probative value of the information or the evidence communicated to the lawyer. This ignorance may either be due to the client's lack of expertise in legal matters or due to the magnitude of information that needs to be communicated to the lawyer. In the latter case even a client with legal knowledge simply cannot afford to sift through all the information in order to suppress the material which he deems to be detrimental.

Even if the client could identify and separate the detrimental information from the rest of the useful data, he would be ill-advised to suppress the former when communicating with his attorney. When seeking legal advice about contemplated actions the client should be interested in sharing potentially detrimental information with the lawyer in order to receive legal advice regarding the consequences of potentially illegal actions. Similarly, when a client is seeking ex-post legal advice,

about how to present his case in litigation, it is often valuable for the lawyer to know the weaknesses of the case in order to develop counterclaims rather than be surprised by the opponent in court. Thus, it makes little sense for the client to invest efforts in determining the value of the information communicated to his lawyer or to suppress detrimental information while communicating with his lawyer if the client wishes to obtain optimal legal advice.

For simplicity, let us assume that information communicated by the client to his lawyer, i.e. facts and documents, comes in the form of discrete units (e.g. single page documents) and that they are communicated one unit at a time.[56] Another important assumption, as explained above, is that the client either does not know or is unable to ascertain in advance whether each unit of information is positive from his point of view and thus supports his claim or negative and therefore adverse to his claim and in support of the opponent's claim. Once this information is reviewed by the lawyer, he can inform the client whether the information is positive or negative. After the client learns which units of information are positive and which are negative, he will only present the positive evidence in court or direct his lawyer to do so. It is also important for the sake of argument to assume that all the information is shielded by the attorney client privilege so that the client can avoid the disclosure of negative information in the pre-trial discovery phase by asserting the privilege, unless an inadvertent waiver takes place.

If the rational client wishes to avoid an inadvertent waiver he must invest in precautions. For example, the client should double check the email address of the lawyer when he is sending an email containing information. Another precaution can be sending physical documents to the lawyer's office by a trustworthy messenger in secured files or sealed boxes. The simple act of going to the lawyer's office for a consultation as opposed to having a conversation in a public place such as a café is another form of precaution.[57]

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[56] This is very simplified, of course. In reality, at least in some cases, all the information that needs to be reviewed by the lawyer can be attached to a single email. However, in the process of litigation or in an effort to obtain legal advice on complicated issues lawyers and their clients do exchange multiple emails with varying amounts of attachments as well as numerous telephone calls, fax messages, etc.

[57] Limiting the circle of persons exposed to privileged attorney-client communications is a frequent confidentiality precaution easily observed by the court. Additionally, privileged information can be

Since positive information will probably be presented by the client in court, he should not be concerned if such information is accidentally disclosed. However, since the client does not know whether the privileged information he is communicating to his lawyer is positive or detrimental to his case, he must invest in precautions to prevent ***any*** accidental disclosure. The reason for this is simple: Unless the court adopts a lenient harm rule, the disclosure of any privileged information, even if the disclosed information is positive from the client's perspective, may be held to be an inadvertent waiver and result in the compelled production of all privileged attorney client communications.

Consider a situation in which one document is accidentally disclosed and the judge holds that this disclosure constitutes inadvertent waiver. Under the lenient harm rule, if the inadvertently disclosed information is not adverse evidence, the client will suffer no harm as a result of the accidental disclosure, because the rest of the information will remain privileged. Hence, if we assume that the information communicated between the lawyer and the client is equally likely to be positive or negative, then in half of the accidents the client will probably suffer no harm. Under the tough harm rule, after determining that inadvertent waiver occurred, the judge will compel the production of all privileged information including adverse information that was not accidentally disclosed. Hence the client will always suffer harm even if the inadvertently disclosed document was initially harmless.

Thus, the client's incentives to invest in care are influenced by the choice of liability regime and the potential harm that he expects to bear.[58] The liability regime is the main influence on the care incentives whereas the choice of the harm rule by the judge can serve to reduce or enhance the effect of the liability regime. Under the tough harm rule, the expected harm is higher and therefore the client's willingness to invest in care should increase. Naturally, the choice of harm rule will be more influential when the court adopts a strict liability regime for inadvertent waiver rather

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labeled as such and filed or kept separately from non-privileged material with password protected access, encryption or other measures that limit the risk of exposure to persons outside the privilege-circle.

[58] Regardless of which liability regime is chosen by the court, the lenient harm rule is superior to the tough harm rule from the client's perspective whenever more than one unit of information is communicated between the client and the lawyer, or whenever they communicate more than once. Of course, the client's investment in care will also depend on his beliefs regarding the ratio of positive and negative units of information. The client should be willing to invest more in precautions if he believes that most of the communicated information is detrimental to his case.

than when it adopts a negligence regime, because under the former, the client is the residual bearer of the harm. Theoretically, the residual harm should deter clients from seeking too much legal advice. Under the negligence regime, a client can avoid the harm altogether by adhering to the standard of care.

The inadvertent waiver doctrine thus turns the act of seeking legal advice into a risky activity for clients who care about the privilege. The rational client will have to add the potential cost of the waiver to the expected outcome from seeking legal advice.

Equipped with this knowledge, it is possible to rethink the effects of the privilege mechanism on the way in which clients obtain legal advice. But before doing so, some additional simplifying assumptions are required in order to conceptualize the way clients derive value from legal advice. The client's benefit from legal advice increases with the amount of information that he communicates to the lawyer because a better informed lawyer can provide more accurate and therefore more valuable advice. However, the marginal benefit to the client from each additional unit of information communicated to the lawyer is decreasing. This is because at a certain point the lawyer forms the fundamental contours of his advice and additional information may improve its accuracy but will not change it. Further along, the communication of additional volumes of information will be counterproductive for all involved parties.[59]

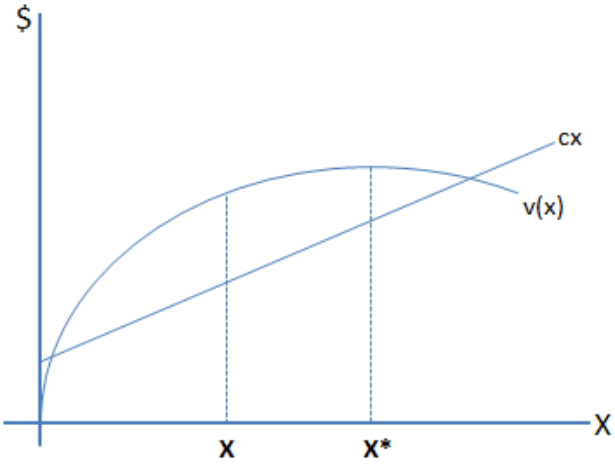
Legal fees will be ignored for the purpose of this intellectual exercise, such that the focus will be on the cost of precautions. Precautions against inadvertent waiver are costly.[60] Assume that each discrete communicated unit of information requires an investment in care to secure its confidentiality. The total cost of care is therefore a linear function which increases as the amount of information that the client wishes to communicate grows. Once precautions are factored into the equation, the client should not be willing to transmit information to the lawyer if the marginal increase in the value derived from legal advice based on the additional unit of communicated

[59] At this point, the lawyer will be overwhelmed by too much information most of which will be irrelevant. This might cause the lawyer to render inaccurate advice due to his inability to sift through all the information and focus on the relevant pieces of data.

[60] For the sake of simplicity I assume that the process of transmitting information to the lawyer is costless for the client. In reality the act of communicating with the lawyer in itself takes time and investment, but these costs do not alter my conclusions and therefore they can be disregarded.

information is lower than the marginal increase in the cost of care required for maintaining confidentiality.

This can be illustrated graphically.



Graph 1

The curve denoted by *v(x)* reflects the value of the legal advice to the client as a function of the amount of information (x) received by the lawyer. The value increases with the amount of information but at a decreasing rate.[61] The *cx* function depicts the costs incurred by the client for securing the confidentiality of the information communicated to the lawyer. While the amount of information x* yields a more accurate and thus more valuable legal advice, it wipes out a bigger portion of the client's value from the legal advice because the client must spend more on care. Hence, a rational client will settle for less accurate legal advice based only on the amount of information denoted by x, because at this point the net gains from the legal advice are at their maximum.

The graphical illustration underscores the fact that the amount of information communicated to the lawyer will not be the optimal amount when precaution costs are

[61] As clarified in footnote 59, *supra*, this curve has a maxima because at a certain point the amount of information will overload the lawyer and he will not be able to render the optimal advice because of his inability to locate and focus only on the information relevant to the case.

accounted for. Consequently, legal advice might not be the most accurate advice that the client could obtain.

One weakness of this simplified model is that an unsophisticated client who does not know in advance whether evidence is detrimental or not is also likely to be ignorant of the exact point beyond which it would make no sense to communicate more information to his lawyer. This weakness is further compounded by the fact that in the process of rendering legal advice information is often provided first and the advice is given later, with a time lag. Hence the client usually learns the value of the legal advice only long after his decision regarding how much information to communicate to the lawyer. Indeed, in reality, imperfect information about the nature of the data should go hand in hand with imperfect information about the optimal amount of data that should be communicated. As in other aspects of the privilege, in this aspect too there is a difference between one shot clients as opposed to sophisticated repeat players.

4. Interim Conclusions: A Focus on Corporate Clients

Several interim conclusions emerge with regards to the application of the inadvertent waiver doctrine to clients, before differentiating between types of clients.

First of all, if courts believe that the privilege promotes seeking legal advice and that confidential legal advice is desirable, then adopting the strict liability regime is not a good strategy. Strict liability causes injurers to reduce their activity level, and will therefore curb the tendency to seek legal advice. But there is no such thing as too much legal advice, at least in theory. Theoretically, enforcement and sanctions for breaching norms are set at the socially optimal level so that legal advice will always induce compliant and socially desirable behavior.

As a second-best solution, courts adopting the strict liability regime for inadvertent waiver should opt for the lenient harm rule in order to reduce the risk-side of legal advice. The same recommendation applies to courts that employ the negligence regime although the effect would likely be significantly lower as clients who adhere to the court's standard of care are not affected by this change.

Secondly, reducing the cost of care against inadvertent waiver will result in an improvement in the quality of legal advice. This conclusion holds regardless of the chosen liability regime. Notably, reducing the cost of care does not necessarily require that the courts lower their standard of care. Technological developments can also reduce the cost of taking precautions while maintaining or even improving the level of care.[62] For example, when volumes of information are communicated, the durability of precautionary mechanisms matters.[63] The analysis so far assumed precautions were non-durable by nature. Non-durable precautions are measures that must be taken with respect to each and every unit of information communicated by the client, so that a cost must be incurred for each and every unit. For example, the time consuming action of encrypting each confidential document before emailing it is a non-durable precaution. Conversely, a durable precaution would consist of investing in setting up an encrypted phone line between the client's office and the lawyer's office which would protect all of their conversations from intruders.

Some clients, more than others, will have an incentive to invest in durable or cost-reducing techniques of protecting the confidentiality of their privileged communications. Such clients will most likely be corporate clients who tend to be sophisticated repeat players in litigation; clients that seek legal advice with high frequency; clients that communicate large volumes of information to their lawyers. Corporate clients are exposed to the risks of inadvertent waiver more than other clients.[64] Indeed, privilege and inadvertent waiver literature often overlooks the implications of differences between types of clients.[65] Another often espoused

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[62] Donald Wochna, *Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm*, 43 Akron L. Rev., 847, 850 (2010) ("client data has undergone a radical transformation" but "attorneys have generally continued to manually review client electronic data... in the same manner as they have reviewed paper documents for generations"); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Richmond J. L. & Tech. 10, *57 (2007) ("There simply is too much information now, for old standards of inadvertent waiver to apply"); Jessica Wang, *Nonwaiver Agreements after Federal Rule of Evidence 502: A Glance at Quick Peek and Clawback Agreements*, 56 UCLA L. Rev. 1835, 1842 (2009) (discovery rules were designed to fit paper discovery and not e-discovery thereby creating "disasterous" costs). Naturally, economic incentives drive entrepreneurs to develop cost saving technology to reduce the costs of e-discovery and garner the saved surplus.

[63] On the difference between durable and nondurable precautions see Mark Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 Northwestern U. L. Rev., 293 (1988).

[64] Gergacz, *supra* note 8, at 5-32.

[65] David Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY, 182 (1988) (observing that right-based supporters of the privilege often have the individual client in mind whereas utilitarian critique of the privilege is usually concerned with corporate actors).

assertion is that corporations do not need the privilege as an incentive to seek legal advice because as legal entities they have no choice except to operate through lawyers.[66] This assertion should be rejected. The *Upjohn* rationale does not focus merely on incentives to seek legal advice but rather on the ability of clients to exchange full and frank information for the purpose of seeking legal advice. While corporations do have to use lawyers often in order to conduct their affairs they do not have to be fully candid and sincere with their lawyers while doing so.

One can speculate that in reality both individual and corporate clients end up receiving the optimal legal advice, but at different costs, which eventually influence the demand for legal advice. For example, individual one shot clients either do not approach lawyers for advice at all because they foresee insufficient benefits, or as shown in Graph 1, they receive optimal advice providing them with less than maximal benefit because they do not know in advance what is the most cost efficient point at which they should stop communicating information to their lawyer. Another possibility is that with regards to individual non-expert clients it is the lawyer that influences the exact amount of information supplied by the client. If lawyers compete for the quality of their advice they are likely to ask the client to supply the optimal of information in order to provide the optimal advice. A more likely possibility is that competition among lawyers focuses on producing the largest possible surplus for their clients and therefore lawyers would rather stop the client's stream of information at the socially suboptimal point, which is privately optimal for the client (and also requires the lawyer to invest less work because there is less information to digest).

On the opposite side of the client spectrum, corporate clients are sensitive to profit maximizing decisions. Therefore they should be sufficiently informed in order to be able to stop communicating information to the lawyer at their private profit maximizing point, even though the legal advice received would then be socially suboptimal. Nevertheless, it is hard to imagine the CEO of a large corporation explaining to its board of directors that he did not obtain the best possible legal advice because it was too costly to send more documents to the firm's lawyers. Instead, a cost reducing mechanism would have to be adopted, by using technology developments. Hence, corporate clients would be able to shift the cost function downwards or

[66] *Id.*, at 218.

preferably flatten it by adopting durable precautions to fit their economies of scale, thereby securing the optimality of the legal advice they receive.

The above mentioned conclusions are subject to a caveat: The assumption that legal advice promotes legal compliance, as suggested in the *Upjohn* ruling, is disputed.[67] Indeed, if privileged legal advice increases the probability of the client choosing illegal or socially undesirable actions, then the policy conclusions should be reversed.

[67] See the literature cited in footnotes 25 and 26, *supra*.

B. The Inadvertent Waiver Doctrine as Applied to Lawyers

This part extends the analysis of the inadvertent waiver doctrine to the attorney's actions. Although it is generally accepted that the attorney client privilege belongs to the client,[68] the attorney is ordinarily the person who asserts the privilege on behalf of the client in the course of litigation. The attorney is actually required to object to the disclosure of privileged information whether it occurs at trial, at a deposition, in a request for documents or in response to interrogatories.[69]

Many courts attribute inadvertent disclosure of privileged information by the lawyer to his client.[70] This means that the lawyer's accidental disclosure of a client´s confidential communication may result in the waiver of the attorney client privilege.[71] As with inadvertent waiver by clients, the lawyer´s inadvertent disclosure may occur outside the scope of litigation. A typical example is that of the lawyer who accidentally emails his comments on a draft contract to the other party and thereby exposes the client's legal weaknesses to future potential litigants.[72] The ABA Ethics 20/20 Commission pointed out that confidentiality may also be lost if client information is accessed by unauthorized third parties or if legal or non-legal employees of the lawyer reveal the information or transmit it to third parties without

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[68] Edward J. Imwinkelried, THE NEW WIGMORE: A TREATISE ON EVIDENCE, Evidentiary Privileges § 6.5.1, 535 (2002).

[69] Rules 33 and 34(b)(2) FRCP direct requests to produce documents to the parties themselves and not to their lawyers. Similarly, other rules governing the production of evidence and response to interrogatories are also directed at the client and not he lawyer. However, the lawyer usually responds to the requests on behalf of the client. See Gensler, *supra* note 40, at 557.

[70] Sitterson v. Evergreen School Dist. No. 114, 196 P.3d 735, 238 Ed. Law Rep. 895 (Wash. Ct. App. Div. 2 2008) (the privilege belongs to the client but waiver by the attorney can be attributed to the client).

[71] This is often concluded from the agency relationship between the client and the lawyer. See Restatement (Third) of the Law Governing Lawyers § 26 cmt. b (2000); Restatement (Second) of Agency § 14N cmt. a (1958) (viewing lawyers as agents); and also Deborah A. DeMott, *The Lawyer as Agent*, 67 Fordham L. Rev. 301 (1998) ("the lawyer-client relationship is a commonsensical illustration of agency.")

[72] For a typical case see Robertson v. Yamaha Motor Corp., 143 F.R.D. 194, 195-96 (S.D. Ill. 1992) (due to a clerical error, an attorney attached privileged documents to a letter sent to opposing counsel); for a typical case with a different outcome see Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351 (M.D. Pa. 2001) (holding that the attorney did not waive the privilege by accidentally faxing documents to a wrong number because the attorney took reasonable precautions to prevent inadvertent disclosure, only one disclosure of a single page occurred, the attorney acted promptly to rectify the disclosure and due to overriding interest of justice); See also Schaefer, *supra* note 9, at 201-202 (stating that inadvertent waiver is a risk for transactional lawyers outside litigation because "transactional attorneys provide large volumes of client documents and electronically stored information to other attorneys in non-discovery contexts, such as when completing due diligence for a business transaction.")

authorization.[73] The main concern of the legal profession to date is inadvertent waiver in the pretrial discovery process.[74]

Courts apply the same liability regimes that apply to the client when they deal with a lawyer's inadvertent waiver. In applying the inadvertent waiver doctrine to the lawyer, a judge will determine whether harm occurred by applying either one of three regimes:[75] strict liability, no liability or negligence. Under strict liability, any inadvertent disclosure by the lawyer will result in the loss of the privilege.[76] Negligence is the commonly used regime with respect to inadvertent waiver by lawyers,[77] with the "middle of the road" or "balanced" five-factors test used as the most common case law-developed standard of care in determining whether inadvertent disclosure lead to a waiver of privilege.[78] The application of the

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[73] ABA Ethics 20/20 Technology and Confidentiality Report, 1, available at: http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_technology_and_confidentiality_posting.authcheckdam.pdf (last visited: 20/6/2012).

[74] See the literature cited in footnote 62, *supra*

[75] See James M. Grippando, *Attorney Client Privilege: Implied Waiver through Inadvertent Disclosure of Documents*, 39 Miami L. Rev. 511 (1985).

[76] For example, Advanced Medical, Inc v. Arden Medical Sys., Inc., 1988 WL 76128 E. D. Pa., July 18, 1988, at *2 ("Generally, inadvertent production of documents pursuant to Rule 34 Federal Rule of Civil Procedure, waives any privilege"); Thomas v. Pansy Ellen Products, Inc., 672 F. Supp. 237, 243 (W.D.N.C. 1987) (voluntary production of documents protected by attorney client privilege, even though inadvertent, effected waiver of privilege).

[77] There are countless examples. Atronic Intern., GMBH v. SAI Semispecialists of America, Inc., 232 F.R.D. 160 (2005) (revealing e-mails between plaintiff's employee and its counsel constituted waiver of attorney-client privilege on carelessness grounds); International Business Machines Corp. v. U.S., 37 Fed. Cl. 599, 79 (1997) (after four privileged documents were inadvertently disclosed during expedited discovery in a federal tax proceedings the court held that the lawyers must prove they had taken adequate precautions to avoid such disclosure in order for the privilege to remain intact); U.S. Fidelity & Guar. Co. v. Liberty Surplus Ins. Corp., 630 F. Supp. 2d 1332 (M.D. Fla. 2007) (law firm waived the privilege by failing to take reasonable precautions to prevent inadvertent disclosure); Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. 2009), subsequent determination on other grounds, 2009 WL 982490 (N.D. Ill. 2009) (holding in favor of retention of the privilege in spite of a significant disclosure of privileged documents where reasonable procedures had been used to review documents in the discovery process). Examples of negligence in the process of discovery vary: Smithkline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 476 (E.D. Pa. 2005) (failing to identify the author on a privilege log constitutes inadvertent waiver); Cunningham v. Conn. Mutual Life Ins., 845 F. Supp. 1403, 1408-09 (S.D. Cal. 1994) (failing to place the document on a privilege log constitutes inadvertent waiver); Banks v. Office of Senate Sergeant-at-Arms, 233 F.R.D. 1, 9 (D.D.C. 2005) (failing to assert the privilege until after the privilege log was submitted resulted in waiver); see also Giesel, *supra* note 14, at 386-387 ("In these inadvertent disclosure settings, the attorney discloses the privileged document as the result of all sorts of activities, most of which could be classified as varying degrees of negligence").

[78] See U.S. v. Rigas, 281 F. Supp. 2d 733 (S.D.N.Y. 2003); Wallace v. Beech Aircraft Corp., 179 F.R.D. 313 (D. Kan. 1998); Bensel v. Air Line Pilots Ass'n, 248 F.R.D. 177, 180 (D.N.J. 2008); Ergo Licensing, LLC v. Carefusion 303, Inc., 263 F.R.D. 40 (D. Me. 2009); Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000), appeal dismissed, 2000 WL 290346 (Fed. Cir. 2000) and appeal dismissed, 2000 WL 290804 (Fed. Cir. 2000); and the literature in note 10, *supra*.

standards of care is often uncertain and vague.[79] Only a few courts have adopted a no liability regime for inadvertent disclosure by lawyers.[80] Eventually, the rules of harm are the same regardless of whether the inadvertent waiver was caused by the client or the lawyer, because the direct bearer of the harm is always the client.

Should inadvertent waiver by the lawyer be held against the client? Courts have for the most part answered this question in the affirmative. The prevailing justification is that the lawyer is the client's agent in asserting the privilege and therefore should be perceived as an agent of the client also with regards to inadvertent disclosure of privileged material. This approach is based on an extension of the agency relationship

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[79] Corey v. Norman, Hanson & Detroy, 742 A.2d 933, 942 (Me. 1999) (the balancing approach creates "an uncertain, unpredictable privilege, dependent on the proof of too many factors concerning the adequacy of the steps taken to prevent disclosure"); VLT, Inc. v. Lucent Techs., Inc., 54 Fed. R. Serv. 3d (West) 1319, 1321-22 (D. Mass. 2003) (jurisdictions vary with respect to the level of negligence or recklessness that constitutes inadvertent waiver). It is worth noting that in cases concerning inadvertent waiver in the process of discovery, the ratio between the amount of disclosed documents and the amount of documents reviewed or produced is often one of the measures used by the court in order to ascertain whether the attorney took reasonable precautions to avoid inadvertent waiver and meet the court's standard of care. The ratios vary significantly thereby increasing the uncertainty surrounding inadvertent waiver. Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) (privilege was waived because disclosure of 165 documents from electronically stored data was "substantive" indicating that the keyword search performed on the data was not reasonable); Edelen v. Campbell Soup Co., 265 F.R.D. 676 (N.D. Ga. 2010) (holding no waiver where only four pages out of more than a 2000 page production were privileged); Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. 2009) (disclosure of 13 percent of privileged documents was "significant" but did not waive the privilege as reasonable procedures had been used to review documents); Laethem Equipment Co. v. Deere & Co., 261 F.R.D. 127 (E.D. Mich. 2009) (disclosure during discovery of two compact disks containing privileged information did not waive the privilege); Bank Brussels Lambert v Credit Lyonnais (Suisse) S.A. 160 F.R.D. 437 (S.D.N.Y. 1995) (inadvertent disclosure of four privileged documents did not waive the privilege as the number of documents erroneously disclosed was miniscule in relation to number produced); Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351 (M.D. Pa. 2001) (attorney sending a single page fax to the wrong number did not waive the privilege); JWP Zack, Inc. v. Hoosier Energy Rural Elec. Co-op., Inc., 709 N.E.2d 336 (Ind. Ct. App. 1999) (no waiver when approximately 69 of 3424 pages produced in discovery were privileged).

[80] The most notable example is *In re* Harold Sampson Children's Trust, *supra* note 54, at 802 (holding that imputing the lawyer's behavior to the client would not promote the "functioning of the justice system"). See also Brigham and Women's Hosp. Inc. v. Teva Pharmaceuticals USA, Inc., 707 F. Supp. 2d 463 (D. Del. 2010); Premier Digital Access, Inc. v. Cent. Tele. Co., 360 F. Supp. 2d 1168 (D. Nev. 2005) (only the client can waive the privilege); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991) (an attorney's inadvertent disclosure does not constitute waiver of the privilege); KL Group v. Case, Kay & Lynch, 829 F.2d 909 (9th Cir. 1987) (declining to regard inadvertent disclosure during discovery as waiver since the client is the holder of the privilege); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099 (D. Del. 1990) (same); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982) (same). See also Giesel, *supra* note 14, 391 (noting that many no-waiver rulings are linked to Mendenhall v. Barber-Greene Co.'s holding that waiver required "intentional relinquishment or abandonment of a known right" but asserting that this is an erroneous interpretation of agency law and that "[T]he waiver must be voluntary but not necessarily intentional and knowing"). See also Meese, *supra* note 11, at 529 and 536 (identifying Mendehall with the subjective intent responsibility regime in tort law but eventually noting that "most courts do not use subjective intent approach.")

between the agent, the lawyer, and his principal, the client.[81] Some courts find that the lawyer's behavior should be attributed to the client as a result of the client's ability to choose the lawyer who represents him,[82] thereby holding the client responsible for the consequences of choosing a careless lawyer. Other courts simply apply an expanded agency doctrine, attributing the lawyer's inadvertent behavior to the client[83].

My intention in this part of the discussion is to challenge the logic of the aforementioned extension by pointing out its incompatibility with the objectives of the privilege. As I will show, the lawyer's inadvertent waiver is an unreliable and also inefficient proxy of the clients concern with regards to confidentiality.

1. The Moral Hazard Problem

For the lawyer´s inadvertent waiver to be the court's litmus test of the client's valuation of confidentiality, one must assume that a lawyer's carelessness implies that his client is at least indifferent to the loss of confidentiality with respect to the same privileged communications. This requires an underlying assumption, that the client can both monitor the lawyer's level of care and influence it.[84]

The striking fact about inadvertent waiver by the lawyer is that its harm is borne by the client. Hence, the lawyer does not directly internalize the harm caused by this negligent behavior and therefore does not have direct incentives to take precautions against it. Despite the apparent moral hazard problem, when courts impute the lawyer's behavior to the client they do so on the premise of a perfect alignment of interests between lawyers and their clients. There are several obstacles that create a divergence between the lawyer's investment in care and the client's intentions and incentives that turn inadvertent disclosure of privileged material by the lawyer into an inaccurate signal.

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[81] Giesel, *supra* note 14, at 350-351 (noting also that the extension can be controversial).

[82] Link v. Wabash Railroad Co., 370 U.S. 626, 633-634 (1962) (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)) (the court dismissed the petitioner's claim due to unexcused conduct of his counsel and added that the "[P]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").

[83] Giesel, *supra* note 14, at 348 ("These courts do not treat the attorney-client relationship as they do other agent-principal relationships" and "some courts seem to apply a modified agency doctrine to the question of whether an attorney has waived the attorney-client privilege"); Rogers, *supra* note 13, 165 n. 20 (observing that the expanded application of the agency doctrine "is rarely explicit - most cases do not lay out the analytical groundwork of expressing that the attorney is the client's agent.")

[84] Giesel, *supra* note 14, at 349 (asserting that clients nowadays are sophisticated and "should be held accountable for their agent's actions").

Attributing the lawyer's inadvertent waiver to the client is only justified if the existing ethical or legal mechanisms create a reasonably accurate alignment of the lawyer's level of care with his specific client's expectations. If there are reasons to believe that the lawyer's behavior might not fairly reflect the client's interest in confidentiality it would be inefficient and potentially counterproductive to draw conclusions about the client's interest from the lawyer's inadvertent waiver.

Are the existing legal and ethical mechanisms designed to ensure the lawyer's obligation to confidentiality sufficient to solve the agency problem? Hardly.

2. The Ethical Duty

Lawyers have an incentive to commit to a certain level of care because confidentiality can be intrinsically important to the client regardless of the litigation or because privileged material can be useful to opposing counsel even if it is not used in litigation.[85] If lawyers do not do so, the additional expected harm borne by the client as a result of the lawyer's lack of care will reduce the willingness of clients to consult with lawyers. It is therefore in lawyers' interests to have an explicit duty to maintain confidentiality in their ethical canons. This duty of confidentiality exists in Rule 1.6(a) of the Model Rules of Professional Conduct (the "model Rules").[86] However, until recently the ensuing obligation to avoid inadvertent waiver is less explicit and may only be understood from Comments [16] and [17] of the Model Rules.[87] The accidental disclosure of confidential information could nonetheless be viewed as a breach of the lawyer's ethical obligation. Following the recommendation of the Ethics 20/20 Commission Rule 16 of the Model Rules was recently amended to include an explicit obligation in Paragraph 16(c) stating that "[A] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client".

What really matters though is whether the ethical quasi-contractual obligation transforms in reality into a standard of care that reflects the client's interest in

[85] Wang, *supra* note 62, at 1846 (noting that opposing counsel can use privileged material to strategize for their case even if they are not able to use the evidence in court).
[86] The American Bar Association's (ABA) Model Rules of Professional Conduct (2006) (the "Model Rules"), in Rule 1.6 (a) state: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…".
[87] Ethics 20/20 Technology and Confidentiality Report, *supra* note 73, at 4.

confidentiality. For this to happen, two conditions must be met. First, lawyers must develop practical standards that reflect the care desired by their clients. Secondly, the standards must be enforced efficiently by ethical tribunals or courts.

Why is the first condition unlikely to be met? Because lawyers do not really ask their clients how much care for confidentiality are they interested in. After all, the purpose of the ethical obligation of confidentiality is to act as a default rule and save the lawyer and the client the need to exchange information, negotiate and contract about confidentiality.[88]

Hence, the lawyer's ethical duty to confidentiality does not create an incentive for the lawyer to align his investment in care with the client's desired level of confidentiality. This is because the lawyer's ethical obligation will only matter if an ethics tribunal or a court finds that the lawyer failed to take reasonable precautions against inadvertent disclosure.[89] The ethics tribunal's standard of care matters to the lawyer more than the client's expectations, but ethics tribunals do not necessarily have the clients best interest in mind nor do they have an incentive to seek and ascertain the levels of care for confidentiality desired by clients. Therefore, their standard is likely to be vague at best and probably below average.[90]

Furthermore, ethical sanctions are imposed on the lawyer but do not directly benefit the client, which means they are not likely to be aligned with the client's specific

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[88] Understanding the ethical obligation as a default rule is strengthened by the recent recommendations of Ethics 20/20, *supra*. The commission proposes to enable the lawyer to adopt a lower or higher standard than the "reasonable" standard of care at the express request of a client thereby acknowledging the obligation's default attributes.

[89] Schaefer, *supra* note 9, at 202 ("[I]f the consequences of the disclosure are sufficiently severe, the client may file an ethics complaint or sue the attorney for professional negligenc.")

[90] Restatement (Third) of the the Law Governing Lawyers, section 50 defines the standard of care as "the competence and diligence normally exercised by lawyers in similar circumstances", but section 52(1) comment b clarifies that the lawyer's duty of care "does not require 'average' performance". See also Wang, *supra* note 61, 1853 ("duty-of-care standard is fairly liberal"). Ethics 20/20 Technology and Confidentiality Report, *supra* note 73, at 4, proposed a fairly vague reasonableness standard. The Commission proposed to amend Comment [17] of the Model Rules to include some factors that may be considered in determining whether the lawyer used reasonable care, including, but not limited to, "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)". These factors are not identical to the five factor test or to other inadvertent waiver standards used by courts, and thus they may increase confusion. The proposed amendtment to Comment [17] in fact further relaxes the standard by downplaying it with respect to communications made at the stage of establishing the legal representation.

expectations.[91] Instead they will reflect a general professional norm.[92] Therefore, sanctions imposed on lawyers that breach their ethical obligation of confidentiality produce a standard level of care, but they do not require the lawyer to learn the client's exact desired level of care.[93]

Tough harm rules pose another complication. The scope of the ethical duty to confidentiality is wider than the scope of the privilege and therefore may cover information that is not covered by the privilege.[94] Should the accidental disclosure of confidential but otherwise unprivileged information by the lawyer be attributed to the client and imply, due to tough harm rules, that the client did not care about the confidentiality of confidential and privileged information as well? This seems to be an inordinately broad construction of the signaling effect of inadvertent waiver.

In fact, calibrating the lawyer's level of care with the client's exact expectations is likely to be an impossible task. First, the assumption that clients know exactly how much they value confidentiality before communicating information with the lawyer is dubious. Often the client learns the value of confidentiality only after communicating with the lawyer. Even if a client knows that he is interested in confidentiality, he might not be able to fully convey the desired level of care to his lawyer and the lawyer might not be able to translate the client's desire to maintain confidentiality into the correct investment in care. With the increasing amount of information that clients

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[91] Posner, *supra* note 23, at 243 (arguing that incentives are suboptimal when damages are not paid to the victims).

[92] David Wilkins, *Who should Regulate Lawyers?*, 105 Harvard L. Rev., 799, 806 (1999) (observing that the aim of professional ethics disciplinary actions is deterence and not compensation).

[93] In addition, if ethical sanctions were the only mechanism to assure against loss of confidentiality, they would have created a standard professional level of care across the profession with a twofold effect. On one hand, clients that desire a sub-standard level of care would have refrained from seeking legal advice in some cases because the cost of care that is embodied in the price of legal advice will have been too high. On the other hand, clients for whom the standard level of care would have been insufficient because they would have desired a higher level of confidentiality assurances would have also avoided legal advice because of the potential harm that they will have borne in case inadvertent waiver had occurred – unless they could have demanded specific higher care before seeking legal advice. The recent Ethics 20/20 Commission took a step in the right direction by proposing that contracting between the client and the lawyer on the level of care will be allowed.
There are other methods of motivating lawyers, such as contingency-based fees, which tie the lawyer's payoff to the successful outcome of the litigation thereby inducing the lawyer to take precautions to avoid waiver of evidence that will decrease the probability of success. This aspect will not be discussed here since it has only partial relevance to our analysis. It applies only when the lawyer causes the waiver while representing the client in litigation. However, a lawyer might cause inadvertent waiver while rendering ex-ante legal advice independent of the litigation. He might not represent the client in the pursuant litigation and thus the ability to weave the litigation outcome into the fee-scheme is not always available.

[94] Luban, *supra* note 65, at 201.

communicate with their lawyers and the overwhelming complexity of pretrial discovery it seems that the client's knowledge about the exact level of care that lawyers can employ is diminishing. For example, pretrial e-discovery is an expert's field that is increasingly outsourced by lawyers to non-lawyers with relevant computer and data-search expertise.[95] Lawyers normally do not possess perfect cutting edge know-how in this field, which means their ability to translate the client's desired level of care into actual precautionary measures is especially limited. The difficulty is manifested by the Ethics 20/20 Commission's admission that technology is changing too rapidly for it to provide an accurate set of precautions.[96]

3. Malpractice Lawsuits

The perfect solution to the moral hazard problem should be to enhance the powers of private incentives to sue. The client's primary private tool in policing his agent's level of care is an ex-post remedy: The malpractice lawsuit.[97] The lawyer's liability for professional malpractice will be naturally governed by a negligence regime. The client will have to prove that the lawyer failed to take the required precautions to avoid accidental disclosure of confidences. If the client succeeds, the lawyer would be forced to compensate the client for his damage and thus internalize what should have been the level of care, or at least the court's interpretation of the client's desired level of care. There are several arguments to the effect that this ex-post mechanism does not provide a perfect solution to the moral hazard problem.[98]

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[95] On the expertise required for electronic pre-production privilege review see generally Wochna, *supra* note 62.

[96] Instead, the commision proposed to established a website that will provide updated information about the current technological stadards of care. Ethics 20/20 Technology and Confidentiality Report, *supra* note 73, at 5.

[97] Section 60(b) of the Restatement (Third) of the Law Governing Lawyers (2000) ("RLGL") states: "[t]he lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure". Furthermore, Section 86(1)(b) of the RLGL requires the lawyer to invoke the privilege "when doing so appears reasonably appropriate, unless the client has waived the privilege or has authorized the lawyer or agent to waive it". See also Giesel, *supra* note 14, at 383 (noting that a lawyer's omission to assert the privilege on behalf of the client would most likely be viewed as professional malpractice).

[98] I do not claim that malpractice lawsuits have no effect whatsoever but that their effect is uncertain, inaccurate and suboptimal. The fact that malpractice lawsuits do have an effect on discovery can be seen in offshore outsourcing of pre-production privilege reviews. As Professor Robertson notes, potential malpractice liability is one of the barriers that yield the phenomenon in which privilege review outsourcing is led by corporations seeking legal services and not by the lawyers representing them. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 Ariz. St. L. J., 125, 137-138 and 174 (2011).

The first argument duplicates the argument regarding the failure of the ethical duty. Courts determine the lawyer's malpractice liability according to a general professional standard of care and not according to the client's specific expectations. Judges do not ascertain what was the client's ex-ante desired level of care when they determine the lawyer's liability.[99] Therefore, this standard of care does not necessarily reflect the care desired by the average client or by the specific claimant.[100]

Secondly, even if the standard of care represents the socially efficient level, malpractice lawsuits against lawyers are notoriously difficult to win.[101] This means that many clients who suffered harm from the lawyer's inadvertent waiver may prefer to avoid malpractice litigation with its certain costs and uncertain benefits.[102] This being the case, the sub-optimal rate of malpractice litigation will result in lawyers employing precautions at a level lower than the one their clients would have desired, unless courts adjust damages upwards in order to compensate for the sub-optimal rate of enforcement. The latter will also not fully solve the problem because some defendants will be judgment-proof due to insufficient personal funds or limited professional malpractice insurance.

Another problematic discrepancy between the lawyer's level of care and the client's desired level of care arises if the judge uses a strict liability regime to determine whether a lawyer accidentally disclosed privileged information, but applies a negligence regime to determine liability in lawyer malpractice lawsuits.[103] In such a setting, as long as the lawyer maintains the court-determined standard of care, he will be able to avoid liability for malpractice. However, since strict liability is applied to

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[99] The five factor test, for example, does not mention the client's expectations at all.

[100] For the same reason professional liability insurance will also focus on the court's standard of care and fail to produce incentives that capture the client's interests. See Posner, *supra* note 23, at 254-259.

[101] Wang, *supra* note 62, at 1859 (citing Laura Catherine Daniel, *Note, The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 Wm & Mary L. Rev., 663, 830-831 (2005).

[102] *Id.*, at 1858-1859 (showing that malpractice lawsuits are not an efficient policing mechanism).

[103] This may also happen in the ethical context. The ethical duty of care is examined through the lens of a negligence regime. Therefore in some cases confidentiality will be lost without the lawyer being responsible for professional misconduct and the client will bear the residual harm. The Ethics 20/20 Technology and Confidentiality Report, *supra* note 73, at 5, clarifies with respect to its proposed Rule 16(c) that "paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions".

inadvertent waiver, then some residual harm will be borne by the client, and will never be internalized by the lawyer.

Finally, ethical rules might discourage clients from suing their lawyers for malpractice since a lawyer is sometimes allowed to reveal client's privileged communications when he is sued by the client.[104] Consequently, private policing of the lawyer's level of care is affected by the court's choice of harm rule. To understand why this is so, assume that after an inadvertent waiver has occurred the client threatens to sue the lawyer. The lawyer retaliates by threatening to disclose the client's privileged communications in the process of defending himself. When the lenient harm rule applies, the client stands to lose more from suing his lawyer because the negligent waiver itself does not cause the disclosure of all the privileged communications, but suing the lawyer may cause that damaging result. On the other hand, if the tough harm rule applies, the client has already lost the privilege with regard to all communicated material on the subject matter, and he is no longer deterred when suing the lawyer, because he now has nothing more to lose in terms of confidentiality. Therefore, the tough harm rule brings us closer to perfect alignment of client and lawyer incentives to take precautions, provided that we espouse the policing effect of malpractice claims.

4. Reputation

Lawyers may be motivated to avoid inadvertent waiver due to the potential reputational damage.[105] Clearly lawyers care about their reputation and take measures to develop and safeguard it. Reputation preserving activities probably include measures against inadvertent waiver. Nonetheless, this begs the question whether reputation concerns are sufficient to create a reasonably accurate alignment of the

[104] Rule 1.16(b) of the Model Rules states that "[A] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:.. (5) to establish a claim or defence on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defence to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client". See also Berliner Corcoran & Rowe LLP v. Orian, 662 F. Supp. 2d 130 (D.D.C. 2009) (holding that clients waived the attorney client privilege with respect to communications with their attorneys when they filed counterclaims against the attorneys).

[105] Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 Or. L. Rev. 15, 25 (1995) (finding "the existence of segmentation in the market for legal services based on the value of reputation.")

lawyer's investment in care with the client's desire for care so as to justify the signaling effect attributed to the lawyer behavior by the courts.

The effect of reputational damage on a lawyer depends on the lawyer's perception about the behavior of future clients, which depends on whether future clients learn about the lawyer's lack of care, attribute the client's losses to that behavior and are themselves concerned about confidentiality. In the process of choosing his lawyer, the client weighs a variety of factors of which only one is the lawyer's reputation in handling the client's confidentiality. This factor is not necessarily the most pivotal in clients' decision to retain a lawyer.

First of all, there is no easily accessible data ranking lawyers inadvertent waivers or even a methodical collection or assessment of this information which is available to non-experts. Even if such data was accessible to potential clients it might never be sought because even if confidentiality matters to clients, inadvertent waiver is not on top of the client's reputation concerns.[106] Indeed, there are good reasons to believe that technology such as search websites, social networks and professional databases have changed the way by which clients seek and retain lawyers, but the literature concerning legal reputation does not deal with inadvertent waiver and the scant empirical data indicates that clients' awareness regarding confidentiality and privilege is not high.[107] While technology may have altered the way clients seek lawyers,[108] there is no indication that it has changed their qualitative preferences.

Second, reputational information that is accessible is likely to be slanted in favor of lawyers. As explained in the preceding part, malpractice lawsuits and ethical complaints against lawyers are filed at a suboptimal rate. Lawyers will also have an interest in settling malpractice lawsuits out of court in order to mitigate the reputational effects, thereby tilting the accuracy of public information to their favor.

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[106] Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 Wash. & Lee L. Rev. 173, 186 (2008) ("Earned reputation may exist but never be available or sought by clients.")

[107] No mention of the issue, for example, in Zacharias, *supra*, or Okamoto, *supra* note 105. In an unpublished empirical survey by Fred Zacharias, cited in Luban, *supra* note 65, at 218 in footnote 26 approximately 70% of the subjects said they will not withhold information from the lawyer sans confidentiality and that "most people were ... unaware of the attorney-client privilege". This strengthens the assertion that confidentiality is not the clients' primary concern when communicating with lawyers.

[108] See generally Ethics 20/20 Introduction and Overview, *supra* note 15, at 5 (technology changes the way clients find lawyers).

Finally, inadvertent waiver as other reputational matters is very fact-sensitive.[109] For example, a client may not know that a firm that was found liable for malpractice no longer employs the lawyer responsible for the waiver, nor that the lawyer is now employed by another firm with no inadvertent waiver history. Another example is that a firm's careless loss of the privilege during e-discovery is not necessarily relevant or indicative of its care for confidentiality when a potential client is seeking legal advice and not representation. Hence, reputation cannot guarantee the accuracy of attributing inadvertent waiver by lawyers to their clients.

5. Obscuring the Client's Genuine Interest

In the previous sections I have argued that ethical norms, malpractice lawsuits and reputation concerns are insufficient to accurately align the lawyer's level of care for confidentiality with the level desired by clients.

The probabilities that inadvertent waiver will befell the lawyer or the client are not dependent on each other. Thus, when the court's attention is drawn to an inadvertent waiver by the lawyer the judge no longer examines the care taken by the client with respect to the same piece of information. If the lawyer's precautions do not reflect the client's desired level of care, when courts recognize inadvertent waiver by the lawyer and order the disclosure of confidential communications they obscure their ability to gauge the client's full and frank interest in confidentiality.[110]

A client may place a high premium on the confidentiality of document 1 but care less about document 2. He communicates both documents to the lawyer, but encrypts document 1 while sharing document 2 through an online file sharing website without any protection. The lawyer then negligently discloses document 1 in pre-trial discovery and the privilege is held to be inadvertently lost with respect to this document. Recognizing the lawyer's inadvertent waiver means that the court will not observe or even examine the genuine level of confidentiality desired by the client with regards to document 1.

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[109] Zacharias, *supra* note 106, at 189.

[110] Accuracy with regards to the client's observed interest in confidentiality matters a great deal. See The Navajo Nation v. Peabody Holding Co., Inc., 255 F.R.D. 37 (D.D.C. 2009) (stating that the attorney client privilege demands adherence to "genuine confidentiality.")

When tough harm rules are combined with the recognition of inadvertent waiver by lawyers, the potential for inaccuracy grows. Recall that under the tough harm rule both documents are de-privileged once confidentiality has been lost with respect to one of them. Under a tough harm rule the rational client will encrypt and protect both documents. Now assume that the lawyer takes less care to protect document 2 once he realizes that this document is less important to the client's case and subsequently negligently discloses this document. Again, courts will disregard the client's real investment in confidentiality and an extremely inaccurate result will follow: Lack of care with respect to the least confidential document will be accepted as a proxy for an inadvertent waiver of the most confidential document. Indeed, this logic justifies the approach adopted by FRE 502(a) limiting the scope of the waiver to the disclosed document.

C. Conclusions and Policy Recommendations

The attorney client privilege is a longstanding tenet of procedural law in common law jurisdictions. In recent decades it has maintained its importance under the premise that it encourages clients to seek legal advice and promotes a candid attorney client exchange of information which purportedly enhances legal compliance with regards to contemplated actions.

The privilege has its social costs in withholding possibly relevant evidence from the courts. The inadvertent waiver doctrine aims to reduce these costs when observable signals of carelessness indicate that the client has not placed sufficient importance on the confidentiality of the information exchanged with his lawyer.

While courts have mostly not declared this in so many words, they have applied the inadvertent waiver doctrine as a form of accident, using various liability regimes and applying them in order to determine whether to inflict the resulting harm on the client.

I have shown that applying a strict liability regime, as a minority of the courts do, is incompatible with the current rationale of the privilege to promote compliance through the seeking of confidential legal advice. Furthermore, courts should adopt

more lenient harm rules with respect to the evidence that is disclosed after inadvertent waiver has occurred if seeking legal advice is important for clients who share small volumes of information with their lawyers and therefore lack the incentive to invest in costly durable precautions as opposed to clients who share large volumes of information with their lawyers and have an incentive to adopt cost reducing and durable precaution technology.

Courts have also imputed the lawyer's inadvertent waiver to the client and employed the same liability regimes and harm rules to the lawyer's behaviour. Considering the enormous increase in costs inflicted on litigants in the pre-trial discovery phase as a result of the possibility of inadvertent waiver by the lawyer, and given the inaccuracy of such inadvertent waiver as an indicative or a predictive signal of the client's care for confidentiality, the best solution would be to abolish the doctrine that attributes the lawyer's inadvertent waiver to the client. Courts would do better to stay focused on the client.

This might seem an extreme solution, but some courts have followed this path,[111] and there is no evidence as yet to contradict the claim that the ability of these courts to adjudicate cases accurately and properly has been compromised. In addition, given that this solution saves the court significant time and effort required in order to adjudicate inadvertent waiver battles, it is consistent with the original intent of the framers of the FRCP to leave the court out of the discovery process as much as possible.[112]

Furthermore, Rule 26 of the FRCP allows the parties to contract out of inadvertent waiver in pre-trial discovery in various ways such as "claw-back" and "quick peek" agreements,[113] thereby implicitly acknowledging the problematic aspects of inadvertent waiver in this phase of litigation. This legislation does not entirely solve the problem because parties might object to such agreements.[114] Hence, a better solution would be completely abolishing the doctrine.

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[111] See the case law cited in footnotes 54 and 80, *supra*.
[112] Gensler, *supra* note 40.
[113] See generally Wang, supra note 62, at 1842-1844.
[114] Additionally, these agreements are not always upheld by the courts. *Id.*, at 1838 ("courts did not act uniformly in upholding such agreements"); another downside is the fact that some courts held that third parties can gain access to information disclosed under such agreements. *Id.*, at 1841.

Sceptical courts may prefer a less extreme recommendation. A less drastic second-best solution would be to abolish the inadvertent waiver doctrine for lawyers in all the phases of lawyer client communications except for the final phase, namely, litigation in court. Presumably, when lawyers and clients appear in court they are at the peak of their alertness and coordination with respect to the case and therefore their incentives in caring for the confidentiality of attorney client communications are at the highest possible level of alignment or at the very least it would be reasonable for the court to expect such a high level of alignment. Additionally, the privilege aims primarily to promote legal advice about contemplated acts and it is less justified in the context of litigation, which revolves around the results of those acts that the client has already taken.[115] Thus, a waiver doctrine that narrows the scope of the privilege could be better justified at the litigation stage.

Finally, fee-shifting arrangements such as contingency fees, solve the moral hazard problem by shifting the costs and risks of litigation from the client to the lawyer. However, this solution raises a host of additional problems. For example, it requires the lawyer to take into account the possibility of losing the case due to inadvertent waiver by the client that occurred prior to the legal representation. A lawyers can avoid the costs of such surprises by stipulating that in such events the fee shifting arrangement will be nullified and the client will be obliged to pay the lawyer for his efforts. Naturally, this will deter some clients from retaining the lawyer.

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[115] Kaplow and Shavell, *supra* note 25 and Shavell, Legal Advice, *supra* note 25, at 518-519 (claiming that it is impossible to conclude whether or not litigation advice has a socially desirable effect because while it "may dilute deterrence of undesirable conduct" it might also "lower sanctions for innocent defendants.")