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The Accidental Lawyer: A Law and Economics Perspective of Inadvertent Waiver.

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ARTICLE

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Abstract. The inadvertent waiver doctrine is part of the attorney–client privilege but its application lacks uniformity and thus is a major cause for distress for lawyers and clients. The concerns about an inadvertent waiver of the privilege intensify as technology changes the way attorneys and clients interact. Accordingly, seeking legal advice has become a dangerous activity.

This Article first demonstrates that courts treat inadvertent waiver as a type of accident without duly attending to the implications of the concept. Drawing on economic analysis of tort law, this Article identifies how the liability regimes and unique harm rules applied by courts to determine whether inadvertent waiver 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 inadvertent waiver 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. This Article suggests that the practice should be eliminated or at least minimized.

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ARTICLE CONTENTS

I. INTRODUCTION

This Article deals with those "oops!" moments in life, particularly in the context of the professional relationship between attorneys and their clients. For example, an unfortunate accident happened to an employee of a Baltimore law firm who routinely removed a hard drive containing client information from her employer's office and carried it home as a precaution against flood or fire.[1] On an August evening, the employee forgot the hard drive on the train while on her way home and was unable to locate it when she returned to the train.[2] The hard drive contained private medical records of the firms' clients involved in medical malpractice lawsuits and additional privileged attorney–client information.[3] The information was password protected, but not encrypted.[4] This was a nightmarish experience for the firm and its clients. Aside from data-privacy protection issues, a myriad of questions concerning the attorney–client privilege spring to mind. Can one claim 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? If it is claimed the firm was negligent, does this inadvertent loss result in the waiver of the attorney–client privilege? 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?[5]

The attorney–client privilege has been part of the common law since days of yore. It shields the client from compelled disclosure of confidential communications between the client and his lawyer for the purpose of obtaining or rendering legal advice.[6] The aim of the privilege is to foster

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1. Tricia Bishop, *Law Firm Loses Hard Drive with Patient Records*, BALT. SUN (Oct. 10, 2011, 8:31 PM), www.baltimoresun.com/news/maryland/bs-md-stent-hard-drive-20111010,0,599052.story.

2. *Id.*

3. *Id.*

4. *Id.*

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

6. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 357–58 (D. Mass. 1950) ("The rule which allows a client to prevent the disclosure of information which he gave to his

free and frank exchange of information and advice,[7] which is perceived to be a good thing. The downside is that by shielding confidential communications from exposure to opposing litigants, the privilege also withholds this information from the court.[8] 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 regard to privileged communications is lost, the privilege can be stripped away by the court.[9] Presumably, inadvertent waiver indicates the client did not take sufficient precautions to protect the confidentiality of information communicated to 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 time.[10] Sometimes clients invest in taking precautions, but still disclose privileged communications by accident; investment in precautions only reduces the probability of an accident but does not completely eliminate it.[11]

attorney for the purpose of securing legal assistance is founded upon the belief that it is necessary 'in the interest and administration of justice.'" (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888))); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (1961) ("[T]he privilege remains an exception to the general duty to disclose.").

7. *See* 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.").

8. *See id.* ("However, since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose."); *In re* Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) ("[T]he [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." (quoting United States v. Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 119 F.3d 210, 214 (2d Cir. 2010); *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973)) (internal quotation marks omitted)).

9. *See* Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993) ("Recent decisions addressing the issue all impliedly conclude that, in the context of pre-trial discovery, an attorney's inadvertent disclosure of an otherwise privileged document may waive the privilege on behalf of the client."); Shawn T. Gaither, *The Attorney–Client Privilege: An Analysis of Involuntary Waiver*, 48 CLEV. ST. L. REV. 311, 311 (2000) (stating inadvertent waiver may result in waiver of the attorney–client privilege).

10. For example, there might be a lack of care if a client discusses confidential matters with his lawyer in a public place where the content of their communications may be overheard by third parties. The client's inadvertent waiver can also result from sharing confidential documents covered by the attorney–client privilege with a third party outside the scope of the privilege circle. *See* Joyner v. Se. Pa. Transp. Auth., 736 A.2d 35, 36 (Pa. Commw. Ct. 1999) (discussing waiver of the privilege by a client who mistakenly left a voice message on opposing counsel's voicemail).

11. In fact, sometimes a precaution against one type of accident may increase the probability of another type of accident, as evidenced by the Baltimore law firm that lost a hard drive that contained client data. Tricia Bishop, *Law Firm Loses Hard Drive with Patient Records*, BALT. SUN (Oct. 10, 2011, 8:31 PM), http://www.baltimoresun.com/news/maryland/bs-md-stent-hard-drive-201110

When the opposing counsel detects an inadvertent waiver in litigation, a battle will often ensue. Opposing counsel normally endeavors to submit into evidence the previously confidential information if such evidence is in the party's possession.[12] If it is not in the opposing counsel's possession, a discovery motion to reveal the inadvertently disclosed evidence is the next move.[13] The client and his lawyer will usually have to prove they did not waive the privilege by the inadvertent disclosure and then try to dissuade the court from using or ordering the disclosure of previously confidential communications.[14]

The judge must then determine whether the inadvertent disclosure of the confidential communications constituted a waiver of the privilege.[15] An affirmative answer would mean the disclosed communications are no longer privileged. Otherwise, the court may forbid opposing counsel from introducing such evidence at trial.

The doctrine of inadvertent waiver is far from settled and is the cause of growing concern among practitioners and clients for many reasons.[16]

First, the application of the waiver doctrine in case law is characterized by a significant lack of uniformity.[17] Courts treat inadvertent waiver as a form of accident, but do so without a proper analysis of the concept.

10,0,599052.story.

12. *See* Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 445–46 (D. Mass. 1988) (ruling on a protective order where confidential information was inadvertently turned over to opposing counsel).

13. *See* Wallace v. Beech Aircraft Corp., 179 F.R.D. 313, 314 (D. Kan. 1998) (overruling a motion to produce inadvertently disclosed documents); Fed. Deposit Ins. Corp. v. Singh, 140 F.R.D. 252, 252 (D. Me. 1992) (ruling on a motion to compel the production of a document that was inadvertently disclosed).

14. *See* Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass. 2000) ("[The defendant] moves this Court to compel return of the inadvertently produced documents."); *Int'l Digital Sys. Corp*., 120 F.R.D. at 446 ("The plaintiff . . . seeks a protective order compelling the defendant . . . to return copies of twenty documents which are protected by the attorney–client privilege but which [the plaintiff] turned over to [the defendant] allegedly inadvertently, as part of the document production in this case. The issue is whether the disclosure by [the plaintiff] is to be held to be a waiver of the privilege as to the documents disclosed.").

15. *See* Alpert v. Riley, 267 F.R.D. 202, 209 (S.D. Tex. 2010) (considering five factors to determine if an inadvertent disclosure of certain documents results in a waiver of the attorney–client privilege for an inadvertent disclosure).

16. *See* 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, 631 (2008) (concluding the law of inadvertent waiver is far from clear, although the promulgation of the new Federal Rules of Civil Procedure 26(b), 26(f), 18(f), and the proposed Federal Rule of Evidence 502, may provide some ease for parties facing this issue).

17. *See* JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE 5-35 (1990) ("[T]he inadvertent disclosure issue is now as confused as any other issue raised under the privilege waiver doctrine.").

However, 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, this Article 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 a waiver. This Article will demonstrate these regimes correspond to the three familiar regimes of tort law liability: strict liability, negligence, and no-liability.[18] The uncertainty stemming from the lack of a single clear regime does not end there. Courts that adopt 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.[19] The most common standard is known as "the five-factor test."[20]

18. Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 213–14 (2010) (noting "[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 referring to these approaches as the "strict," "lenient," and, the most commonly followed, "balancing" approaches).

19. *Compare Alpert*, 267 F.R.D. at 209 ("The factors to consider include: '(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.'" (quoting Alldread v. City of Grenada, 988 F.2d 1425, 1433–34 (5th Cir. 1993))), *and Amgen, Inc.*, 190 F.R.D. at 291 ("This approach empowers courts to consider a number of circumstances relating to the inadvertent production, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice."), *with* Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (considering "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error"), *and* Pinnacle Pizza Co. v. Little Caesar Enters., Inc., 627 F. Supp. 2d 1069, 1074 (D.S.D. 2007) (considering "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in light of the extent of document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) the promptness of measures taken to remedy the problem; and (5) whether justice is served by relieving the party of its error").

20. 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." *Alldread*, 988 F.2d at 1433. The five-factor test can be traced to *Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985). The five-factor test is applied in a variety of cases. *See, e.g.*, *Alpert*, 267 F.R.D. at 213 (applying the five-factor test in

Second, little attention is 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.[21] This Article will demonstrate that some of the applications of the inadvertent waiver doctrine are inconsistent with the privilege's current rationale.

The following discussion utilizes familiar concepts from the 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, the Article also identifies the missing component in the conceptualization of inadvertent waiver as an accident: the concept of 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 often use tort law terminology in their treatment of inadvertent waiver cases.[22] However, this Article will claim courts have not addressed the fact

determining that waiver occurred when files were placed on an adverse party's computer); Ergo Licensing, LLC v. Carefusion 303, Inc., 263 F.R.D. 40, 46 (D. Me. 2009) (using the five-factor test to find that no waiver occurred when documents were inadvertently produced in response to a request by the opposing party); *Pinnacle Pizza Co.*, 627 F. Supp. 2d at 1075 (reviewing the five factors and deciding that confidential information divulged during a deposition was not a waiver of the privilege); United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 490 (N.D. Miss. 2006) (outlining the five-factor test in a case involving disclosure of privileged materials); *Amgen, Inc.*, 190 F.R.D. at 292 (relying upon the five-factor test in determining whether an attorney's private files were inadvertently disclosed); Wallace v. Beech Aircraft Corp., 179 F.R.D. 313, 314 (D. Kan. 1998) (noting the district court applies the five-factor test to determine whether waiver of the attorney–client privilege occurred). However, some courts adopted other criteria. *See* Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1037–41 (N.D. Ill. 2009) (examining whether the party intended to produce a privileged or protected document or whether the production was a mistake).

21. *Infra* Section A.1 ("Justifying the Privilege: The Compliance Rationale"). One notable exception is the economic analysis of inadvertent waiver during pretrial discovery. Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 513–14 (1990). Meese identifies and discusses the similarities between inadvertent waiver case law and economic analysis of tort law with a focus on property rights. *See id.* at 516 ("[T]he privilege is a sort of property right which encourages the generation of information which in turn serves the goals of the justice system."). Additionally, Meese does not differentiate between the application of inadvertent waiver to clients and its application to lawyers, the development of different harm rules on top of the variety of liability rules, or the different effects on repeat as opposed to one-shot players. These issues are discussed below.

22. *See* Ciba–Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 410 (D.N.J. 1996) (describing inadvertent disclosure as an unintentional act and further stating that a disclosure resulting from gross negligence could be considered intentional and result in waiver of the privilege).

that inadvertent waiver is a unique form of accident. It is unique because of the nature 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, the court defines and inflicts the harm in the inadvertent waiver context.[23] Therefore, it is essential to understand properly the manner in which courts determine the scope of the harm they inflict. This Article will demonstrate that courts formulate 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. The Article will proceed to utilize the accident framework in order to predict the implications of the 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 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.[24] However, scant attention has

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

24. *See generally* 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, 219–24 (2006) (addressing the problem of disclosing documents protected by the attorney–client privilege); John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2 FED. CTS. L. REV. 57, 61–64 (2007) (discussing the implications of a new rule of Federal Civil Procedure regarding inadvertent disclosures); 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, 471–74 (1993) (examining the tests courts apply when there is an inadvertent disclosure of a document); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1608–54 (1986) (articulating a framework for courts to determine waiver decisions); 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, 366–75 (2000) (describing the challenges regarding the lawyer–client privilege that lawyers are confronted with due to the increase of new technology); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility As the Governing Precept*, 47 FLA. L. REV. 159, 178–86 (1995) (discussing a number of different issues an inadvertent disclosure raises); 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, 631 (2008) ("This Note concludes that the amendments and the proposed rule may provide some relief to parties dealing with issues of inadvertent waiver, but it cautions parties to continue to conduct careful privilege reviews. As the law currently stands, the consequences of waiver are far from clear.").

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.[25] This justification is dubious because, as I will demonstrate, 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.

The problem of inadvertent waiver by lawyers due to disclosure of confidential communications is a very salient one.[26] The problem is compounded by the influence of technology and its effect on 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 they transfer information to opposing litigants in pretrial discovery.[27] Pretrial

25. *See* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 349 (2007) ("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."). Giesel's view of sophisticated clients 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 *infra* Section A.4 ("Interim Conclusions: A Focus on Corporate Clients").

26. The issue of confidentiality is central to the work and some of the recommendations made by the ABA Commission on Ethics 20/20. *See* ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (Feb. 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf (addressing "a wide range of topics, including confidentiality in a digital age"). The Ethics 20/20 Report on outsourcing of legal activities "was particularly interested in procedures to protect confidential information" and the methods used by outsourcing providers to safeguard the confidentiality of information. ABA COMMISSION ON ETHICS 20/20, INITIAL DRAFT PROPOSAL—OUTSOURCING 3 (May 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_outsourcing.authcheckdam.pdf. These methods include encryption, firewalls, biometric identification to prevent unauthorized access to data, monitoring of employee computers, disabling the use of portable data storage devices, and periodic audits of these measures. *Id.* at 4.

27. ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (Feb. 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf.

discovery is highly influenced by the growth of electronic information retention and sharing possibilities as well as the legal obligations to retain information.[28] Technological developments, such as the ability to share information quickly online and use "cloud computing" data retention to store and access vast amounts of information, have made confidential information more accessible to intruders.[29] 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.[30] Inadvertent waiver, as a result of negligent protection or screening of documents, may entail the disclosure of privileged material to rival litigants. This, supposedly, is the lawyer's nightmare. In order to avoid the unfortunate consequences of inadvertent waiver, expensive pre-discovery screening costs are spent in litigation.[31] However, the

28. *See* David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 MINN. J.L. SCI. & TECH. 151, 156 (2011) (observing courts broadly interpret the Federal Rules of Civil Procedure as implying expansive preservation 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) ("The Federal Rules of Civil Procedure allow for—and the intent behind them indeed call for—more restraints on discovery than many courts and parties recognize.").

29. *See* Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 875–76 (9th Cir. 2002) (detailing the unauthorized access to online materials); Sasha K. Danna, Recent Development, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 LOY. L.A. L. REV. 1683, 1742 (2005) (noting discovery material secured and stored online may still be accessible by unauthorized users).

30. ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 8 (Feb. 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf (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* Hopson v. City of Balt., 232 F.R.D. 228, 244 (D. Md. 2005) (bemoaning that 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); 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. 1, 3–6 (2006) (relating the information explosion in creation and storage of data with respect to potentially discoverable business information); 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, 362 (2001) (observing in the era of digital communications "lawyers have all sorts of new and exciting ways in which they can inadvertently breach their clients' confidences"); Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 199 (2010) ("Clients 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.").

31. For a general assessment of the costs of pre-production privilege review, see David Degnan,

combination of rising litigation costs and uncertainty about 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 developed by the courts.[32] 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—along with its critique—is briefly explained before presenting the mechanics of the inadvertent waiver doctrine. The next section conceptualizes the way courts apply inadvertent waiver as an accident. First, the Article analyzes the liability regimes employed by the courts, and then it describes the unique nature of harm in this context. The Article then presents 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, this Article argues that they differ with respect to the costs they incur and this influences the demand for legal advice.

Part B addresses 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. The Article then sets out to challenge the logic of the agency 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

Accounting for the Costs of Electronic Discovery, 12 MINN. J.L. SCI. & TECH. 151, 158–82 (2011) (proposing solutions to the high cost of electronic discovery). *See also* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 360 (1981) ("As 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."); Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 200 (2010) ("The prospect of inadvertent disclosure strikes fear and sometimes pain in the hearts of attorneys.").

32. Rule 502 of the Federal 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 privilege with respect to inadvertently disclosed evidence. FED. R. EVID. 502; FED. R. CIV. P. 26(b)(5)(B). Nevertheless, the implementation of the standard of care is left to the courts.

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.

II. DISCUSSION

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

1. Justifying the Privilege: The Compliance Rationale

Historically, justifications for the privilege ranged from non-instrumental theories to instrumental efficiency-based rationales.[33] However, following the United States Supreme Court's ruling in *Upjohn Co. v. United States*,[34] the prevailing justification for the privilege is encouraging the 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.[35] The underlying

33. For a comparative and historical discussion of the rationales, see JONATHAN AUBURN, LEGAL PROFESSIONAL PRIVILEGE—LAW & THEORY 16–55 (Oxford 2000). *See also* Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney–Client Privilege*, 66 CAL. L. REV. 1061, 1069–91 (1978) (exploring the historical foundations of the attorney–client privilege); Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CAL. L. REV. 487, 490–93 (1928) (examining the historical justifications for the attorney–client privilege).

34. Upjohn Co. v. United States, 449 U.S. 383 (1981).

35. *See id.* at 392 (discussing the application of the narrow "control group test" to corporate attorney–client privilege and explaining "[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* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 380 (2007) ("This preventative effect of the privilege creates societal benefits because this effect encourages legitimate conduct and discourages conduct contrary to law. Modern day courts frequently espouse this instrumental rationale of the attorney–client privilege."); JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE §§ 1–16 (1990) (noting the privilege rationale "to encourage client law-abiding behavior, seems almost designed for the modern business organization"); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 836–37 (8th ed. 2011) (claiming 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 lawyers know what to ask the client and will stop her before she communicates detrimental information, see Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 361–62 (1990) (suggesting the benefits of the attorney–

assumption is that once the client learns the legal consequences of his contemplated actions, the client will choose a legal rather than an illegal course of action.[36] While the privilege enables the free and frank exchange of information between the lawyer and the client and encourages clients to seek the advice of legal experts, some scholars note that clients who seek legal advice do not necessarily end up pursuing legally compliant or socially desirable courses of action.[37] Hence, it is not always true that the privilege is socially desirable.[38] Nevertheless, the compliance justification

client privilege outweigh the detriments).

36. This is a common assumption about the privilege's purpose. It is emphasized in Comment 2 to Rule 1.6 of the 2006 version of the Model Rules of Professional Conduct, which states:

> The 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.

MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 2 (2012); *see* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 354 (1981) ("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.").

37. Following Professor Shavell, one should distinguish between advice about contemplated acts, also referred to as "ex ante legal advice," and advice about litigation that 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* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 516, 517 (Peter Newman ed., 1998) (distinguishing between ex ante legal advice and ex post legal advice). For a critique of the assumption that protecting confidentiality promotes compliance, see Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123, 134 (1988) ("Since 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. However, where expected sanctions are less than the harm done by acts, legal advice and thus protection of confidentiality may or may not lead to socially desirable behavior."). *See also* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 363 (1981) ("[I]t is wrong to suppose that a broad privilege is needed to ensure compliance with legal rules."); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 614 (1989) (noting 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). On the ambiguity of legal advice in promoting compliance, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 808–09 (8th ed. 2011) (asserting legal advice can prevent inadvertent incompliance with law but may also prevent inadvertent compliance).

38. *See* Steven Shavell, *Legal Advice*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 516, 519 (Peter Newman ed., 1998) (claiming confidentiality matters especially "to

for the privilege persists in spite of the theoretical challenge to its validity. It is therefore reasonable to expect other components of the privilege, including the inadvertent waiver doctrine, to serve and advance the compliance rationale.

A client may waive the privilege and allow the disclosure of privileged communications.[39] The waiver can be voluntary and intentional, but may also be the result of inadvertent disclosure of privileged material on the part of the client or the lawyer.[40] Because the privilege withholds information from the court, courts grant it grudgingly and deny it whenever it does not encourage the free exchange of private information between the lawyer and the client.[41] 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 an inadvertent waiver of the privilege because it undermines the premise that the client intended the communication to be confidential.[42]

If privilege matters, why does the doctrine of inadvertent waiver make sense? Many courts are reluctant to recognize the privilege and construe its

those obtaining advice subversive of the law").

39. Rule 502 of the FRE acknowledges a client can disclose material otherwise protected by the attorney–client privilege or the work product doctrine if the "waiver is intentional." FED. R. EVID. 502; *see* Alpert v. Riley, 267 F.R.D. 202, 209 (S.D. Tex. 2010) (reiterating that voluntary disclosure waives the attorney–client privilege); Dolin, Thomas & Solomon LLP v. U.S. Dep't of Labor, 719 F. Supp. 2d 245, 253 (W.D.N.Y. 2010) ("The privilege may be explicitly waived by the client."); Schanfield v. Sojitz Corp. of Am., 258 F.R.D. 211, 214 (S.D.N.Y. 2009) ("It is well-established that voluntary disclosure of confidential material to a third party waives any applicable attorney–client privilege."); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 384 (2007) ("[B]asic agency principles make clear that a client certainly should be able to expressly instruct the attorney to waive the privilege.").

40. 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 23(b)(5)(B)." FED. R. EVID. 502(b).

41. *See In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973) (holding the privilege must be "strictly confined within the narrowest possible limits consistent with the logic of its principle" (quoting 8 WIGMORE, EVIDENCE § 2291 (McNaughton rev. ed. 1961))); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 83 (N.D.N.Y. 2003) (recognizing the attorney–client privilege ought to be narrowly construed because it does withhold relevant information from the court).

42. *See* Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123, 144 (1988) ("[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.").

application narrowly.[43] Therefore, they seek screening mechanisms that will justify unveiling cloaked information that 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 client 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 the client did not take sufficient precautions to maintain the confidentiality of the exchanged information, he may conclude the client placed less importance on confidentiality at the time of the communication. It therefore follows that the absence of the privilege would not chill the flow of information between the client and the lawyer at that earlier point in time.[44]

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 apparent because courts often use negligence terminology in the context of inadvertent waiver.[45] This section will 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, such as when he is careless. The lawyer may also be the injurer in certain cases, a possibility that 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,

43. *See, e.g.*, *Henry*, 212 F.R.D. at 83 ("[S]ince the privilege has the effect of withholding relevant information from the [fact finder], it applies only where necessary to achieve its purpose." (citing Fisher v. United States, 425 U.S. 391, 403 (1976))).

44. JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE §§ 4–5 & 5–43 (1990).

45. *See, e.g.*, 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, 741 (Ind. Ct. App. 2000) (asserting the attorney–client privilege must be judged against a negligence standard); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 386–87 (2007) ("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.").

the careless client will bring on the demise of his own case.[46]

Courts expect the client to take care in order to minimize the probability of an inadvertent waiver, especially 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.

a. Determining Liability

When the court must decide whether there was an inadvertent disclosure and the client is liable, it will often apply one of the three fundamental liability regimes from tort law: strict liability, no liability, or negligence.[47] 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.[48] However, in applying the inadvertent waiver doctrine, courts use these regimes in a different manner than in tort law. Namely, courts use the liability regimes as a mechanism to determine whether harm occurred, whereas in tort law, liability regimes are mechanisms to apportion damage for an already existing harm.[49]

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.[50] Given this

46. *See, e.g.*, *In re Horowitz*, 482 F.2d at 81–82 (holding the client waived the attorney–client privilege because he made no effort to preserve confidentiality of documents).

47. 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* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 179–80 (2004) (defining the fundamental liability regimes); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1 (1980) (comparing strict liability and negligence).

48. Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 213–14 (2010). 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. *See id.* at 214 ("While many consider the balancing test the fairest approach, the standard creates substantial uncertainty regarding whether a court will ultimately determine that a particular disclosure waived the privilege."). This confusion is purely semantic and therefore has no implication on my discussion.

49. By determining an accidental disclosure did not waive the privilege, the court de facto holds the accident did not create harm.

50. *See* Michigan Law Review Association, Note, *Inadvertent Disclosure of Documents Subject to the Attorney–Client Privilege*, 82 MICH. L. REV. 598, 600–07 (1983) (stating 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).

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,[51] whereas under a negligence regime a standard of care is 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.[52]

51. *See* Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 521 (1990) (explaining that strict liability, also referred to as "strict responsibility," is the traditional approach attributed initially to Dean Wigmore); *see, e.g.*, Minebea Co., Ltd. v. Papst, 228 F.R.D. 34, 34 (D.D.C. 2005) (noting 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); *id.* at 35 ("If a client wished to preserve the privilege, it must treat the confidentiality of attorney–client communications like jewel—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.'" (quoting Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988))) (internal punctuation omitted); Fed. Deposit Ins. Co. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) ("[W]hen a document is disclosed, even inadvertently, it is no longer held in confidence despite the intentions of the party." (citing *In re Sealed Case*, 877 F.2d at 980)); Wichita Land & Cattle Co. v. Am. 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."); *see also* JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE 5–44 (1990) (claiming there may be a distinction between "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* Michigan Law Review Association, Note, *Inadvertent Disclosure of Documents Subject to the Attorney–Client Privilege*, 82 MICH. L. REV. 598, 612–14 (1983) (differentiating between the effects of voluntary disclosure and involuntary disclosure); Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 531 (1990) (supporting this distinction by asserting involuntary disclosure should not justify inadvertent waiver insofar as contributory negligence is not a defence against an intentional tort); *id.* (declaring 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); *id.* (stating this rationale does not fit technological developments that 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); Natalie A. Kanellis, Comment, *Applicability of the Attorney–Client Privilege to Communications Intercepted by Third Parties*, 69 IOWA L. REV. 263, 263–64 (1983) (exploring the attorney–client privilege within the context of discovery communicated by a third party and distinguishing the traditional view, which stipulates that the communication is not privileged, and the modern trend, which holds that the privilege remains).

52. *See, e.g.*, *Int'l Digital Sys. Corp.*, 120 F.R.D. at 450 (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); Suburban Sew & Sweep v. Swiss-Bernina, 91 F.R.D. 254, 254–55 (N.D. Ill. 1981) (finding the client was negligent for not destroying a draft document that was retrieved by the opponent from a trash-bin).

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 the application of a strict liability regime is relatively problem-free from a judge's perspective.[53] Accordingly, strict liability will be significantly more cost-effective for courts.[54] Under strict liability, whenever the court observes an inadvertent disclosure, it will assume the client has waived the privilege regardless of the actual investment in precautions.[55] When this is the case, the classic economics of tort law yield the conclusion that the client always chooses 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.[56] On the other hand, applying a strict liability regime means activity levels will be restricted; the free exchange of information between the client and the lawyer will be limited as if it were an environmentally hazardous activity, such as operation of a nuclear power plant.[57]

As it turns out, however, the negligence regime is the most common among the courts when applying the inadvertent waiver doctrine.[58] From an economic perspective, this is at odds with the courts' best interest. From a judge's perspective, the negligence regime is costlier because it compels the court to develop a standard of care against which the client's

53. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 229 (8th ed. 2011) (explaining strict liability cases are simpler to try and therefore "we can expect litigation costs to be lower under strict liability than under negligence").

54. *See* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 524 (2009) (arguing the court's costs are not a trivial matter because the original drafters of the FRCP did not include extensive rules for the court management of discovery proceedings, instead assuming it would be a self-executing process that would not involve the court).

55. *See* Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 521–23 (1990) (describing how the privilege is waived under the strict liability approach, regardless of the intent).

56. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 226 (8th ed. 2011) (describing the assumptions courts make when dealing with inadvertent disclosure); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF TORT LAW 196 (2004) (noting strict liability means the victim bears the cost of any accident that could not be efficiently prevented).

57. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 228 (8th ed. 2011) (describing the effect a strict liability standard will have on all communication between attorneys and their clients); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF TORT LAW 196 (2004) (relaying how imposition of a strict liability standard affects the attorney–client relationship).

58. Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 214 (2010) (describing the different factors courts use in employing the negligence standard); *see* Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 523–26 (1990) (referring to the "conduct" approach).

behavior will be measured.[59] Furthermore, when a dispute arises as to whether inadvertently disclosed information resulted in a waiver of the privilege, litigation concerning whether the standard of care was met necessarily ensues. This entails more judicial resources being spent adjudicating the waiver dispute under the negligence regime.[60] Nevertheless, if courts view furthering communications between clients and their lawyers 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.[61] Additionally, in order to produce efficient compliance, a standard of care must be certain, easily identifiable, 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

59. *See, e.g.*, U.S. Fidelity & Guar. Co. v. Liberty Surplus Ins. Corp., 630 F. Supp. 2d 1332, 1340–41 (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); Commonwealth v. Allison, 751 N.E.2d 868, 889 (Mass. 2001) (detailing a standard of care for office-sharing attorneys by holding they must maintain separate fax machines or install other procedures to safeguard client confidentiality).

60. *Cf.* Atronic Intern., GMBH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 166 (E.D.N.Y. 2005) (ruling there was no evidence of reasonable procedures for separating confidential communications from non-privileged communications); *In re* Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda), 681 N.E.2d 838, 841 (Mass. 1997) (holding the fact that a document was stolen suggests insufficient precautions were taken, but the presumption can be contradicted if the party proves sufficient precautions were taken); JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE 5–35 (1990) ("It just takes those courts a little longer since the document-screening procedures are elaborately dissected and their failings laid bare.").

61. 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. Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 538–40 (1990). 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 that is above the optimal level. *Id.* If the court sets a socially efficient standard, the client will do her utmost to adhere to this standard and thereby avoid liability. *Id.* If the court sets a standard above the socially efficient standard of care, then the client's behavior depends on her expected total costs. These would consist of the client's precaution cost and her expected harm in the event that inadvertent waiver occurs. *Id.* 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. *Id.* 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 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. *Id.*

standard of care from the multitude of cases applying the inadvertent waiver doctrine.[62] Consequently, clients that face multiple litigation proceedings in various courts or jurisdictions—and clients that do not know in advance what jurisdiction they are likely to litigate in—face a vague standard. This implies clients will prefer to wastefully over-invest in precautions in order to make sure 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.[63] FRE 502 adopted the balanced approach—namely, a negligence regime.[64] It aimed 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 legislature did not resolve the uncertainty with respect to the standard of care.[65]

b. Determining Harm

We are now prepared to address the issue of harm, 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 accidents. In tort law, the judge presumes harm and then determines the level of compensation (the amount of damages imposed on the liable party) vis-à-vis that exogenously given harm.[66] The court cannot influence the magnitude of the harm in an

62. *See id.* at 540–42 (outlining problems with a variety of standards of care).

63. *See* Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised Nov. 28, 2007), Congressional Record—Senate, S1317 (Feb. 27, 2008) (pointing out that FRE Rule 502 "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" and that "the 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").

64. *See id.* (explaining "the rule opts for the middle ground" and 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").

65. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 214–20 (2010) (professing "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 "the new FRE 502(b) approach incorporates the same uncertainty and possibility of waiver that exists in balancing jurisdictions").

66. *Cf.* Michigan Law Review Association, Note, *Inadvertent Disclosure of Documents Subject to the Attorney–Client Privilege*, 82 MICH. L. REV. 598, 604 (1983) (describing the attorney's liability

accident, but it can decide whether to fully compensate, under-compensate, 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. Once it establishes 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.[67] 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 relevant case law reveals three major rules governing the level of harm courts impose on litigants pursuant to an inadvertent waiver of the privilege.

The lenient harm rule adopted by some courts means the scope of the waiver applies only to the specific information that was inadvertently disclosed, whereas the rest of the privileged communications remain shielded.[68]

The tough harm rule has some variations of increasing severity. In the mildest and most common form, even inadvertent disclosure of some of the privileged material will result in a waiver of the privilege to all communications between the client and the lawyer pertaining to the subject matter of the disclosed information.[69] When accidental disclosure

for inadvertent disclosure through tort law).

67. *Id.* at 598–600 (explaining how the liability of the attorney who inadvertently discloses material varies depending on how the court, in its discretion, views the level of harm done to the client).

68. This is mostly the case with respect to inadvertent disclosure of material protected by the work product privilege. *See, e.g.*, Cont'l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 773–74 (D. Md. 2008) (holding inadvertent disclosure of work product should not necessarily result in subject matter waiver); *see also In re* EchoStar Commc'ns Corp., 448 F.3d 1294, 1301 (Fed. Cir. 2006) (noting the work product privilege may belong to the lawyer rather than the client and sometimes cannot be waived by the client at all).

69. The mild version of the tough harm rule seems to be the prevalent rule in case law. *See, e.g.*, Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1340 (Fed. Cir. 2005) (holding waiver extends beyond the document initially produced); Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995) (extending inadvertent disclosure to all communications that involve the same subject matter); E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc., 269 F.R.D. 600, 609 (E.D. Va. 2010) (declaring a manufacturer's statement to the press waived its work product privilege to a certain extent); Navajo Nation v. Peabody Holding Co., 255 F.R.D. 37, 48 (D.D.C. 2009) (holding any disclosure of attorney–client material will apply to all communications relating to the same subject matter); *In re EchoStar Commc'ns Corp.*, 448 F.3d at 1299 (asserting waiver applied to all subject matter communications); *In re* Natural Gas Commodity Litig., 229 F.R.D. 82, 85 (S.D.N.Y. 2005) (extending waiver to documents inadvertently produced when extreme carelessness is demonstrated); Duplan Corp. v. Deering Milliken, 397 F. Supp. 1146,

occurs in 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 regard to all the information communicated between the client and the lawyer covered by the same type of privilege.[70]

As opposed to the two rules above, some courts adopt a no harm rule, which stipulates that inadvertent waiver is not an accident at all.[71]

Courts can increase the harm inflicted by both the lenient and the tough rules if they determine the disclosed information will be available to third parties to the specific litigation at hand.[72] 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 a client is required to communicate one hundred documents to his lawyer for the purpose of preparing for litigation, and that thirty 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 ten percent of the documents he communicated to the lawyer. Hence, the

1161 (D.S.C. 1975) (stating the mild version of the tough harm rule appears to be the prevalent rule in case law).

70. No authorities were found to this effect; hence, this is merely a theoretical possibility.

71. There are very few cases that apply the no harm rule, and most of them concern waiver by attorneys, as discussed *infra* Part B ("The Inadvertent Waiver Doctrine as Applied to Lawyers"). An often-cited example is *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 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. Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 803 (Wis. 2004). In this case, the waiver occurred in the process of discovery, prior to litigation over a real estate transaction. *Id.* at 796. The attorney disclosed the privileged material because he was unaware of the client's privilege with respect to the material. *Id.* The client was not consulted prior to the disclosure. *Id.* After the attorney resigned, a new attorney noticed the disclosure and petitioned the court to undo the disclosure. *Id.* Finding that "only the client can waive the attorney–client privilege," the court ordered the documents be returned to the client as privileged. *Id.* at 803.

72. *See, e.g.*, Hopson v. City of Balt., 232 F.R.D. 228, 229 (D. Md. 2005) (noting a risk of waiver exists in subsequent litigation against a different party, even if current parties agreed inadvertent disclosure would not result in waiver).

client will accidentally disclose three of the privileged documents. When opposing counsel 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 thirty privileged documents, whereas under the 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 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 consequences will follow. Should the court find the client complied with the standard of care, it would rule there was no waiver of the privilege. Otherwise, the court will apply one of the standards of harm.

Rule 502(a) of the FRE aimed to address the distressing uncertainty of 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."[73]

The requirement of intent seems to restrict the defined scope of the waiver in FRE 502(a) to voluntary waivers rather than inadvertent waivers.[74] This language conflicts with the legislative intent 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.[75]

On top of this ambiguity, the inclusion of a fairness consideration in

73. FED. R. EVID. 502(a).

74. *See id.* (requiring the waiver be intentional if it is to extend to undisclosed communication and information).

75. S. REP. NO. 110-264, at 3 (2008), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-110srpt264/pdf/CRPT-110srpt264.pdf.

FRE 502(a)(3) increases its vagueness. Furthermore, even if FRE 502(a) applies to inadvertent waiver, it provides only a partial solution, assuming it is not adopted by state courts.

In summation, the courts possess strong influence over the incentives 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.

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. With respect to these rules, this framework enables a conceptualization of the rational reaction of clients who seek legal advice.

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 her advice based on the relevant facts of the case.[76] In potential future litigation, the information communicated to the lawyer may be either detrimental or favorable to the client's case. The client's interest is that the attorney–client privilege will shield against the requirement to disclose information deemed harmful to the client's case in the event of future litigation.[77] 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 the lawyer will be able to mount the client's claim or defense and also be prepared for the opposing party's counter argument. 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.[78]

76. *See* United States v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) ("[A] client will not be less likely to show his lawyer important documents, because those documents do not become more easily discoverable by their revelation to the lawyer.").

77. *See, e.g.*, State ex rel. Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. 1995) (en banc) ("Where disclosure of 'privileged material' is alleged, prohibition is available, since an erroneous disclosure 'cannot be repaired on appeal.'" (quoting State ex rel. Peabody Coal Co. v. Clark, 863 S.W.2d 604, 608–09 (Mo. 1993) (en banc))).

78. *See* Daniel Northrop, *The Attorney–Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document to Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney–Client Privilege*, 78 FORDHAM L. REV. 1481, 1492 (2009) ("Unlike other evidentiary rules that exclude evidence because it is unreliable or does not otherwise aid in the search for truth, privileges expressly subordinate the goal of truth seeking to other societal interests.").

In many cases, the client does not know the probative value of the information or the evidence communicated to the lawyer. This ignorance may 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 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.[79] 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 supports his claim or is negative, and therefore is adverse to his claim and supports the opponent's claim. Once the lawyer reviews this information, she can inform the client whether the information is positive or negative. After the client learns which units of information are positive and which are

79. This is oversimplified, 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. My focus here is only on communications that may be privileged. *See generally* Anette C. Wilson & Edward D. Brown, *Attorney–Client Privilege and Duty of Confidentiality: Distinction and Application*, COLO. LAW., Jan. 2002, at 97, 98 ("Because the privilege protects certain communications and not facts, *per se*, pre-existing documents and items that would be discoverable if held in the client's possession, such as tax returns, will not gain privileged protection if merely placed in the attorney's possession.").

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 pretrial discovery phase, 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 lawyer's email address prior to sending an email containing information. Another precaution is sending physical documents in secured files or sealed boxes to the lawyer's office by a trustworthy messenger. 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.[80]

Because the client will probably present positive information in court, he should not be concerned if such information is accidentally disclosed. However, because the client does not know whether the privileged information communicated to his lawyer is positive or detrimental to his case, he must invest in precautions to prevent *any* accidental disclosure.[81] The reason for this is simple: unless the court adopts a version of the 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.[82]

Consider a situation in which one document is accidentally disclosed and the judge holds this disclosure constitutes an inadvertent waiver. Under the lenient harm rule, if the inadvertently disclosed information is not adverse evidence, then the client will suffer no harm as a result of the

80. Limiting the circle of persons exposed to privileged attorney–client communications is a frequently used confidentiality precaution easily observed by the court. Additionally, privileged information can be 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.

81. *See* Anette C. Wilson & Edward D. Brown, *Attorney–Client Privilege and Duty of Confidentiality: Distinction and Application*, COLO. LAW., Jan. 2002, at 97, 101 ("[A]ttorneys must be sensitive to disclosures of confidential information made to third parties. Disclosure to a third party constitutes a waiver of any confidentiality protection that may exist with such communications, and perhaps the underlying subject matter, unless the third party is a privileged third party.").

82. *See* Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney–Client Privilege, and Federal Rule of Evidence 502*, 32 CAMPBELL L. REV. 467, 472 (2010) ("In order for an inadvertent disclosure to be considered a de facto court-compelled production that would not result in the waiver of the attorney–client privilege, a court must have compelled the holder of the privilege to produce an extraordinarily high volume of documents within an extremely short period of time.").

accidental disclosure because the rest of the information will remain privileged. Hence, if we assume the information communicated between the lawyer and the client is equally likely to be positive or negative, then in half of all accidental disclosures, 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 not accidentally disclosed. Therefore, the client will always suffer harm, even if the inadvertently disclosed document was initially harmless.[83]

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.[84] 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; 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 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 consider the potential cost of the waiver with 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 in which 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

83. *See generally id.* at 475 (describing the irreversible effects of an inadvertent waiver of privileged information).

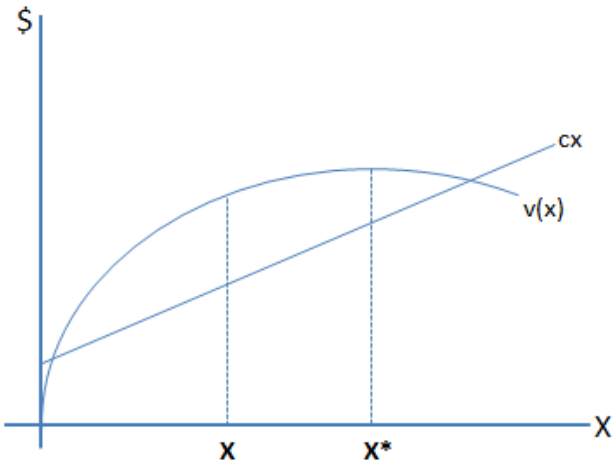
84. Regardless of which liability regime is chosen by the court, the lenient harm rule is superior to the tough harm rule from the client's perspective whenever more than one unit of information is communicated between the client and the lawyer, or whenever they communicate more than once. Of course, 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.

valuable—legal advice. However, the marginal benefit to the client from each additional unit of information communicated to the lawyer decreases with each additional unit communicated. At a certain point, the lawyer forms the fundamental contours of her advice, and additional information may improve its accuracy but will not change it. Further along the continuum, the communication of additional volumes of information will be counterproductive for all involved parties.[85]

Legal fees will be ignored for the purpose of this intellectual exercise, such that the focus will be on the cost of precautions against inadvertent waiver, which are costly.[86] Assume each discretely 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 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 information is lower than the marginal increase in the cost of care required for maintaining confidentiality. This can be illustrated graphically:

85. 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 her inability to sift through all the information and focus on the relevant pieces of data.

86. For the sake of simplicity, I assume 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.



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.[87] 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 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 taken into account. Consequently, legal advice might not be the most accurate advice the client could obtain.[88]

87. This curve has a maximum because at a certain point, the amount of information will overload the lawyer and she will not be able to render the optimal advice because of her inability to locate and focus only on the information relevant to the case.

88. *See* Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 384–85 (Mo. 1978) ("Some of the advice given by the attorney may be based on information obtained from sources other than the

One weakness of this simplified model is that an unsophisticated client who does not know in advance whether evidence is detrimental is also likely to be ignorant of the exact point beyond which it would not make 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 between the two points. Hence, the client usually learns the value of the legal advice only long after his decision is made regarding how much information to communicate to the lawyer. 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 there is a difference between one-shot clients and sophisticated repeat players.

4. Interim Conclusions: A Focus on Corporate Clients

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

First of all, if courts believe 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 clients to reduce their activity level and will therefore curb the tendency to seek legal advice.[89] However, 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.[90]

client. Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney–client consultation. All should be protected.").

89. *See* John C. Coffee Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 306 (2004) ("[B]ecause gatekeepers have reduced relevance, they also have reduced leverage with their clients."). *See generally* Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney–Client Privilege, and Federal Rule of Evidence*, 32 CAMPBELL L. REV. 467, 502 (2010) (discussing the effects that a strict approach to waiver will have on attorney–client privilege).

90. *See* John C. Coffee Jr., *The Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1308 (2003) (explaining gatekeeper obligations can produce socially desirable outcomes).

As a second-best solution, courts adopting the strict liability regime for inadvertent waiver should opt for the lenient harm rule 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 because clients who adhere to the court's standard of care are not affected by this change.

In addition, 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 the courts lower their applicable standard of care. Technological developments can also reduce the cost of taking precautions while maintaining or even improving the level of care.[91]

For example, when clients communicate volumes of information, the durability of precautionary mechanisms matters.[92] 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 instance, the time-consuming action of encrypting each confidential document before emailing it is a non-durable precaution.[93] Conversely, a durable precaution would include investing in an encrypted phone line between the client's office and the lawyer's office, protecting all of their conversations from unwanted intruders.[94]

91. *See* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICHMOND J.L. & TECH. 10, 36 (2007) ("There simply is too much information now, for old standards of inadvertent waiver to apply."); Jessica Wang, Note, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1842 (2009) (relaying that discovery rules were designed to fit paper discovery and not e-discovery, thereby creating "disastrous" costs); Donald Wochna, *Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm*, 43 AKRON L. REV. 847, 850 (2010) ("Although client data has undergone a radical transformation . . . attorneys have generally continued to manually review client electronic data . . . in the same manner as they have reviewed paper documents for generations."). Naturally, economic incentives drive entrepreneurs to develop cost-saving technology to reduce the costs of e-discovery and garner the saved surplus.

92. On the difference between durable and non-durable precautions, see Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293, 302 (1988).

93. *See id.* at 310–11 (suggesting repetitiveness is a distinctive feature in determining non-durability and offering the following as examples of non-durable precautions: failure to look for cars, failure to signal when switching lanes, and an obstetrician's use of a fetal distress test on a patient).

94. *See id.* at 310 (explaining a durable precaution is one that lasts for a long period of time and does not need to be done on a repeated basis, like installing a fire escape).

Some clients, more than others, have an incentive to invest in durable or cost-reducing techniques to protect the confidentiality of their privileged communications. These particular clients are most likely corporate clients who tend to be sophisticated repeat players in litigation, clients who seek legal advice with high frequency, and clients who communicate large volumes of information to their lawyers. Corporate clients are exposed to the risks of inadvertent waiver more than other clients.[95] Indeed, privilege and inadvertent waiver literature often overlooks the implications of the differences between different types of clients.[96] Another often-espoused 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.[97] 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 complete and candid information for seeking legal advice. While corporations are often required to use lawyers to conduct their affairs, they do not have to be fully candid and sincere with their lawyers while doing so.

In reality, both individual and corporate clients end up receiving the optimal legal advice, but at different costs. This eventually influences the demand for legal advice. For example, individual one-shot clients either do not approach lawyers for advice 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 additional information to their lawyer. Another possibility is, with regard to individual non-expert clients, the lawyer 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 amount of information in order to provide the optimal amount of advice. A more likely possibility is that competition among lawyers focuses on producing the largest possible surplus for their clients; therefore, lawyers would rather stop the client's stream of information at the socially suboptimal point, which is privately optimal for

95. JOHN WILLIAM GERGACZ, ATTORNEY–CORPORATE CLIENT PRIVILEGE 5–32 (1987).

96. *See* 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).

97. *Id.* at 218.

the client (coincidentally requiring 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.[98] Therefore, lawyers should keep these clients sufficiently informed in order to give them the ability 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 need to be adopted by using technological developments. Hence, corporate clients would be able to shift the cost function downwards or, preferably, flatten the cost function by adopting durable precautions to fit their economies of scale—thereby securing optimal legal advice.

The above-mentioned conclusions are subject to one caveat: the assumption that legal advice promotes legal compliance, as suggested in the *Upjohn* ruling, is disputed.[99] Indeed, if privileged legal advice increases the probability of the client choosing illegal or socially undesirable actions, then the policy conclusions should be reversed.

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, the attorney is ordinarily the person who asserts the privilege on behalf of the client in the course of litigation.[100] The attorney is 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.[101]

98. Robert P. Cummins & Megyn M. Kelly, *The Conflicting Role of Lawyer As Director*, LITIGATION, Fall 1996, at 48, 48.

99. *See, e.g.*, Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality,* 17 J. LEGAL STUD. 123, 134 (1988) (suggesting clients will follow legal advice from their attorneys if "expected sanctions equal the harm that results from sanctionable acts" but if the "expected sanctions are less than the harm caused by the acts," clients may not be inclined to follow legal advice).

100. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE, EVIDENTIARY PRIVILEGES § 6.5.1, at 535 (Richmond D. Friedman ed., 2002).

101. Rule 34(b)(2) of the Federal Rules of Civil Procedure directs requests to produce documents to the parties themselves and not to their lawyers. FED. R. CIV. P. 34(b)(2). Similarly, other rules governing the production of evidence and response to interrogatories are also directed at

Many courts attribute inadvertent disclosure of privileged information by the lawyer to her client.[102] This means the lawyer's accidental disclosure of a client's confidential communication may result in waiver of the attorney–client privilege.[103] As with inadvertent waiver by clients, the lawyer's inadvertent disclosure may occur outside the scope of litigation. A typical example is of the lawyer who accidentally emails his comments on a draft contract to the other party—thereby exposing the client's legal weaknesses to future potential litigants.[104] The ABA Ethics 20/20 Commission stated confidentiality may also be lost if unauthorized third parties access client information or if legal or non-legal employees of the lawyer reveal the information or transmit it to third parties without authorization.[105] Thus, the legal profession's main concern to date is inadvertent waiver during the pretrial discovery process.[106]

the client and not the lawyer. *Id.* R. 33. However, the lawyer usually responds to the requests on behalf of the client. *See* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 557 (2009) (stating that, in the American legal system, the parties are responsible for responding to discovery, but in practice, the lawyer typically dominates the process).

102. *E.g.*, Sitterson v. Evergreen Sch. Dist. No. 114, 196 P.3d 735, 739 (Wash. Ct. App. 2008) (noting the privilege belongs to the client but waiver by the attorney can be attributed to the client).

103. 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) ("Attributing the acts of lawyers to their clients is warranted by the fact that, in an important sense, they really are acts authorized by the principal."); RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a (1958) (viewing lawyers as agents); *see also* Deborah A. DeMott, *The Lawyer As Agent*, 67 FORDHAM L. REV. 301, 301 (1998) ("[T]he lawyer–client relationship is a commonsensical illustration of agency.").

104. *See, e.g.*, Robertson v. Yamaha Motor Corp. 143 F.R.D. 194, 195–96 (S.D. Ill. 1992) (recounting facts where, due to a clerical error, an attorney attached privileged documents to a letter sent to opposing counsel); *see also* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 201–02 (2010) (stating 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"). *But see* Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351, 362–63 (M.D. Pa. 2001) (holding 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 the overriding interests of justice were against waiver).

105. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 4 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

106. *See*, *e.g.*, Donald Wochna*, Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm*, 43 AKRON L. REV. 847, 850 (2010) (relaying that reviewing documents for privilege occurs mostly during the general discovery process).

Courts apply the same liability regimes that apply to the client when they deal with a lawyer's inadvertent waiver. In extending the inadvertent waiver doctrine to the lawyer, a judge will determine whether harm occurred by applying one of three regimes: strict liability, no liability, or negligence.[107] Under strict liability, any inadvertent disclosure by the lawyer will result in the loss of the privilege.[108] Negligence is the most commonly used regime with respect to inadvertent waiver by lawyers,[109] 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 led to a waiver of privilege.[110] The applicable

107. *See* James M. Grippando, *Attorney–Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511, 512, 514–15 (1985) (comparing the strict liability standard with the "conduct analysis" standard, where an attorney's inadvertent disclosure does not waive the privilege unless a full or partial disclosure was not accidental).

108. *See, e.g.*, Advanced Med., Inc. v. Arden Med. Sys., Inc., No. 87-3059, 1988 WL 76128, at *2 (E.D. Pa. July 18, 1988) ("Generally, inadvertent production of documents pursuant to Rule 34 Federal Rule of Civil Procedure, waives any privilege."); Thomas v. Pansy Ellen Prods., Inc., 672 F. Supp. 237, 242–43 (W.D.N.C. 1987) (deciding voluntary production of documents that were protected by attorney–client privilege, even though inadvertent, effected waiver of privilege).

109. *See, e.g.*, Heriot v. Byrne, 257 F.R.D. 645, 668–69 (N.D. Ill. 2009) (holding in favor of retention of the privilege in spite of a significant disclosure of privileged documents where reasonable procedures were used to review documents in the discovery process), *subsequent determination on other grounds*, 2009 WL 982490 (N.D. Ill. 2009); U.S. Fidelity & Guar. Co. v. Liberty Surplus Ins. Corp., 630 F. Supp. 2d 1332, 1341 (M.D. Fla. 2007) (deciding a law firm waived the privilege by failing to take reasonable precautions to prevent inadvertent disclosure); Atronic Int'l GMBH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 164 (E.D.N.Y. 2005) (pronouncing that revealing e-mails between plaintiff's employee and its counsel constituted waiver of attorney–client privilege on carelessness grounds); Int'l Bus. Machs. Corp. v. United States, 37 Fed. Cl. 599, 605 (1997) (adjudging that after four privileged documents were inadvertently disclosed during expedited discovery in a federal tax proceeding, the lawyers must prove they took adequate precautions to avoid this kind of disclosure for the privilege to remain intact). Examples of negligence in the discovery process vary. *See, e.g.*, Banks v. Office of Senate Sergeant-at-Arms, 233 F.R.D. 1, 9 (D.D.C. 2005) (ruling failure to assert the privilege until after the privilege log was submitted resulted in waiver); Smithkline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 476 (E.D. Pa. 2005) (ruling failure to identify the author on a privilege log constitutes inadvertent waiver); Cunningham v. Conn. Mut. Life Ins., 845 F. Supp. 1403, 1408–09 (S.D. Cal. 1994) (deciding failure to place the document on a privilege log constitutes inadvertent waiver); *see also* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 386–87 (2007) ("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.").

110. *See, e.g.*, Ergo Licensing, LLC v. Carefusion 303, Inc., 263 F.R.D. 40, 47 (D. Me. 2009) ("On balance, the only reasonable conclusion is that the privilege has not been waived in this case."); Bensel v. Air Line Pilots Ass'n, 248 F.R.D. 177, 180–81 (D.N.J. 2008) (applying each of the five factors for determining whether waiver has occurred and finding four of the five factors in the present case weighed in favor of finding waiver); United States v. Rigas, 281 F. Supp. 2d 733, 738, 740 (S.D.N.Y. 2003) (holding inadvertent disclosure of work product documents during discovery does not amount to a waiver where the government took steps to protect such files by maintaining them on a secure, password-protected computer network); Amgen, Inc. v. Hoechst Marion Roussel, Inc.,

standard of care is often uncertain and vague.[111] Only a few courts adopt a no liability regime for inadvertent disclosure by lawyers.[112] Ultimately,

190 F.R.D. 287, 292 (D. Mass. 2000) (applying the "middle test" and finding a waiver of the privilege when disclosure of 3,821 privileged documents could have been prevented with adequate precaution); Wallace v. Beech Aircraft Corp., 179 F.R.D. 313, 314 (D. Kan. 1998) ("While, apparently the initial review was not properly done by reviewing each document . . . the combined procedures employed to prevent disclosures appears adequate. This factor weighs in favor of finding that the privilege was not waived."); *see also* United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 491 (N.D. Miss. 2006) ("The court thus finds that the defendants have not by inadvertent waiver waived their right to any attorney–client privilege or work product protection.").

111. *See, e.g.*, VLT, Inc. v. Lucent Techs., Inc., 54 Fed. R. Serv. 3d 1319, 1321–22 (D. Mass. 2003) (noting jurisdictions vary with respect to the level of negligence or recklessness that constitutes inadvertent waiver); Corey v. Norman, Hanson & Detroy, 742 A.2d 933, 942 (Me. 1999) (stating 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"). It is worth noting in cases concerning inadvertent waiver in the discovery process, 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. *See, e.g.*, Edelen v. Campbell Soup Co., 265 F.R.D. 676, 698 (N.D. Ga. 2010) (holding no waiver where only four pages out of more than a two-thousand page production were privileged); *Heriot*, 257 F.R.D. at 659, 662 (judging disclosure of 13% of privileged documents was significant, but did not waive the privilege as reasonable procedures had been used to review documents); Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 135 (E.D. Mich. 2009) (ruling disclosure during discovery of two compact discs containing privileged information was inadvertent and did not constitute a "blanket waiver" of the privilege); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 257 (D. Md. 2008) (deciding the privilege was waived because disclosure of 165 documents from electronically stored data was substantive, indicating the keyword search performed on the data was not reasonable); Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351, 362–63 (M.D. Pa. 2001) (deciding an attorney sending a single page fax to the wrong number did not waive the privilege); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 446 (S.D.N.Y. 1995) (stating inadvertent disclosure of four privileged documents did not waive the privilege, because the number of documents erroneously disclosed was miniscule in relation to the number produced); JWP Zack, Inc. v. Hoosier Energy Rural Elec. Coop., Inc., 709 N.E.2d 336, 342–43 (Ind. Ct. App. 1999) (finding no waiver when approximately sixty-nine of the over 3,000 pages produced in discovery were privileged).

112. *See, e.g.*, Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 802 (Wis. 2004) (holding that imputing the lawyer's behaviour to the client would not promote the "functioning of the justice system"); *see also* KL Group v. Case, Kay & Lynch, 829 F.2d 909, 917–18 (9th Cir. 1987) (declining to regard inadvertent disclosure during discovery as waiver since the client is the holder of the privilege); Brigham & Women's Hosp. Inc. v. Teva Pharm. USA, Inc., 707 F. Supp. 2d 463, 471 (D. Del. 2010) ("Plaintiffs are attempting to use the advice of counsel both as a sword . . . and as a shield . . . . They cannot have it both ways."); Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168, 1174–75 (D. Nev. 2005) (holding only the client can waive the privilege); Geo. Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 936 (S.D. Fla. 1991) (reasoning an attorney's inadvertent disclosure does not constitute waiver of the privilege); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990) ("It would fly in the face of the attorney–client privilege to allow a truly inadvertent disclosure of a privileged communication by counsel to waive the client's privilege."); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) ("[I]f we are serious about the attorney–client privilege and its relation to the *client's*

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 courts hold the inadvertent waiver by the lawyer against the client? For the most part, courts have 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 with regard to inadvertent disclosure of privileged material.[113] This approach is based on an extension of the agency relationship between the agent, the lawyer, and his principal, the client.[114] Some courts find the lawyer's behavior should be attributed to the client because of the client's ability to choose the lawyer who represents her[115]—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.[116]

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 demonstrate, the lawyer's inadvertent

welfare, we should require more than such negligence by *counsel* before the client can be deemed to have given up the privilege."); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 391 (2007) (noting many no-waiver rulings are linked to *Mendenhall*'s holding that waiver required "intentional relinquishment or abandonment of a known right," but asserting this is an erroneous interpretation of agency law because the waiver need not necessarily be intentional and knowing as long as it was voluntary); Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 528, 536 (1990) (identifying *Mendenhall* with the subjective intent responsibility regime in tort law but eventually noting that "most courts do not use subjective intent approach")

113. *See, e.g.*, Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 381 (2007) (acknowledging it is a widely accepted practice for attorneys acting as agents of their clients to have authority to assert the privilege).

114. *See id.* at 350–51 (noting also that the extension can be controversial).

115. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 633–34 (1962) (dismissing the petitioner's claim due to the unexcused conduct of his counsel and adding 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").

116. *See* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 348 (2007) ("These courts do not treat the [attorney–client] relationship as they do other [agent–principal] relationships. . . . [S]ome courts seem to apply a modified agency doctrine to the question of whether an attorney has waived the attorney–client privilege."); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility As the Governing Precept*, 47 FLA. L. REV. 159, 165 n.20 (1995) (observing 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").

waiver is an unreliable and inefficient proxy for the client's concern for confidentiality.

1. The Moral Hazard Problem

For the lawyer's inadvertent waiver to serve as the court's litmus test of the client's valuation of confidentiality, one must assume a lawyer's carelessness implies that his client is at least indifferent to the loss of confidentiality with respect to the same privileged communications.[117] This requires an underlying assumption—that the client can both monitor the lawyer's level of care and influence it.[118]

The striking fact about inadvertent waiver by the lawyer is that its harm is borne by the client.[119] 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.[120] 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.[121] Several obstacles create a divergence between the lawyer's investment in care and the client's intentions and incentives, which turns inadvertent disclosure of privileged material by the lawyer into an inaccurate signal.

117. *See* Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility As the Governing Precept*, 47 FLA. L. REV. 159, 167 (1995) (noting one rationale is "that the client has the ability to protect the confidentiality of privileged materials and that, therefore, any disclosure is a manifestation of the client's lack of intent to keep the confidential status of the materials").

118. *See* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 349 (2007) (asserting clients in the current era are sophisticated and "should be held accountable for their agent's actions").

119. *See* Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility As the Governing Precept*, 47 FLA. L. REV. 159, 189 (1995) ("[A]lthough the negligence is the attorney's, the penalty harms the client, whose confidential materials were exposed and used against him. The client pays the price for his attorney's negligence.").

120. *See id.* at 190 ("A blanket rule does not discriminate between different degrees of care an attorney might take to avoid disclosure and therefore does not reward professional excellence.").

121. *See* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 385 (2007) ("Most courts seem to accept that an attorney is acting with implied authority, or at least apparent authority, to waive the privilege when the attorney fails to object to a disclosure, knowingly discloses a communication known to be privileged . . . ."); Bradley G. Johnson, Note, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 982–83 (2000) (giving examples of how an attorney's interests may differ from his client's interests).

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 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. The existing legal and ethical mechanisms designed to ensure the lawyer's obligation to confidentiality are insufficient to solve the agency problem.

2. The Ethical Duty

Lawyers have an incentive to commit to a certain level of care because confidentiality is intrinsically important to the client in litigation and, even if it is not used in litigation, because privileged material can be useful to opposing counsel when strategizing for the case.[122] If lawyers do not commit to a certain level of care, 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' best 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 ABA Model Rules of Professional Conduct (Model Rules).[123] However, until recently, the ensuing obligation to avoid inadvertent waiver was less explicit and could only be understood by reading the commentary to Model Rule 1.6.[124]

The accidental disclosure of confidential information can nonetheless be viewed as a breach of the lawyer's ethical obligation. Following the recommendation of the ABA Ethics 20/20 Commission, Rule 1.6 of the Model Rules was recently amended to include an explicit obligation, stating: "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."[125]

122. *See* Jessica Wang, Note, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1846 (2009) (noting opposing counsel can use privileged material to strategize for their case even if they are not able to use the evidence in court).

123. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2012) (providing the statutory scheme for confidentiality of information).

124. *See id.* cmt. 16–17 (explaining the attorney's duty to act competently to preserve confidentiality and take reasonable precautions when transmitting communications).

125. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 4 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.p

What really matters is whether the ethical quasi-contractual obligation transforms into an actual standard of care that reflects the client's interest in confidentiality. For this to occur, two conditions must be met. First, lawyers must develop practical standards that reflect the care desired by their clients. Second, ethical tribunals or courts must enforce these standards efficiently.

The first condition is unlikely to be met because lawyers often do not ask their clients how much they care about confidentiality. After all, the purpose of the ethical obligation of confidentiality is to act as a default rule and to save the lawyer and the client the need to exchange information, negotiate, and contract about confidentiality.[126]

Hence, the lawyer's ethical duty of 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 the lawyer failed to take reasonable precautions against inadvertent disclosure.[127] 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 client's best interest in mind, nor do they have an incentive to seek and ascertain the level of care for confidentiality desired by the client. Therefore, the tribunal's standard is likely to be vague at best and below average.[128]

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126. *See id.* at 5 ("A client may require the lawyer to implement special security measures not required by this Rule or give informed consent to forgo security measures that would otherwise be required by this Rule.").

127. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 86 MD. L. REV. 195, 202 (2010) ("If the consequences of the disclosure are sufficiently severe, the client may file an ethics complaint or sue the attorney for professional negligence.").

128. Section 52(1) of the Restatement (Third) of the Law Governing Lawyers defines the standard of care as "the competence and diligence normally exercised by lawyers in similar circumstances," but the commentary to section 52 clarifies the lawyer's duty of care "does not require 'average' performance." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 & cmt. b (1998); *see also* Jessica Wang, Note, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1853 (2009) (acknowledging "the duty-of-care standard is fairly liberal"). The ABA Ethics 20/20 Technology and Confidentiality Report proposed a fairly vague reasonableness standard. ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 5 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf. The Commission proposed amending Comment 17 of Model Rule 1.6 to include some factors that may be considered in determining whether the lawyer used reasonable care, including, but not limited to:

> [T]he sensitivity of the information, the likelihood of disclosure if additional safeguards are not

Furthermore, ethical sanctions imposed on the lawyer do not directly benefit the client, which means the sanctions are unlikely to correspond with the client's specific expectations.[129] Instead, they will reflect a general professional norm.[130] Therefore, sanctions imposed on lawyers who 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.[131]

The tough harm rule poses another complication. The scope of the ethical duty of confidentiality is wider than the scope of the privilege; therefore, it may include information not covered by the privilege.[132] Should the accidental disclosure of confidential—but otherwise unprivileged—information by the lawyer be attributed to the client and

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).

Id. 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 amendment 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. *Id.*

129. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 243 (8th ed. 2011) (arguing incentives are suboptimal when damages are not paid to the victims).

130. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 806 (1999) (observing the aim of professional ethics disciplinary actions is deterrence, not compensation).

131. In addition, if ethical sanctions were the only mechanism to assure against loss of confidentiality, this would create 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 refrain from seeking legal advice in some cases because the cost of care that is embodied in the price of legal advice will be too high. On the other hand, clients for whom the standard level of care is insufficient, because they desire a higher level of confidentiality, would also avoid legal advice because of the potential harm they will bear if inadvertent waiver occurs—unless they could demand 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 is allowed. *See* ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 5 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf (allowing a client to require more or fewer security measures than required by Rule 1.6(c)). There are other methods to motivate lawyers, such as contingency-based fees, which tie the lawyer's payoff to the successful outcome of the case, 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 because 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.

132. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 201 (1988) ("The duty of confidentiality is broader than the privilege in two respects.").

imply, due to the tough harm rule, 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 she is interested in confidentiality, she might not be able to fully convey the desired level of care to her 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 communicate to their lawyers and the overwhelming complexity of pretrial discovery, it seems that the client's knowledge about the exact level of care lawyers can employ is diminishing. For example, pretrial e-discovery is an expert's field, increasingly outsourced by lawyers to non-lawyers with relevant computer and data-search expertise.[133] Lawyers normally do not possess cutting edge knowledge 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 ABA Ethics 20/20 Commission's admission that technology is changing too rapidly for it to provide an accurate set of precautions.[134]

3. Malpractice Lawsuits

The perfect solution to the moral hazard problem is to enhance the 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.[135] The

133. *See generally* Donald Wochna, *Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm*, 43 AKRON L. REV. 847, 854–55 (2010) (expounding on the expertise required for the electronic pre-production privilege).

134. *See* ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 105A, at 5 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf (proposing the establishment of a website that will provide updated information about the current technological standards of care).

135. Section 60(b) of the Restatement (Third) of the Law Governing Lawyers states: "[T]he lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(b) (2000). Furthermore, section 86(1)(b) requires the lawyer to invoke the privilege

lawyer's liability for professional malpractice will naturally be governed by a negligence regime. The client will have to prove the lawyer failed to take the required precautions to avoid accidental disclosure of confidences.[136] If the client succeeds, the lawyer must compensate the client for the 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.[137] However, many argue this ex-post mechanism fails to provide a perfect solution to the moral hazard problem.[138]

The first argument duplicates the prior 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.[139] Judges do not ascertain the client's

"when doing so appears reasonably appropriate, unless the client has waived the privilege or has authorized the lawyer or agent to waive it." *Id.* § 86(1)(b); *see* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 383 (2007) (noting a lawyer's failure to assert the privilege on behalf of the client would most likely be viewed as professional malpractice).

136. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2012) (establishing a lawyer has a duty to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client"); Jeanne Andrea Di Grazio, Note, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney–Client Communications Via E-mail and the Internet—From* Upjohn Co. v. United States *and Its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553, 553 (1998) ("The Model Codes of Professional Responsibility and the Model Rules of Professional Conduct set forth certain guidelines for lawyers regarding their obligations to their clients and the safeguards they should undertake to secure confidential client communications.").

137. *See* Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1078 n.142 (1984) ("The more expected accident costs a producer internalized, the more his level of care would approach the socially desired level of care . . . and the more accurately the price of his product would reflect the full social costs of accidents.").

138. 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 have an effect on discovery is apparent from offshore outsourcing of pre-production privilege reviews. Potential malpractice liability is a factor in the phenomenon of privilege review outsourcing. *But see* Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 262, 266–67 (2012) (describing the numerous possibilities for malpractice claims in legal outsourcing). As Professor Robertson notes, however, it is not lawyers who are the impetus for outsourcing; rather, the phenomenon is led by corporations seeking legal services. *See* Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 137 (2011) ("Companies' outside law firms may participate in the process of offshoring if their clients demand it, but most law firms are unlikely to initiate it without client participation.").

139. *See* Timothy P. Terrell, *Professionalism on an International Scale: The Lex Mundi Project to Identify the Fundamental Shared Values of Law Practice*, 23 EMORY INT'L L. REV. 469, 576 (2009) (discussing how a lawyer's standard of care is based on "the lawyer's 'fiduciary duty' to a client and is the usual foundation for discussions of the standard of care and the reasonably prudent lawyer").

ex-ante desired level of care when they determine the lawyer's liability.[140] Therefore, this standard of care does not necessarily reflect the care desired by the average client or by the specific claimant.[141]

Secondly, even if the standard of care represents the socially efficient level, malpractice lawsuits against lawyers are notoriously difficult to win.[142] Thus, many clients who suffered harm from the lawyer's inadvertent waiver may prefer to avoid malpractice litigation with its certain costs and uncertain benefits.[143] Because of this, the suboptimal rate of malpractice litigation will result in lawyers employing precautions at a level lower than what their clients would have desired, unless courts adjust damages upwards to compensate for the suboptimal rate of enforcement. The latter also will 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.[144] In such a setting, as long as the lawyer

140. The five-factor test, for example, does not mention the client's expectations at all. *See* Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) ("The elements which go into that determination include the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the disclosure. There is, of course, an overreaching issue of fairness . . . .").

141. For the same reason, professional liability insurance focuses on the court's standard of care and thus fails to produce incentives that capture the client's interests. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 243, 254–59 (8th ed. 2011).

142. *See* Jessica Wang, Note, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1859 (2009) ("Moreover, [client-initiated] suits may be difficult to prove, the process may take a very long time, and they would impose additional litigation costs and stress on the court docket." (citing David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 831 (1992))).

143. *See id.* at 1858–59 (showing malpractice lawsuits are not an efficient policing mechanism).

144. 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 ABA Ethics 20/20 Technology and Confidentiality Report clarifies, with respect to its proposed Rule 1.6(c), that:

> [P]aragraph (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.

ABA COMMISSION ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES RESOLUTION

maintains the court-determined standard of care, she will be able to avoid liability for malpractice. However, because strict liability is applied to inadvertent waiver, some residual harm will be borne by the client—and will never be internalized by the lawyer.[145]

Finally, because a lawyer is sometimes allowed to reveal a client's privileged communications when sued by the client, ethical rules might discourage clients from suing their lawyers for malpractice.[146]

Consequently, private policing of the lawyer's level of care, via a malpractice lawsuit, 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 her 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.[147] 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; therefore, she is no longer deterred from suing the lawyer because she has nothing more to lose in terms of confidentiality.[148] It follows that the tough harm rule brings us closer to perfect alignment of client and

105A, at 5 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

145. *See* Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility As the Governing Precept*, 47 FLA. L. REV. 159, 190 (1995) (pointing out an attorney can avoid liability through application of standards that do not take the expected degree of care into account).

146. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2012) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense 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, 135 (D.D.C. 2009) (holding clients "waived the attorney–client privilege with respect to" communications with their attorneys when they filed counterclaims against the attorneys).

147. *See, e.g.*, Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 484 (E.D. Va. 1991) (limiting the extent of the inadvertent waiver to the actual document disclosed).

148. *See, e.g.*, Navajo Nation v. Peabody Holding Co., Inc., 255 F.R.D. 37, 48 (D.D.C. 2009) (noting "*any* disclosure of attorney–client material will be considered 'a waiver of the privilege as to all communications relating to the same subject matter'" (quoting *In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994))).

lawyer incentives to take precautions, provided we espouse the policing effect of malpractice claims.

4. Reputation

Lawyers may be motivated to avoid inadvertent waiver due to the potential reputational damage.[149] Clearly, lawyers care about their reputation and take measures to develop and safeguard it.[150] 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 lawyer's investment in care with the client's desire for care to justify the signaling effect attributed to the lawyer's behavior by the courts.

The effect of reputational damage on a lawyer depends on the lawyer's perception of the behavior of future clients. In turn, this perception depends on whether future clients will 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—only one of which is the lawyer's reputation in handling the client's confidentiality. However, reputation is likely not the most pivotal factor 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 available to non-experts. Even if such data was accessible to potential clients, they might not seek it because even if confidentiality matters to clients, inadvertent waiver is not on top of the client's reputation concerns.[151] Indeed, there are good reasons to believe technology such as search websites, social networks, and professional databases change the way clients seek and retain lawyers.[152] However, the literature concerning legal reputation does not deal with inadvertent waiver, and the scant empirical data indicates clients' awareness regarding

149. *See* Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 38 (1995) ("[T]he existence of segmentation in the market for legal services based on the value of reputation.").

150. *See id.* at 20–21 (noting reputation is an important concern that "exists and affects law firm behavior").

151. *See* 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.").

152. *See* ABA COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 5 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf ("Technology is changing the way that clients find lawyers.").

confidentiality and privilege is not high.[153] While technology may have altered the way clients seek lawyers, 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 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 in their favor.[154]

Finally, as with other reputational matters, inadvertent waiver is very fact-sensitive.[155] For example, a client may not know a firm found liable for malpractice no longer employs the lawyer responsible for the waiver, or that another firm with no inadvertent waiver history now employs the liable lawyer. Similarly, 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 argued that ethical norms, malpractice lawsuits, and reputation concerns are insufficient to align accurately the lawyer's level of care for confidentiality with the level desired by the client.

The probabilities that inadvertent waiver will befall the lawyer or the client are not dependent upon each other. Thus, when a court is faced with an inadvertent waiver by a 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, and the court recognizes inadvertent waiver by the lawyer and orders the disclosure of confidential communications, the court ignores the client's

153. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 218 n.26 (1988) (citing an unpublished empirical survey by Fred Zacharias that found approximately 70% of the subjects would not withhold information from the lawyer sans confidentiality, and "most people were . . . unaware of the attorney–client privilege").

154. *See* ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 90 (2d ed. 1991) (noting attorneys facing a malpractice suit have an incentive to settle out of court and include confidentiality terms in the settlement).

155. *See* Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 189 (2008) ("Unless a client is in a position to inquire specifically about prior results, and knows the questions to ask, result information may be meaningless . . . .").

complete and candid interest in confidentiality.[156]

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

When the tough harm rule is combined with the recognition of inadvertent waiver by lawyers, the potential for inaccuracy grows. Recall that under the tough harm rule, both Documents A and B are de-privileged once confidentiality is lost with respect to one of them. Under the tough harm rule, the rational client will encrypt and protect both documents. Now assume the lawyer takes less care to protect Document B once he realizes 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.[157] Indeed, this logic justifies the approach adopted by Federal Rule of Evidence 502(a), limiting the scope of the waiver to the disclosed document.

III. 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

156. Accuracy with regard to the client's observed interest in confidentiality matters a great deal. *See* Navajo Nation v. Peabody Holding Co., Inc., 255 F.R.D. 37, 48 (D.D.C. 2009) ("The attorney–client privilege demands adherence to 'genuine confidentiality.'" (quoting Permian Corp. v. United States, 665 F.2d 1214, 1217 (D.C. Cir. 1981))).

157. *See In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 310 (D.D.C. 1994) (noting regardless of the level of care for any other communications, "any disclosure inconsistent with the confidential nature of the attorney–client relationship waives the attorney–client privilege . . . as to all other communications related to the same subject matter" (citing *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989))); *see also In re Sealed Case*, 877 F.2d at 980 (declaring further the court "will not distinguish between various degrees of 'voluntariness' in waivers of the attorney–client privilege").

and promotes a candid attorney–client exchange of information—this purportedly enhances legal compliance with regard 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 the client has not placed sufficient importance on the confidentiality of the information exchanged with his lawyer.

While courts have 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.

This Article demonstrated 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 seeking 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. Such clients should be treated differently than those who share large volumes of information with their lawyers and thus have an incentive to adopt cost-reducing and durable precaution technology.

Courts also impute the lawyer's inadvertent waiver to the client and employ the same liability regimes and harm rules to the lawyer's behaviour. Considering the enormous increase in costs inflicted on litigants in the pretrial discovery phase because of possible 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 follow this path,[158] and there is no evidence yet to contradict the claim that the

158. *See, e.g.*, KL Group v. Case, Kay & Lynch, 829 F.2d 909, 919 (9th Cir. 1987) (declining to regard inadvertent disclosure during discovery as waiver because the client is the holder of the privilege); Brigham & Women's Hosp. Inc. v. Teva Pharm. USA, Inc., 707 F. Supp. 2d 463, 469–70 (D. Del. 2010) ("Because the privilege belongs to the client, not the attorney, only the client may waive it." (citing *In re* Seagate Tech., LLC, 497 F.3d 1360, 1372 (Fed. Cir. 2007))); Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168, 1174 (D. Nev. 2005) (stating only the client can waive the attorney–client privilege); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp.

abolition of inadvertent waiver compromises the ability of these courts to adjudicate cases accurately and properly. 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 Federal Rules of Civil Procedure (FRPC) to leave the court out of the discovery process as much as possible.[159]

Furthermore, Rule 26 of the FRCP allows the parties to contract out of inadvertent waiver in pretrial discovery in various ways such as "claw-back" and "quick peek" agreements,[160] 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.[161] Hence, a better solution would be to completely abolish the doctrine.

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 phases of lawyer–client communications except for the final phase—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. 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 primarily aims to promote legal advice about contemplated acts and it is less justified in the context of litigation, which

936, 939 (S.D. Fla. 1991) (finding an attorney's inadvertent disclosure does not constitute waiver of the attorney–client privilege); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990) (concluding the inadvertent disclosure of documents by counsel did not waive the attorney–client privilege); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (declaring a lawyer's inadvertent disclosure does not forfeit the attorney–client privilege because waiver requires "more than such negligence by *counsel*"); Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 802 (Wis. 2004) (explaining that allowing an attorney to unilaterally waive the privilege "would be placing too heavy a burden on the attorney–client relationship").

159. *See* Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 524 (2009) (noting the drafters intended discovery as preparation for trial and did not anticipate management by the court).

160. *See generally* Jessica Wang, Note, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1842–44 (2009) (discussing two prominent types of nonwaiver agreements).

161. Additionally, courts do not always uphold these agreements. *See id.* at 1838 (explaining attorneys sought nonwaiver agreements in an effort to cut privilege review costs, but "courts did not act uniformly in upholding such agreements"); *see also id.* at 1841 (noting many courts have held third parties could gain access to inadvertently disclosed information despite such agreements).

revolves around the results of those acts the client has already taken.[162] 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.[163] 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 occurring prior to the legal representation. A lawyer can avoid the costs of such surprises by stipulating that in such a scenario, the fee-shifting arrangement will be nullified and the client will be obliged to pay the lawyer for his efforts. Naturally, this would deter some clients from retaining the lawyer.

162. *See* Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 569 (1989) (indicating simply that legal advice during litigation does not "induce socially desirable behavior" because it is given after the behavior has occurred); *see also* Steven Shavell, *Legal Advice*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 516, 518 (Peter Newman ed., 1998) (claiming it is impossible to conclude whether litigation advice has a socially desirable effect because while it "may dilute deterrence of undesirable conduct," it might also lower "sanctions for defendants who did not violate the law").

163. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2012) (stating "a lawyer may advance court costs and expenses of litigation" to a client).