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INADVERTENT DISCLOSURE OF CONFIDENTIAL INFORMATION: WHAT DOES A CALIFORNIA LAWYER NEED TO KNOW?

I. INTRODUCTION

A lawyer's nightmare. You are standing at the fax machine, watching your highly confidential document finish scanning through the machine, when you think to yourself: "Did I dial the right fax number?"

This is just one of the infinite scenarios where innocent, inadvertent acts can lead to disclosure of confidential information to opposing parties. Inadvertent disclosure can involve simple human error, like above, or high-tech glitches. It could also involve document production so voluminous that it is both humanly and technologically impossible to safeguard against all inadvertent disclosure.1 New technology and increased litigation complexity can exacerbate the problem.2

Case law is not clear as to the effect inadvertent disclosure of confidential information could have on litigation.3 Is inadvertently disclosed information still protected by either the work-product or the attorney-client privilege? Can unintentional acts by an attorney ever imply a waiver of the client's privilege? If so, when?

The background section of this comment considers three influences on the current state of the law: (1) the sparse California case law on point; (2) the federal case law, emphasizing the Ninth Circuit; and, (3) the views held by the American Bar Association.4 The analysis section discusses how the current law can be applied to guide a California attorney when


2. For example, the advent of fax machine technology created a new way to make these kinds of errors.

3. See discussion infra Part II.

4. See discussion infra Part II.
he or she inadvertently sends or receives confidential documents. This comment then proposes that the courts more clearly establish what is legally expected of an ethical attorney who sends or receives inadvertently disclosed information. Greater emphasis should be placed on the importance of the attorney-client privilege and on professionalism in general. The courts ought not tolerate the willful exploitation of opposing counsel's clerical error.

II. BACKGROUND

A. California Courts

1. The Kanter Case

Only one California court decision has involved a fully inadvertent disclosure of attorney-client privileged information. In Kanter v. Superior Court, Mr. Kanter sued Safeco Insurance Co. and its attorney, Gerald Edelstein, claiming that officers of Safeco and Edelstein conspired to commit bad faith insurance practices.

Kanter's attorney subpoenaed Edelstein's non-privileged files regarding the underlying litigation—which Kanter had won—because he was now trying to collect on the judgment. Edelstein forwarded his entire file to the attorney who represented both Safeco and himself. The attorney claimed to have dutifully segregated the file into privileged and non-privileged documents. The documents were forwarded to the attorney's copying service with instructions that, "privi-
leged docs. (yellow pages) are to be kept in our office; remaining copies are to be sent to opposing counsel."\(^{13}\) The copies were delivered to Kanter's attorney.\(^{14}\)

Of the approximately 1600 documents delivered to Kanter's attorney, about 160 documents were later identified as privileged.\(^{15}\) Edelstein's attorney declared, "[a]t no time did I intend to produce any privileged documents," and the "legal file would not have been produced but for my mistake and clerical error in my office."\(^{16}\) In response to questions posed at a deposition regarding the documents, he objected and asserted the attorney-client privilege.\(^{17}\) A motion for a protective order was filed, asserting that the production was inadvertent, the documents were still privileged, and no questions regarding them could legitimately be posed.\(^{18}\)

The trial court granted the protective order, requiring Kanter's counsel to return the documents, destroy copies and other documents produced using the privileged information, and not to discuss, refer to, or question a party about the privileged documents.\(^{19}\) That decision was vacated by the appellate court on a peremptory writ.\(^{20}\)

In vacating the trial court's decision, the appellate court considered whether inadvertent conduct by an attorney can ever imply a waiver by the client of the attorney-client privilege, and if so, when.\(^{21}\) The court held that "[i]nadvertent production, like voluntary testimony about privileged communications, evidences an intent inconsistent with the continued assertion of the privilege."\(^{22}\) Thus, the attorney's inadvertent disclosure of privileged documents "could waive [the] privilege and . . . [the errant party] ha[s] the burden of proving that the privilege had not been waived."\(^{23}\)

The court, in essence, re-framed the issue by requiring the holder of the privilege (i.e., the client) to convince the court that the attorney's error did not imply a waiver of the

\(^{13}\) Id. at 812.
\(^{14}\) Kanter, 253 Cal. Rptr. at 812.
\(^{15}\) Id.
\(^{16}\) Id.
\(^{17}\) Id.
\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Kanter, 253 Cal. Rptr. at 820.
\(^{21}\) Id. at 813.
\(^{22}\) Id.
\(^{23}\) Id. at 815.
privilege. The court summarily rejected the argument that only the client, as holder of the privilege, could waive the privilege. The court also summarily rejected the contention that inadvertence is the antithesis of purposefully relinquishing a privilege; that is, that it could imply an intent to waive.

To rationalize placing the burden upon the errant party, the court borrowed from federal case law. The court compiled six factors in order to decide whether the facts surrounding the inadvertent disclosure supported the errant party's assertion that a privilege remained intact. The court considered: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time required to rectify the error; (3) the scope of the disclosure; (4) the extent of the disclosure; (5) the issue of fairness and protection of the privilege balanced against how carefully or negligently the privilege was guarded; and, (6) the existence of special circumstances, such as accelerated or compelled discovery.

The court then applied the factors to the situation before it. The precautions were not reasonably designed to protect the confidentiality of the documents: Edelstein did not segregate the privileged from the non-privileged documents; the attorney forwarded both to the copier, although only the non-privileged were to be copied; he did not check the work of the copier; and, the privileged documents were found unsegregated and not in any orderly fashion, regardless of the attorney's assertion that he had separated them. The time required to rectify the error was great: The defendants did not discover the error themselves, and, ultimately, the documents were in plaintiff's hands for fifteen months before de-

24. Id. at 814, 819.
25. Id. at 814.
26. Kanter, 253 Cal. Rptr. at 816.
27. Id. at 815 (citing Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 25 (9th Cir. 1981); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979), cert. denied sub nom, Sea Land Serv., Inc. v. United States, 444 U.S. 915 (1979).
29. Id. at 819.
30. Id.
31. Id.
32. Id.
33. Id.
fendants moved for a protective order. The scope of the disclosure was wide: 10% of all the documents and 35% percent of the correspondence turned out to be privileged, too many to support an intent to maintain confidentiality. The extent of the disclosure was total; the plaintiff had fifteen months to examine the documents. The court stated that fairness demanded that since the defendant committed the error, he should bear the burden of showing that waiver should not have been found.

Additionally, the plaintiff could not realistically expunge his mind and his case of the documents after fifteen months, i.e., "unring[ ] the bell." Lastly, no extraordinary circumstances surrounded the nature of the discovery and subpoena process. After analyzing the six factors above, the Kanter court found Edelstein was entitled to no relief from the waiver implied by his attorney's inadvertent disclosure. Because the attorney-client privilege was deemed waived, the trial court's protective order was vacated. The receiver of the inadvertently disclosed information was free to use it against the sender at trial.

2. Other Cases

The California courts have had other opportunities to consider whether an attorney receiving privileged information may use it to his or her advantage. These cases are not precisely on point because the privileged information was not disclosed by inadvertent, accidental conduct. However, a brief look at how the courts view the receiving attorney is nonetheless helpful.

a. Cooke v. Superior Court

In Cooke v. Superior Court, involving a marital dissolution, a butler eavesdropped on privileged communications be-

34. Kanter, 253 Cal. Rptr. at 820.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. Kanter, 253 Cal. Rptr. at 820.
41. Id.
42. 147 Cal. Rptr. 915 (Ct. App. 1978).
tween Mr. Cooke and his attorney. The butler forwarded the privileged information he overheard to Mrs. Cooke, who gave it to her attorney. Mr. Cooke's motion for a protective order was successful; the use of the information was prohibited and Mrs. Cooke's attorney was disqualified from participating in the litigation because he had been exposed to the privileged information.

The court of appeals agreed with the trial court that the information was still privileged and refused to allow the use of the information in the litigation. This outcome logically favored the aggrieved party more than in Kanter, since the disclosure involved some surreptitious conduct, rather than mere inadvertence.

However, the court of appeal ruled the attorney disqualification by the trial court was not warranted. The receiving attorney should not have been disqualified because of mere "exposure" to privileged information, with the exception of if such exposure occurred because the attorney had previously represented Mr. Cooke. Here, Mr. Cooke was never a client of Mrs. Cooke's attorney.

b. Aerojet-General Corp. v. Transport Indemnity Insurance

Aerojet-General Corp. v. Transport Indemnity Insurance also dealt with an attorney improperly receiving privileged information. Aerojet's attorney received a privileged memo drafted by opposing counsel, discussing his opinion of a particular witness. This occurred because the memo had fallen into the hands of an employee of Aerojet, who forwarded it to that attorney.

Aerojet's attorney, knowing the privileged nature of the memo, used it and did not share the news that he had received the memo with opposing counsel, or even his own col-

43. Id. at 917.
44. Id.
45. Id.
46. Id. at 918.
47. Id. at 921.
48. Cooke, 147 Cal. Rptr. at 920.
49. Id.
50. 22 Cal. Rptr. 2d 862 (Ct. App. 1993).
51. Id. at 863.
52. Id.
53. Id.
leagues. The attorney deposed the previously unknown witness, held the memo in his office, and allowed routine office cleaning to destroy the memo months later. The insurance company’s attorney eventually became suspicious, and ultimately Aerojet’s attorney disclosed how he got the memo and that it had been destroyed. A sanction order was issued to Aerojet’s attorney for failing to advise opposing counsel of receipt of the privileged document on a timely basis. The court deemed the conduct unethical and in bad faith. The order held the attorney’s firm responsible for all costs and precluded the witness from testifying.

On appeal, the court addressed the issue of whether the inadvertent receipt of privileged, confidential communication creates a duty for the receiving attorney. The court indicated that “[t]here is no State Bar rule of professional conduct, no rule of court nor any statute specifically addressing this situation and mandating or defining any duty under such circumstances.” The court adamantly stated that Aerojet’s attorney was free from any wrong-doing and reversed the trial court’s sanction order, since there was no duty to disclose in a timely manner. The attorney did nothing the court could deem as frivolous or delaying, thus making sanctions improper. The issue of whether the privileged information was properly excluded from the trial was mooted by the fact that Aerojet prevailed at trial regardless.

c. McGinty v. Superior Court

Unlike the Aerojet case, in McGinty v. Superior Court, the attorney receiving unsolicited information did not use it knowing it was privileged. As such, the court reasoned that sanctions against the attorney were even more improper.

54. Id. at 864.
55. Id. at 863-64.
56. Aerojet-General Corp., 22 Cal. Rptr. 2d at 863.
57. Id. at 864.
58. Id.
59. Id. at 864-65.
60. Id. at 865.
61. Id.
62. Aerojet-General Corp., 22 Cal. Rptr. 2d at 865.
63. Id. at 866-67.
64. Id. at 866.
65. 31 Cal. Rptr. 2d 292 (Ct. App. 1994).
66. Id. at 294.
since no willful use of confidential information was involved.\textsuperscript{67} Unlike Aerojet, the McGinty court addressed the issue of whether exclusion of the privileged information was proper, because the outcome of the trial had not rendered the issue moot.\textsuperscript{68} The court held that to exclude the information would be improper.\textsuperscript{69} They reasoned that to do so would be an unfair windfall to the defendant and would severely undermine the plaintiff's case. Furthermore, all the information at issue was likely to have been legitimately discovered.\textsuperscript{70} The court also stated that the avowed purpose of discovery sanctions is remedial, not punitive, as the lower court had used them.\textsuperscript{71}

Perhaps coincidentally, each of the foregoing California cases did not condemn a lawyer who benefited from an exploited clerical error or surreptitious discovery of privileged information.

B. Federal Courts

The federal courts spawn considerably more cases on this issue than California courts. Opinion significantly differs as to the effect of an inadvertent disclosure of privileged information.

1. The Ninth Circuit


In 1978, the Ninth Circuit reviewed a situation that epitomizes modern litigation involving voluminous document production. In \textit{Transamerica Computer Co. v. International Business Machines Corp.},\textsuperscript{72} IBM was required, pursuant to an accelerated discovery order, to review 17 million pages of its documents to ensure no privileged documents were included in the delivery to opposing counsel.\textsuperscript{73} Despite herculean precautions to separate the privileged documents, IBM

\textsuperscript{67} Id. at 298.
\textsuperscript{68} Id. at 293.
\textsuperscript{69} Id. at 298.
\textsuperscript{70} Id. at 297.
\textsuperscript{71} McGinty, 31 Cal. Rptr. 2d at 297.
\textsuperscript{72} 573 F.2d 646 (9th Cir. 1978).
\textsuperscript{73} Id. at 648.
inadvertently turned over approximately 5800 pages of privileged communications.\textsuperscript{74}

The court sidestepped the issue of whether inadvertent disclosure could have waived the privilege by finding that the circumstances under which IBM was required to produce documents made the production of privileged documents inevitable.\textsuperscript{75} The trial court had imposed an extremely rigorous schedule of accelerated discovery for voluminous documents.\textsuperscript{76} This “de facto” compelled IBM to produce privileged documents without “adequate enough opportunity to claim [the privilege].”\textsuperscript{77} Where IBM was thus compelled to produce privileged documents, compliance did not waive the privilege.\textsuperscript{78} The court limited it holding to the “truly exceptional and . . . unique” circumstances of this case.\textsuperscript{79}

b. Weil v. Investment/Indicators, Research and Management

Three years later, the Ninth Circuit considered more directly whether inadvertent disclosure could waive a privilege. In \textit{Weil v. Investment/Indicators, Research and Management},\textsuperscript{80} the court revealed its views on whether inadvertence could imply waiver, stating that “the subjective intent of the party asserting the privilege is only one factor to be considered in determining whether waiver should be implied.”\textsuperscript{81} The court flatly stated that “‘inadvertence’ of disclosure does not as a matter of law prevent the occurrence of waiver.”\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{74} \textit{Id.} at 650.
\item \textsuperscript{75} \textit{Id.} at 650-52. Thus the facts of this case are on point but the holding does not address whether attorney inadvertence can waive the privilege.
\item \textsuperscript{76} \textit{Id.} at 651.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Transamerica Computer}, 573 F.2d at 651.
\item \textsuperscript{79} \textit{Id.} The circumstances of the trial itself were also unique in that the trial judge, as part of the accelerated discovery, ruled that “errors were bound to result,” so privilege would be preserved as long as the party continued to “employ reasonable screening techniques.” \textit{Id.} at 650. This was a prophylactic ruling made by the trial judge to safeguard the privilege during this extraordinary discovery process. \textit{Id.} This is an important narrowing of the factual setting of this case along with the accelerated discovery process, that seems to be ignored in virtually all subsequent application of the case found in this comment.
\item \textsuperscript{80} 647 F.2d 18 (9th Cir. 1981).
\item \textsuperscript{81} \textit{Id.} at 24.
\item \textsuperscript{82} \textit{Id.}
c. United States v. Zolin

Six years later, in 1987, the Ninth Circuit applied Transamerica and Weil to a case involving purely accidental, inadvertent disclosure in a non-voluminous discovery setting. In United States v. Zolin,\textsuperscript{83} a secretary sent what were thought to be blank audio tapes to an opposing party, but they in fact contained privileged communications.\textsuperscript{84} The court said that, like IBM in Transamerica, the privilege holder was deprived of "[adequate] opportunity to claim the privilege" and, therefore, held there was no waiver.\textsuperscript{85} Whereas voluntary disclosure waives a privilege,\textsuperscript{86} "[t]he secretary's delivery of the tapes . . . was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver."\textsuperscript{87} Oddly, the court allowed the ordinary secretarial error to usher in the same anti-waiver protection that the extraordinary circumstances of accelerated discovery did in Transamerica.\textsuperscript{88} The court made no mention of the portion of the Weil case that indicated inadvertent disclosure (e.g., secretarial error) could possibly imply a waiver of the privilege.

d. United States v. De La Jara

In the most recent Ninth Circuit case of United States v. De La Jara,\textsuperscript{89} the court reasserted that portion of Weil that stated that the circumstances surrounding the inadvertent disclosure of privileged information must be considered\textsuperscript{90} and that certain circumstances could imply a waiver even when disclosure is inadvertent.\textsuperscript{91} The court borrowed, and greatly broadened, the prophylactic rule fashioned by the trial judge in Transamerica which heretofore only applied in the extraordinary circumstances of voluminous, accelerated discovery.\textsuperscript{92} The De La Jara court held that "the privilege [is] pre-

\textsuperscript{83} 809 F.2d 1411 (9th Cir. 1987), aff'd in part and vacated in part, 491 U.S. 554 (1989).
\textsuperscript{84} Id. at 1417.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 1415, 1417.
\textsuperscript{87} Id. at 1417.
\textsuperscript{88} Id.
\textsuperscript{89} 973 F.2d 746 (9th Cir. 1992).
\textsuperscript{90} Id. at 749 (citing Transamerica Computer Co. v. International Bus. Machs. Corp., 573 F.2d 646, 652 (9th Cir. 1978)); Zolin, 809 F.2d at 1415.
\textsuperscript{91} De La Jara, 973 F.2d at 749-50 (citing Weil v. Investment/Indicators, Research and Management, 647 F.2d 18, 24 (9th Cir. 1981)).
\textsuperscript{92} Id. at 750.
served if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege . . . [and] conversely, . . . [that] the privilege . . . [is] waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter.  

Thus, in *De La Jara*, the fact that the party failed to take steps to recover the inadvertently disclosed document or to protect its confidentiality until six months had passed, "allowed the mantle of confidentiality which once protected the documents to be irretrievably breached, thereby waiving his privilege."  

The Ninth Circuit cases offer seemingly divergent rules. *Zolin* indicates that inadvertent, accidental disclosure of privileged information by an attorney's secretary deprives the holder of the opportunity to assert the privilege, and therefore constitutes no waiver.  

*De La Jara* indicates that the holder of the privilege must demonstrate that reasonable steps were taken to assert and preserve the privilege, if he or she is to stave off the waiver implied by the inadvertent disclosure.

2. *Other Circuit and District Courts*

Other circuit court opinions add considerable confusion to the issue of inadvertent disclosure. The District of Columbia Circuit credits the attorney-client privilege the least and is quickest to find waiver.  

The *In re Sealed Case* indicates that the privilege is only as intact as the holder makes it.  

The privilege is waived by disclosure, even wholly inadvertent disclosure.  

[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels — if not crown jewels. Short of court-compelled disclosure, or equally extraordinary circumstances [as in *Transamerica*], we will not distinguish between various

93. Id. (citation omitted).
94. Id. (citation and quotation omitted).
95. *Zolin*, 809 F.2d at 1417.
96. *De La Jara*, 973 F.2d at 750.
97. *See generally infra* Part II.B.2.
98. 877 F.2d 976 (D.C. Cir. 1989).
99. Id. at 980.
100. Id.
degrees of 'voluntariness' in waivers of the attorney-client privilege.\textsuperscript{101}

This is consistent with the same circuit court's opinion ten years earlier in \textit{In re Grand Jury Investigation of Ocean Transportation},\textsuperscript{102} where "[a]n intent [of the holder] to waive one's privilege is not necessary for such a waiver to occur."\textsuperscript{103} As recently as 1994, district courts in the District of Columbia Circuit have upheld this harsh but easy to apply approach.\textsuperscript{104} Thus, one is at the mercy of the attorney's precautions so long as the attorney "acted within the scope of authority conferred" upon him.\textsuperscript{105}

Outside of the District of Columbia, the circuits have given the attorney-client privilege more weight, but in varying degrees.\textsuperscript{106} The opposite view of the D.C. Circuit is best summarized in the district court opinion of \textit{Mendenhall v. Barber-Greene Co.}\textsuperscript{107} Though it is a district court opinion, it has been widely discussed throughout the circuits.\textsuperscript{108} \textit{Mendenhall} points out that the terms "inadvertent waiver" are oxymoronic:

We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.' Inadvertent production is the antithesis of that concept . . . . [I]f we are serious about the attorney-client privilege and its relation to the client's welfare, we

\textsuperscript{101} Id. (citation and footnote omitted).
\textsuperscript{102} 604 F.2d 672 (D.C. Cir. 1979), cert. denied sub nom, Sea Land Serv., Inc. v. United States, 444 U.S. 915 (1979).
\textsuperscript{103} Id. at 675.
\textsuperscript{105} \textit{Grand Jury Investigation of Ocean Transp.}, 604 F.2d at 675.
\textsuperscript{106} See generally infra Part II.B.2.
should require more than such negligence by counsel before the client can be deemed to have given up the privilege.\(^{109}\)

In addition, the *Mendenhall* court determined that "[f]or this Court [waiver leads to] . . . harsh results out of all proportion to the mistake of inadvertent disclosure."\(^{110}\)

The Third and Eleventh Circuits have not considered *Mendenhall*, but their district courts have followed it as recently as 1995.\(^{111}\) The Eighth Circuit felt no need to address those district courts which have followed *Mendenhall*, when presented with the opportunity to do so in 1993.\(^{112}\)

Not surprisingly, the modern trend in the federal courts has been to adopt a middle ground. Rather than always or never, inadvertent disclosure will waive the privilege sometimes.\(^{113}\) The First, Fourth, Fifth, Ninth, and Tenth Circuits have found implied waiver of the attorney-client privilege when information has been inadvertently disclosed in certain circumstances.\(^{114}\) As recently as 1995, the First Circuit held in *Texaco Puerto Rico v. Department of Consumer Affairs*,\(^{115}\) that "[i]t is apodictic that inadvertent disclosure may work a waiver of the attorney-client privilege."\(^{116}\) This


\(^{110}\) *Id.* at n.8.

\(^{111}\) See *Berg Elecs.*, 875 F. Supp. at 261; *Georgetown Manor, Inc.*, 753 F. Supp. at 936; *Helman*, 728 F. Supp. at 1099. However, a recent split among the district courts of the Third Circuit has developed. For example, in February of 1995, the District Court of Delaware elected to adopt the *Mendenhall* approach. *Berg Elecs.*, 875 F. Supp. at 263. But at the end of the same year, the District Court of New Jersey (also in the Third Circuit) expressly eschewed *Mendenhall* and adopted the middle ground approach of *ad hoc* reviewing the circumstances surrounding the disclosure. *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404 (D.N.J. 1995). This further exemplifies how *Mendenhall* serves as a nice pivoting point for what direction the courts take. *See also supra* note 108.

\(^{112}\) See *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993) (ruling on a case of inadvertent disclosure, without a hint of dissatisfaction with prior cases in which their district courts followed *Mendenhall*).

\(^{113}\) *See, e.g.*, *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).

\(^{114}\) *See, e.g.*, *Mendenhall*, 531 F. Supp. at 951.

\(^{115}\) *See, e.g.*, *Texaco P. R.*, Inc. v. Department of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995); *Aldred v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993); *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992); *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984).

\(^{116}\) *See id.*

\(^{117}\) 60 F.3d 867 (1st Cir. 1995).

\(^{118}\) *Id.* at 883.
dogmatic statement disregards those circuits that are not in accord, but reflects the greater weight of case law.

The greater weight of current case law throughout the circuits shows that, under certain circumstances, inadvertent disclosure is capable of implying a waiver of the attorney-client privilege.119

3. The “Circumstances” Approach

The cases which follow this trend require a review of the “circumstances” of the disclosure on a case-by-case basis.120 The courts, even in the D.C. Circuit, agree that the extraordinary circumstances of the Transamerica case do not constitute a waiver.121 For the D.C. Circuit these are the only circumstances that would excuse inadvertent disclosure, and thus waive the privilege.122 Other courts, however, consider that other “circumstances” might also excuse inadvertent disclosure.123

A widely accepted form of assessing whether the “circumstances” indicate that the privilege was not waived, is the five factor test.124 A court considers: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time required to rectify the error; (3) the scope of the disclosure, (4) the extent of the disclosure; and (5) the issue of fairness and protection of the privilege balanced against how carefully or negligently the privilege was guarded.125 Importantly, courts will make a presumption of waiver, placing the burden on the holder of the privilege to convince the court the privilege has not already been waived by the inadvertent disclosure.126

119. See cases cited supra note 115.
120. See cases cited supra note 115.
122. Id. at 980.
123. See cases cited supra note 115.
125. See cases cited supra note 124.
126. See cases cited supra note 124.
For example, a recent Fifth Circuit case involved a defendant who inadvertently produced one privileged cassette tape among twenty non-privileged tapes. In applying the five factors, the court concluded:

[The defendant] had not taken reasonable and available precautions to protect the materials from disclosure, that the scope of the discovery was limited such that the [defendant] could reasonably have discovered any privileged materials and that the disclosure was complete since [plaintiff] had become aware of the full contents of the tapes. Nevertheless, ... other considerations outweighed those factors and favored a finding that there had been no waiver. The [defendant] had immediately asserted the attorney client privilege upon learning of the disclosure and considerations of fairness counseled in favor of ordering the materials returned. The tapes were clearly privileged and would not have been discoverable absent a waiver and furthermore, the disclosure of the tapes was obviously inadvertent.

In adopting the five factor approach, the Fifth Circuit rejected the cases that said inadvertent disclosure either never, or always, waived the privilege.

In our view, an analysis which permits the court to consider the circumstances surrounding a disclosure on a case-by-case basis is preferable to a per se rule of waiver. This analysis serves the purpose of the attorney client privilege, the protection of communications which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.

The approach of analyzing the "circumstances" has received some criticism as being too arbitrary and yielding diverse outcomes. Outcomes in these cases are subject not

127. Alldread, 988 F.2d 1425.
128. Id. at 1433-34 (citation omitted).
129. Id. at 1434.
130. Id.
131. See, e.g., In re United Mine Workers of Am. Employee Benefit Plans Litig., 156 F.R.D. 507, 511-12 n.8 (D.C. Cir. 1994) (indicating that interpreting "circumstances" presents "practical difficulties"); In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (preferring a rule of waiver rather than "distinguishing between various degrees of 'voluntariness.'").
only to the “circumstances” of the inadvertent disclosure, but also to the court’s personal paradigm with regard to the law of attorney-client privilege.\textsuperscript{132}

C. American Bar Association

The \textit{California Rules of Professional Conduct} and the \textit{American Bar Association Model Rules of Professional Conduct} do not specifically address these unusual inadvertent disclosure and waiver situations.\textsuperscript{133} The American Bar Association (“ABA”) expressed its views by issuing formal opinions addressing the question of what the receiving and sending attorneys should do when confidential information is inadvertently disclosed. Two Formal Ethics Opinions issued by the ABA are highly relevant to this comment.\textsuperscript{134}

1. Formal Opinion 92-368

ABA Formal Opinion 92-368 indicates that an attorney who receives inadvertently sent confidential information should refrain from examining the information, notify the sender (assuming he or she is ignorant as to his or her errant transmittal), and abide by the sending attorney’s instructions.\textsuperscript{135} The opinion concludes that the importance of “potentially competing principles . . . pales in comparison to the importance of maintaining confidentiality.”\textsuperscript{136}

The opinion disagrees with the law in the D.C. Circuit that inadvertent disclosure destroys confidentiality and waives the attorney-client privilege.\textsuperscript{137} The ABA states that “[t]he fact that [the D.C. Circuit’s] result is reached is not surprising if one starts with hostility to the privilege . . . . [T]he Model Rules certainly reflect a far more positive view toward

\textsuperscript{132} As this comment will bear out, the District of Columbia’s hostility toward the privilege results in virtually a \textit{per se} finding of a waiver, regardless of the circumstances.

\textsuperscript{133} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (stating that the rules offer no explicit guidance on this issue).


\textsuperscript{136} \textit{Id}.

\textsuperscript{137} \textit{Id.} See also \textit{In re United Mine Workers of Am. Employee Benefit Plans Litig.}, 156 F.R.D. 507, 511 (D.C. Cir. 1994) (responding to the ABA’s criticism and reluctantly declining to follow the ABA opinion).
the importance of maintaining the confidentiality of attorney-client communications."\textsuperscript{138}

The opinion agrees with case law requiring "something more" than a mere inadvertent mistake before a waiver is found.\textsuperscript{139} Specifically, the opinion agrees with the five factor approach discussed above as a means of exploring whether a waiver should be implied.\textsuperscript{140} The opinion intimates that its view is palatable and not extreme, since some courts following \textit{Mendenhall} have gone even further by insisting that a waiver can never be implied from unintended conduct.\textsuperscript{141}

Lastly, the opinion gives weight to a consideration rarely found in the case law: Professionalism.\textsuperscript{142} "[T]he ... professionalism inherent in doing the right thing can . . . only [accrue] to the lawyer's benefit."\textsuperscript{143}

2. \textit{Formal Opinion 94-382}

A second ABA Formal Opinion addresses situations where an attorney receives confidential information, not sent inadvertently, but gained surreptitiously.\textsuperscript{144} \textit{ABA Formal Opinion 94-382} adopts a rule similar to \textit{ABA Formal Opinion 92-368}, but more flexible in nature.\textsuperscript{145} When a lawyer is offered or sent materials from an unauthorized party that the lawyer determines are privileged, the lawyer should refrain from reviewing the materials any more than is necessary to determine how to proceed.\textsuperscript{146} The lawyer should then notify the adverse party or lawyer and follow their instructions, or ask the court for a ruling on the disposition of the materials.\textsuperscript{147} The receiving lawyer may be entitled to use the materials if the unauthorized sender is rectifying improper conduct, such as disclosing documents that were being improperly withheld by the adverse party.\textsuperscript{148}

\begin{enumerate}
\item \textsuperscript{138} \textit{ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368} (1992).
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382} (1994).
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.}
\end{enumerate}
warns that this situation could give rise to an accusation that
the materials were not unsolicited by the receiving lawyer,
and thus become a basis for disqualifying the receiving law-
ner due to possession of an opponent's confidential
information.\textsuperscript{149}

The opinion specifically agrees with the district court
case of \textit{In re Shell Oil Refinery},\textsuperscript{150} where an employee dis-
closed confidential documents of his employer to opposing
counsel.\textsuperscript{151} That case required the receiving lawyer to return,
and refrain from making use of, all confidential documents,
citing concern for the preservation of the "integrity of this ju-
dicial proceeding."\textsuperscript{152}

The opinion notes several state bar opinions that disa-
gree and conclude the receiving lawyer is free to use the
materials to his or her advantage.\textsuperscript{153}

The ABA's opinions on inadvertent disclosure of privi-
leged information made a rare appearance in a district court
case in 1994. In \textit{Resolution Trust Corp. v. First of America
Bank},\textsuperscript{154} the defendant's attorney inadvertently sent an obvi-
ously privileged document to plaintiff's counsel.\textsuperscript{155} The court
agreed with the ABA's reasoning that the importance of confi-
dentiality and professional ethics dictate that the error
should not imply a waiver of the attorney-client privilege.
The court stated:

\begin{quote}
In this Court's judgment, common sense and a high sensi-
tivity toward ethics and the importance of attorney-client
confidentiality and privilege should have immediately
caused the plaintiff's attorney to notify defendant's coun-
sel of his office's mistake. While lawyers have an obliga-
tion to vigorously advocate the positions of their clients,
this does not include the obligation to take advantage of a
\end{quote}
clerical mistake in opposing counsel's office where something so important as the attorney-client privilege is involved.  

3. California Bar Association

There are no formal opinions from the California Bar Association that are on point. However, given that the ABA view is dictated largely by an emphasis on the importance of client confidentiality, an attorney in California would likely face a similar stance from the California Bar, since California emphasizes confidentiality a great deal. Specifically, a California lawyer "shall not violate his or her duty of protecting all confidential information as provided in [the] Business and Professions Code." The California Business and Professions Code requires attorneys to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This great importance placed upon the client's confidentiality would likely support a similar perspective as the ABA, and a general reluctance to find waiver of confidentiality from inadvertent disclosure.

D. Summary

It is apparent that there is a lack of concurrence as to the effect of inadvertent disclosure of confidential information. In California, there is clear guidance on this issue from the Kanter case. The divergent rulings in the federal courts point out the complexity of the issue. The American Bar Association attempts to clear the air with bright-line rules based upon ethical concerns. In the next section, all of the foregoing shall be applied to a hypothetical situation in order to show the range of consequences in the various jurisdictions.

III. Analysis

You have just realized you mistakenly sent or received confidential information to or from opposing counsel—what happens now? With the infinite factual variations under

156. Id. at 220 (citation omitted).
157. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-600(B) (1996).
159. See discussion supra Part II.A.1.
160. See discussion supra Part II.B.
which one can acquire confidential information, it is difficult to give a clear answer. However, as a focal point for analysis, this comment shall consider the following hypothetical that is not unlikely in everyday litigation.

A. *Hypothetical*

Attorney Alex writes a four page letter to a client outlining the strengths and weaknesses of the client’s case. The letter is labeled in bold letters at the top: “Confidential. Attorney-Client Privileged.” The client is 3000 miles away on vacation. Alex hands the letter to a secretary and asks to have it sent to co-counsel Chris for review. The secretary mails the letter to *opposing* counsel Otto, by mistake. Otto reads the letter and intends to use the information to his client’s advantage. Alex discovers the error five days later when Chris calls and asks Alex why the letter has not been sent.

The federal courts’ response to this simple hypothetical is not clear. The California state courts offer clearer, but troublesome, guidelines.

B. *California Law*

As previously stated, the *Kanter* case is the only case directly on point that involved purely mistaken disclosure.\(^{161}\) Did the actions of Alex’s office imply that the client waived the privilege of having vital communications kept in confidence, when the client was 3000 miles away on vacation? The answer is yes, unless Alex can persuade the court not to find a waiver by arguing the six *Kanter* factors.\(^{162}\) The client must show that Alex’s “[i]nadvertent production... evidences an intent inconsistent with the continued assertion of the privilege.”\(^{163}\) Alex must file a motion for a protective order, seeking return of the document, forbidding fruits of the document, and also asking for a disqualification of opposing counsel as he or she is tainted by the confidential information.\(^{164}\)

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161. See supra note 8 and accompanying text.
162. *Kanter v. Superior Court*, 253 Cal. Rptr. 810, 819-20 (Ct. App. 1988). The *Kanter* court’s six factors are essentially the same as the five factor analysis. However, the six factor analysis adds one factor for considering special circumstances, such as in the *Transamerica* case where voluminous document production was deemed to have been compelled by the court. *Id.*
163. *Id.* at 814.
164. These are the typical remedial measures sought in such cases.
Alex must show the circumstances are such that the inadvertent production should not imply a waiver.165

1. First Factor

The first factor asks, did Alex take adequate precautions to protect the confidentiality of the documents?166 Here Alex properly and boldly labeled the document confidential and privileged. Even a recipient who is not a trained lawyer would instantly be on notice that the document is private and confidential. The fact that the document is a letter addressed to someone besides the recipient, rather than a generic document, further bolsters the argument that the receiver would be on notice that the transmittal was errant.

Alex could point out that the secretary's mistake was understandable, since both the intended and unintended recipients were attorneys and were both involved in the case. The error is more excusable and understandable given the fact it was made in responding to a request to send the document to someone other than the addressee. Any training Alex had given the secretary on handling confidential documents would help Alex's argument. Any other precautions taken with the outgoing mail or faxes should also be brought to the court's attention.167

The court could consider that simple communication errors between co-counsels are not difficult to prevent and that the information should have been in memo form addressed specifically to co-counsel to reduce potential errors. However, Alex should be successful in characterizing these precautions as appropriate for any prudent lawyer's practice, and the inadvertent disclosure as impossible to prevent with total certainty.

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165. Kanter, 253 Cal. Rptr. at 818.
166. Id. at 819.
167. The issue of labeling documents with warnings of confidentiality is becoming murky. In the abstract, such bold labeling blatantly puts the receiver on notice that the document is confidential. But a wide spread reaction by law firms of blankety labeling nearly all documents in this manner dilutes the effect of the warning. The use of these warnings has become so commonplace that they appear on fast food lunch order faxes! See Abdon M. Pallasch, Fax Cover Sheets Carry Dire Warnings for Law and Lasagna, 18 CHI. LAW. 14 (1995). If an attorney who received confidential information can show the sender has a practice of indiscriminately labeling documents with confidentiality warnings, then the errant sender may get little credit for such a precaution from the court. Id.
2. *Second Factor*

The second factor asks, did Alex take too much time to rectify the error?\(^{168}\) Alex moved for a protective order as soon as the error was discovered. It would have been helpful if Alex's own efforts or safeguards revealed the error. Alex might be successful in characterizing his response as immediate under the circumstances, clearly inconsistent with waiver. The error occurred merely five days before the efforts to rectify the error began.

3. *Third and Fourth Factors*

The third and fourth factors consider the scope and extent of the inadvertent disclosure.\(^{169}\) Since only one document is involved, the disclosure is total. The disclosure cannot be characterized as a needle in a haystack of documents, nor a minor, yet privileged, piece of information. In five days time it is likely the recipient has learned everything from the four page document, unlike the argument that could be made with a four hundred page document. Alex will have difficulty characterizing this factor as inconsistent with waiver.

4. *Fifth Factor*

Factor five is concerned with fairness to the parties.\(^{170}\) Alex can argue that the effect of finding waiver due to a common, innocent mistake such as this creates an unfair windfall for opposing counsel. Nonetheless, the court will presume that it is fair for Alex to bear the "burden of dealing with the ramifications of the error, not [opposing counsel]."\(^{171}\) The "information gleaned from the documents has saturated [opposing] counsel's mind; thereby, presenting the old dilemma of 'unringing the bell.'"\(^{172}\) This is especially true here since the information the opponent now has (Alex's legal strategies, impressions, and opinions) can play an important role in virtually every aspect of the opponent's strategy, and cannot fairly be removed from the opponent's consciousness. Short of disclosure of the "smoking-gun," this is the worst type of disclosure for Alex.

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169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
5. Sixth Factor

The sixth factor looks at whether there are special circumstances involved that make waiver inappropriate.\footnote{173}{\textit{Id.}} Alex has nothing to offer here. There is not the court compelled or accelerated discovery, nor ultra voluminous production which has swayed courts in the past. Alex was not responding to any discovery—he sent out the document of his own impetus.

6. Conclusion in California

Alex will likely be unsuccessful at stopping the opposing counsel from keeping the document and using its contents. The \textit{Kanter} court was not persuaded to grant relief from waiver in a factual setting that was an equally innocent and garden-variety error, but in a much more voluminous document setting.\footnote{174}{See discussion supra Part II.A.1.} Alex only had to protect one extremely confidential letter, but failed.

Opposing counsel Otto will not be in any legal jeopardy for actions that might seem despicable to a layperson. He never had an obligation to point out his fellow bar member's error, nor to refrain from taking full advantage of the clerical error. It is well settled in California under the \textit{Cooke}, \textit{Aerojet}, and \textit{McGinty} cases, that the passive receiver of confidential information may willfully and surreptitiously capitalize on the opponent's information leak.\footnote{175}{See discussion supra Part II.A.2.}

The client is lost in the shuffle. How can a client be deemed to have waived the precious attorney-client privilege, that belongs to him or her personally, while merely vacationing 3000 miles away? Under \textit{Kanter}, the privilege is gone. The inadvertence of the attorney will be ascribed to the client.\footnote{176}{\textit{Kanter}, 253 Cal. Rptr. at 814-15 (citing \textit{Carroll v. Abbott Lab., Inc.}, 654 P.2d 775 (Cal. 1982)).} Since the attorney acts as the client's agent, the client cannot complain about the exercise of authority.\footnote{177}{Id. at 815 (citing \textit{In re Grand Jury Investigation of Ocean Transp.}, 604 F.2d 672, 675 (D.C. Cir. 1979), \textit{cert. denied sub nom}, \textit{Sea Land Serv., Inc. v. United States}, 444 U.S. 915 (1979)).}
C. Federal Law

1. Ninth Circuit

The Ninth Circuit is riddled with district court rulings that, similar to the Kanter case, presume waiver unless the six circumstances surrounding the error support non-waiver.\(^{178}\) Undoubtedly, Alex would be faced with making the same arguments as above. However, the Court of Appeals for the Ninth Circuit has sent confusing signals to the district courts. The Zolin case is notably similar to the Alex hypothetical. Recall that in Zolin, a secretary sent tapes mistakenly containing confidential information, rather than the intended blank tapes.\(^{179}\) The court summarily indicated the secretary’s conduct “was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver,”\(^{180}\) although the court found waiver on other grounds.\(^{181}\) Alex can make a compelling argument that the factual similarities involving a secretarial error make Zolin controlling, requiring a finding of no implied waiver.\(^{182}\)

The district courts have found ways around Zolin in order to find a waiver. In the case of In re Sause Brothers Ocean Towing,\(^{183}\) the district court rationalized the higher court’s ruling in Zolin on secretary error as “a brief discussion that did not detail the surrounding circumstances . . . [and] of limited precedential value . . . [because] it did not concern a production of documents in discovery.”\(^{184}\) The district court went on to note that the Zolin court ultimately found waiver on other grounds in a “more expansive discussion appearing earlier in its opinion.”\(^{185}\) These distinctions do not undermine Zolin’s applicability in Alex’s case.

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180. Id.

181. Id. at 1415.

182. Id. at 1417.


184. Id. at 115.

185. Id.
In the Alex hypo, opposing counsel Otto can characterize Zolin’s finding of no waiver as a conclusory, off-hand, sub-ruling that pales in comparison the Ninth Circuit’s other lengthy, seriously considered, analogous rulings that do find waiver. True, both the Weil and De La Jara cases did state, with more attentive, detailed analysis than Zolin, that inadvertent disclosure can create a waiver.\textsuperscript{186} However, these cases are not as factually on point with the hypo as the Zolin case.\textsuperscript{187}

Otto can also deflate the Zolin case because of its reliance on the Transamerica case.\textsuperscript{188} The Zolin court cites from Transamerica that no waiver occurs if the holder has “no opportunity to claim the privilege.”\textsuperscript{189} The Transamerica case is distinguishable. In Transamerica, IBM’s lack of opportunity to claim waiver was because of an extraordinary, voluminous, accelerated discovery circumstance, not because of a secretary’s mistake.\textsuperscript{190} The Transamerica court deemed it impossible for IBM to avoid inadvertent mistakes, and thus impossible to have all opportunity to claim the privilege.\textsuperscript{191} Therefore, Otto could argue that Zolin’s use of Transamerica, and Alex’s use of Zolin, is flawed.

However, Alex’s argument analogizing to Zolin still seems impervious given the distinct similarity of facts. Of course, there is the concern that the Ninth Circuit could disavow that portion of their ruling in Zolin. If the Zolin argument fails, Alex will still be faced with the opportunity to argue the six factor test. As stated above, this would likely be unsuccessful.

\textsuperscript{186} See, e.g., Weil v. Investment/Indicators, Research and Management, 647 F.2d 18, 23-25 (9th Cir. 1981) (using three pages of analysis to decide inadvertence can waive privilege, versus the one-paragraph discussion in Zolin flatly stating that inadvertence is inconsistent with waiver).

\textsuperscript{187} Recall that the Weil and De La Jara cases did not involve an innocent office clerk error at all. See Weil, 647 F.2d at 18; United States v. De La Jara, 973 F.2d 746 (9th Cir. 1992).

\textsuperscript{188} United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), aff’d in part and vacated in part, 491 U.S. 554 (1989) (citing Transamerica Computer Co. v. International Bus. Machs. Corp., 573 F.2d 646, 651 (9th Cir. 1978)).

\textsuperscript{189} Id.

\textsuperscript{190} Transamerica, 573 F.2d at 650-51.

\textsuperscript{191} Id.
2. **Other Circuits**

In the other circuits, Alex must be prepared to argue the six factor test, given its prevalence in district courts throughout the country.\(^{192}\) This argument is detailed in the California *Kanter* case analysis above.\(^{193}\)

In some jurisdictions, notably the District of Columbia Circuit, Alex will be faced with a *per se* waiver created by his secretary’s mistake.\(^{194}\) In these jurisdictions, inadvertent disclosure always waives the attorney-client privilege for the disclosed information, thus no analysis is necessary. Otto will enjoy this jurisdiction; the client however, while 3000 miles away, will be stripped of the privilege without recourse.

Yet in other circuits, Alex can argue that it is impossible, illogical, and unfair for his secretary’s mistake to indicate the client waived the attorney-client privilege by implication. Citing *Mendenhall* and other supporting cases,\(^{195}\) Alex can argue “[i]ndendent production is the antithesis of [the] concept [of waiver],” which would generate “harsh results out of all proportion to the mistake.”\(^{196}\) The facts show the secretary’s mistake was the epitome of inadvertence, and in no way reflected the desires of the client. Granting a waiver would result in grave harm to the client, in that the information disclosed to the opposing counsel was the attorney’s complete analysis of the pending case. In these jurisdictions, Alex would be successful in staving off a waiver of his client’s attorney-client privilege.

3. **American Bar Association**

As stated above, there are no California Bar Association rules to apply to these situations. If the American Bar Association’s stance is adopted, Alex could file a complaint against opposing counsel Otto. Otto willfully disregarded ABA Formal Opinion 92-368 when he failed to notify Alex that he had received Alex’s errant transmittal. Had Otto called, he would

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192. See *supra* note 115.
193. See discussion *supra* Part III.B.
194. See discussion *supra* Part II.B.2.
INADVERTENT DISCLOSURE

also have been obligated to follow Alex’s instructions with regard to rectifying the error.

Otto has no argument that he did not know the document was privileged or sent in error. The letter was not addressed to Otto, and it was clearly labeled as confidential in a manner either a layperson or an attorney would notice and understand. Further, when Otto read the letter (also in violation of the ABA opinion), the contents would clearly appear confidential and privileged in nature. Otto’s actions are directly in conflict with the ABA’s required actions, respect of confidentiality and professionalism. The ABA can discipline Otto, but obviously cannot affect the legal aspects of the situation, nor the rights of the client.

IV. PROPOSAL

A. The Relative Importance of the Attorney-Client Privilege

Given the infinite number of factual settings under which inadvertent disclosure of information can occur, it is impractical to suggest a uniform solution. Although it is not possible to anticipate the factual settings, it is feasible to address the principles a judge may bring to bear on future decisions. Future cases will continue to turn not just on the facts, but on the court’s personal view of overriding concerns such as truth seeking, the adversarial system, the client’s interests, attorney carelessness, and hopefully, professionalism.

For example, many courts show hostility toward the attorney-client privilege because “[it] ‘impedes [the] full and free discovery of the truth.’” Accordingly the privilege is to be strictly confined within the “narrowest possible limits.” The privilege is “not as sacred as a constitutional right” and does not require a “knowing and intelligent waiver.” These courts are much more likely to find waiver of the privilege.

How important is the attorney-client privilege? The answer is subject to debate. “It appears that we may have a

198. In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984) (citing Weil v. Investment/Indicators, Research and Management, 647 F.2d 18, 24 (9th Cir. 1981)).
199. Id. (citing In re Grand Jury Investigation, United States, 599 F.2d 1224, 1235 (3d Cir. 1979)).
conflict here between two eminent authorities, *i.e.*, Wigmore on the one hand and McCormick on the other. Wigmore says the privilege's benefits are "'indirect and speculative'" and its obstruction is "'plain and concrete.'" Conversely, McCormick notes that the privilege "'protect[s] . . . [important] interests and relationships'" and causes only "'incidental sacrifice[s]' to fact gathering."

Thus, the core disagreement among the cases is the issue of the relative importance of the attorney-client privilege. The privilege's importance should no longer be a question of a judge's subjective beliefs, which has created the array of law on this issue. Where inadvertent disclosure has occurred, and wherever practical, the scales ought to be tipped in favor of upholding the privilege.

**B. Current Law**

Unfortunately, the weight of case authority dictates that inadvertent disclosure automatically implies a waiver of the attorney-client privilege, unless the circumstances warrant relief from that implied waiver. This comment proposes that the *exact opposite* be the rule. Clerical errors should *not* imply that the client has waived the privilege, unless the circumstances warrant implying a waiver. There is ample justification for this new rule: professionalism.

A layperson would likely be surprised to learn that courts often waive an unsuspecting client's privilege, thereby entitled a lawyer to willfully exploit a clerical error by using the privileged information. The Attorney Alex hypothetical highlighted the plight of the client in this scenario. Should an innocent clerical error legally eviscerate the client's confidentiality and his or her entire case when other options exist? No, but it can happen.


202. *Id.* at 721 (quoting *Kanter*, 253 Cal. Rptr. at 813).


204. *See*, *e.g.*, *Texaco P.R., Inc. v. Department of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995); *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993); *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992); *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984).
The cases discuss the privilege largely as an evidence issue with little focus on the ethical implications. As indicated above, the ABA has tried to shift the analysis to include issues of professionalism and concern for the client's confidentiality when inadvertent disclosure occurs. The courts ought to support this view in the future. The ABA correctly views inadvertent disclosure not as an issue of one client in one case, but rather as an opportunity to show how the legal profession views its clients in general.

Professor Monroe Freedman, a distinguished expert on this issue, disagrees. Professor Freedman indicates the adversarial system makes it improper and illogical to suggest that an attorney have any concern for the opponent's attorney-client privilege. The professor disparages efforts in the name of "professionalism" as a "current vogue." However, Professor Freedman discounts what is at stake when a profession endorses the exploitation of clerical errors. It is common knowledge, and requires no citation to a source, that the legal profession is not viewed as the pinnacle of professionalism by society today. *Time Magazine* refers to a concern with "a growing cynicism toward the law itself." Popularity in general may not be important, but the profession's service to society is certainly more important than the strict adherence to the adversarial rules to which Professor Freedman refers. Unwavering respect for clients' confidences, even those of the opposing counsel's client, and uniform judicial treatment not tolerating willful exploitation of a clerical error in a court of law, will better serve the adversarial system and society. A working standard of what is legally expected from an ethical lawyer who inadvertently sends or receives privileged information would ease the current *ad hoc* application.

C. Future Law

This comment's proposal to reverse the presumption, and find no waiver from inadvertent disclosure will, of course, need to be tempered with issues of practicality. Indeed, some

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207. Id.
circumstances will warrant finding a waiver where the sender is reckless, the receiver could not have been aware the information was privileged, and the disclosure cannot be undone. It is difficult to "unring the bell" and place the parties back in the position they were in before the inadvertent disclosure.\textsuperscript{209} However, these situations that mature past the point of practical remedy would be minimized if attorneys were required to behave ethically early on, and required to bear the risk if they do not.

For example, if you receive documents inadvertently sent to you, return them. The inadvertence may be yours next time. If you are approached by a third party with confidential information, refuse to accept it and notify the opposing party, and the court, if foul-play is suspected. If an attorney willfully contaminates him or herself with privileged information, the courts should not hesitate to disqualify that attorney. If an attorney is unwittingly contaminated with privileged information that is clearly not otherwise discoverable, a protective order should issue, disallowing the use of the information. If the inadvertent sender is reckless, opposing counsel should report it to the Bar, instead of punishing the errant attorney and client on his or her own.

These proposals may sound simplistic to a veteran of high stakes litigation. The benefits of making the right ethical choice may pale in comparison to the immediate benefits of making the choice based upon evidentiary considerations. However, the long term benefits of making the right ethical choices are great, but often not apparent. Aside from the benefits of having a clearer understanding of what is required of the attorney and bolstering the professional nature of the practice of law, the ABA accurately states that, "[there is] credibility and professionalism inherent in doing the right thing."\textsuperscript{210}

V. Conclusion

Clerical errors are inevitable, and as document processing technology advances, the opportunities for error will increase. When an attorney, or an attorney's staff, inadvertently discloses information protected by the attorney-client

\textsuperscript{209} Kanter v. Superior Court, 253 Cal. Rptr. 810, 820 (Ct. App. 1988).
privilege, some courts indicate there is an implication that the client has waived the privilege since the information is no longer secret. In these jurisdictions, the opposing party is free to exploit the clerical error. This denigration of the attorney-client privilege is countered by courts at the other extreme that indicate it is illogical to imply any intention from inadvertent, unintended conduct. Most courts approach the issue somewhere in-between these extremes.

At the heart of the issue of whether inadvertent disclosure waives the attorney-client privilege is the relative importance courts place on the privilege at the outset. Currently, most courts that do not follow the above extremes will automatically presume a waiver has occurred, and then review the circumstances to determine if that presumption is invalid.

The exact opposite should be the rule. The courts should presume a waiver has not been implied by the clerical error, unless the circumstances warrant implying waiver. Rather than presuming a waiver has been implied, the courts should presume a hostility toward attorneys who willfully exploit clerical errors. The current disarray of case law would become more orderly if the courts uniformly attached a more heightened importance to client confidentiality when reviewing the facts surrounding the inadvertent disclosure in the name of professionalism.

Although attorneys are in an adversarial setting and are required to zealously represent their client, the profession as a whole has responsibilities to behave ethically and with integrity. The need for this is heightened when, as now, society is skeptical of the legal profession. The ABA implores attorneys not to take advantage of opposing counsel’s clerical errors and stresses the importance of client confidentiality and legal professionalism.

The courts should follow suit, and uniformly recognize that inadvertent disclosure does not waive the protection of the attorney-client privilege, unless the party wishing to pierce the privilege justifies a contrary ruling.

Joseph S. Stuart