

RETURN TO SENDER?: Inadvertent Disclosure Of Privileged Information

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SYNOPSIS

A 1992 ABA Ethics Opinion directs lawyers not to read privileged information inadvertently sent by an adversary or other attorney. But the ethical obligations all lawyers owe to the courts and to their own clients conflict with that opinion. A better rule would hold that information does not remain privileged after it has been voluntarily transmitted to an opposing lawyer.

“The inadvertent production of a privileged document is a spectre that haunts every document intensive case.”¹

I. INTRODUCTION

With the volume of documents exchanged in discovery in even a typical lawsuit, let alone in complex matters such as class actions or multi-district litigation, the chances are great that some document produced will inadvertently disclose privileged information. This is especially true when so much information is created, stored and even produced electronically, so that an attorney can produce a document simply by clicking its title on a computer screen, forwarding it in its entirety without reviewing its contents.

And yet no clear rules exist to guide litigants and courts when privileged information is accidentally given to an adversary.

Not even the American Bar Association provides clear guidance, approving a Model Rule that contradicts earlier ABA ethics opinions, perhaps because state and county bars have variously accepted, modified, or outright rejected this 1992 ABA opinion.

Reported court decisions are all over the map as well. Some hold that disclosure of privileged material always waives the privilege; others hold that it never waives the privilege. And, while the majority of decisions require examining all the circumstances to ferret out

¹ Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 480 (E.D. Va. 1991).

whether the disclosure was “inadvertent” or the result of negligent (i.e., careless) handling of privileged information, what constitutes negligence in one court is evidence of due diligence for another.²

The different approaches to inadvertent disclosure reflect not only different tolerance of attorney error in light of the desire to promote professional collegiality, but also different philosophies concerning the relative merit of the attorney-client privilege itself (and the work product doctrine), when balanced against other values.

Some courts and commentators view the attorney-client privilege as fundamental and nearly absolute, and believe it is necessary to encourage full communication between attorney and client.³ Courts following this view require an attorney receiving an

² Ken A. Zeidner, *Inadvertent Disclosure and The Attorney-Client Privilege: Looking to The Work-Product Doctrine for Guidance*, 22 *Cardozo L. Rev.* 1315, 1319 (2001) “The lack of a single methodology for addressing inadvertent disclosure of privileged documents has resulted in confusion within the federal court system. None of the three approaches, however, adequately resolves the issue of inadvertent disclosure. The strict liability approach, though predictable, ‘fails to give adequate recognition to the underlying values of the attorney-client privilege, which are to encourage full and frank communication with counsel and ensure effective legal representation.’ The subjective intent approach, though also predictable, produces a ‘now you see it, now you don’t’ approach [which] creates a risk of undermining the appearance of justice.’ The circumstances approach, though attempting to balance conflicting privilege and discovery policies, ‘results in an uncertain privilege[,] . . . the protection of [which] will depend on courts reviewing and making judgments on a broad array of facts’.”

See, also, Ken A. Zeidner, *Inadvertent Disclosure of the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 *Cardozo L. Rev.* 1315, 1356 (2001) where author suggests “[a] better approach to inadvertent disclosure would . . . be accomplished by presuming that the attorney-client privilege was not waived by the inadvertent disclosure, but allowing the receiving party to rebut this presumption by a showing of substantial need for the documents and undue hardship in obtaining their substantial equivalent: in effect, treating the inadvertent disclosure as attorney work product.”

³ But see, Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 *U. Pitt. L. Rev.* 145, 149 (2004): “Treating privileges as absolute is undeniably comforting to the members of the professions which enjoy the privileges. Further, classifying the privilege as absolute simplifies the courts’ task in administering privilege rules. However, the basic question is

opponent's privileged information to be extremely discreet: to stop reading the material; to notify the sender that they've received it; to confer with the sender; and then to follow the sender's directions about what to do with the materials.

In effect, these decisions require that attorneys, as officers of the court, "protect the privilege" of confidentiality, even if it is an opponent's privilege.

Other courts and commentators, like Professor Monroe Freedman, view the attorney-client privilege as one important value in a justice system serving other important, perhaps even more important, values, such as zealous advocacy and the pursuit of truth through an adversarial trial on the merits

This article will examine each of these two fundamental views, analyze the impracticality of burdening a receiving attorney with obligations of confidentiality ostensibly owed by the other side's lawyer, and discuss fairness and other questions of right and wrong. It concludes that cases supporting the return of inadvertently disclosed privileged materials are without ethical support or a convincing legal foundation; instead, that the rules of evidence, including those that govern waiver of evidentiary objections, should determine the disposition of the material, including its admissibility.

the validity of the behavioral assumption underlying Wigmore's insistence on absolute privileges. Is it true that but for an evidentiary privilege, the average layperson standing in a confidential relationship would not consult or confide? Simply stated, that generalization is flawed . . ."

II. SOURCES OF THE PROBLEM

It seems to happen all the time: You receive a letter, memorandum, fax or e-mail that is a communication between your adversary and her client. Maybe it was just information that they didn't want to or have to disclose; maybe it was your adversary's playbook, describing weak points in their case or the vulnerabilities of their witnesses. For instance:

1. Counsel drafts a letter to her client that evaluates options for settlement. The letter refers to witness statements and crucial documents, and offers legal opinions and impressions. She intends to send it by e-mail to her client, but a phone call interrupts her. After the phone call, she inadvertently clicks on "Reply to All" on a previously stored e-mail, then realizes that she has sent all this privileged and extremely important information to opposing counsel as well as to her client. She attempts to unring this bell by motions to retrieve the letter, bar its use as evidence and disqualify opposing counsel.

2. After weeks spent by attorneys and paralegals reviewing thousands of documents to be produced to the opponent in complex litigation, the producing side forwards privileged documents to opposing counsel. Motion for return and for destruction of these documents is filed.

3. In a document production of several thousand pages, about three percent are labeled “Attorney-Client Communication/Attorney Work Product,” followed by “Do not circulate or duplicate,” and “Complete and return to SCIF Civil Litigation Center.” Further, the word “confidential” is printed around the perimeter of the first page of each of the privileged forms. Nevertheless, these documents are sent to opposing counsel, who insists on using them to support her client’s case. She argues that modern usage of these confidentiality labels is so prevalent that they do not alert strangers to the truly privileged nature of documents and are practically meaningless.

4. Opposing counsel conducts an electronic search of data bases in a remote repository made available through discovery, downloading them onto a CD-ROM. The CD includes not only privileged documents, but also dozens of “deleted” privileged documents. The privilege holder argues that the complexities of e-discovery make this error inevitable, and demands that the documents must be returned or deleted, and that all reference to them or material they reference, be barred from evidence.

III. THE VARIETY OF COMMON SOLUTIONS TO THE PROBLEM

Responding to ever increasing problems of inadvertent disclosure, the ABA Standing Committee on Ethics and Professional Responsibility in 1992 outlined the three things an attorney receiving her opponent's confidential⁴ and privileged⁵ information must do:

- (1) refrain from examining the document once the inadvertent disclosure is discovered,⁶
- (2) notify the sending lawyer, and
- (3) abide by his or her instructions concerning the disposition of the document.⁷

⁴ Cal. Evid. Code § 952 defines confidential communication as “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”

⁵ See, Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601, 608 (Cal. App. 2004), review granted, 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) For purposes of this article, privileged information includes information protected by the work product privilege. “An attorney’s notes containing his impressions, conclusions, opinions, or legal theories regarding a witness’ prior statement is absolutely immune from discovery . . .”

⁶ Richards v. Jain, 168 F. Supp. 2d 1195, 1200-01 (W.D. Wash 2001) paralegal in plaintiff’s firm viewed almost 1,000 privileged, potentially relevant e-mails contained in CD-ROM disk. The court disqualified plaintiff’s firm, explaining it was “. . . necessary to remedy the substantial taint placed on any future proceedings by the possession and review of the disk.” The court held , “An attorney who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents. . . a failure by an attorney to abide by these rules is grounds for disqualification . . .”

⁷ ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 92-368 (1992); Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351, 362 (M.D. Pa. 2001). Fax cover sheet and one page letter inadvertently sent to opponent. “ABA Comm. On Ethics and Prof’l Responsibility,

Formal Op. 92-368 (1992), in this court's opinion, heightens the level of civility and respect among lawyers, and establishes a professional courtesy which is compatible with vigorous advocacy and zealous representation. In this regard, information that is clearly identified as confidential in nature or appears on its face to be subject to the attorney-client privilege under circumstances that make it clear it was not intended for the receiving lawyer, should not be examined. The receiving lawyer should immediately notify the sending lawyer and abide by his instructions with respect to inadvertently disclosed privileged material." See also Model Rules of Prof'l Conduct R. 4.4(B) (2000) requiring only that receiving lawyer notify sender of receipt of privileged information;

Walter W. Steele, Jr., *Shoot Out at the Not-O.K. Corral or Privileged Client Communications – Lost and Found in Texas*, 33 St. Mary's L.J. 739, 745 (2002) "It is important to note that this test [the ABA test] does not address what the receiving lawyer is to do with the material in the interim. However, the Restatement of the Law Governing Lawyers does provide an answer to that issue. The Restatement holds that: If the person whose information was disclosed is entitled to have it suppressed or excluded [(e.g., a non-negligent inadvertent disclosure)], the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege . . . Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information." Citing Restatement (Third) of the Law Governing Lawyers § 60 cmt. m (1998).

State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Cal. App. 1999) "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall *immediately notify* the sender that he or she possesses material that appears to be privileged."

United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 175 (C.D. Cal. 2001) ". . . when the court is in equipoise, a tie should be awarded to the privilege holder, at least when the attorney-client is involved. See United States v. Mett, 178 F. 3d 1058, 1065 (9th Cir. 1999) stating that 'where [the] attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure.'"

Holland v. Gordy Co., No. 231183, 2003 WL 1985800, at *10 (Mich. App. Apr. 29, 2003) Court found that plaintiff's counsel had committed ethical violations in reviewing defendant's litigation files and failing to notify defendant's counsel of his possession of the files. The trial court found that plaintiffs had committed a "clear absolute violation" of ABA Formal Opinion 92-368 when they examined and copied the documents without notifying defendant's counsel. The court further noted that "ABA Formal Opinion 92-368 may . . . be applicable because the ABA's interpretations are binding on ABA members and several of plaintiff's counsel are members of the ABA. Citing Resolution Trust Corp. v. First of America Bank, 868 F. Supp. 217 (W.D. Mich. 1994), ". . . the district court noted that even though there is an arguable conflict between Michigan's interpretation of the rules and the ABA's interpretation, the ABA's interpretations are binding on ABA members."; Tex. R. Civ. P. 193.3(d) "Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - - the producing party amends the response, identifying the

This ABA opinion seemingly relied on the belief that the value of attorney-client confidentiality was superior to any other value raised by the inadvertent disclosure waiver of confidential information:⁸

material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.”

Ken A. Zeidner, *Inadvertent Disclosure of the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 *Cardozo L. Rev.* 1315, 1330 (2001), “The attorney-client privilege presupposes that the privilege has not been waived. As owner of the privilege the client has power to waive it; his attorney, however, acting as his agent, can also waive the privilege on his behalf. Waiver has generally been defined as an ‘intentional relinquishment of . . . a known right.’ This definition, however, applies to constitutional rights; the attorney-client privilege is not guaranteed by the United States Constitution. Therefore most courts do not regard intent as a disposition in determining whether the attorney-client privilege has been waived. Waiver may be implied from a party’s conduct that is inconsistent with a claim of the attorney-client privilege, such as offensive use of the privilege, or breach of a communications confidentiality.”

John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – State Law*, 51 *ALR 5th* 603, 663 (1997) “. . . some writers have suggested that waiver theory is the wrong frame of analysis for the instant problem. It has been suggested that equitable estoppel may be a better framework. Estoppel may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right. A waiver ‘depends upon what one himself intends to do, without regard to its effect upon the one claiming the waiver, whereas an estoppel depends rather on what the adversary is induced to do.’ As an estoppel may arise from merely negligent conduct, and release of privileged information to an opponent changes the opponent’s knowledge to some extent, estoppel should be a viable alternative framework.”

United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 175 (C.D. Cal. 2001), see fn. 8 “Using the term ‘waiver’ to describe the consequences of the inadvertent production of privileged documents is customary but misleading. Such a ‘waiver’ is not really a waiver in the true sense, but is more accurately viewed as a ‘forfeiture’ designed ‘to punish the person claiming the privilege for mistake.’” Citing *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F. 3d 1122, 1127 (7th Cir. 1997).

Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601 (Cal. App. 2004), review granted 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) Where counsel, unfamiliar with privileged nature of the document used in deposition, failed to object, the court stated that “waiver is the intentional relinquishment of a right with knowledge of the facts. The burden is on the party claiming waiver to prove the existence of an intentional and knowing waiver.” Since opposing counsel did not properly identify the document as a privilege work product document of his opponent, failure to object at deposition was justified.”

⁸ Craig S. Lerner, *Conspirators' Privilege in Innocents' Refuge: A New Approach To Joint Defense Agreements*, 77 *Notre Dame L. Rev.* 1449, 1474 (2002), “. . . Scholars . . . [have argued] that the privilege is justified, regardless of its cost, because it protects the privacy

[T]he concept of confidentiality is a fundamental aspect of the right to the effective assistance of counsel,” the ABA opinion says. “As reflected in each iteration of the Rules of Professional Responsibility, the obligation of the lawyer to maintain and to refuse to divulge client confidences is virtually absolute.⁹

of a socially valued relationship or because it would, be 'immoral for society to constrain anyone from discovering what the limits of [the laws] power over him are.'"

See, Leibel v. General Motors Corp., 646 N.W. 2d 179, 186 (Mich. App. 2002) Memorandum outlining problems encountered by GM in litigating seatback lawsuits, discovered while plaintiffs were reviewing documents in defendant law firm's document repository. Memo discovered by at least three separate law firms reviewing depository documents. Holding the document remained confidential, and adopting the strict subjective test for discoverability, the court held: “. . . to constitute a valid waiver, there must be an intentional, voluntary act or ‘true waiver.’ Thus, a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected . . .”

⁹ ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 92-368 (1992).

See, Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 Emory L.J. 1255, 1268 (1999).

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), “The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. (citation omitted) Its purpose is to encourage the full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves the public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client . . .”

Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) calling the attorney-client privilege one of the oldest recognized privileges for confidential communications.

See also, Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass. 2000), criticizing two “rigid” approaches to whether inadvertently disclosed information was waived. “. . . the ‘never waived’ approach, . . ., creates little incentive for attorneys to guard privileged material closely and fails fully to recognize that even an inadvertent disclosure undermines the confidentiality which undergirds the privilege. (citation omitted) Likewise, while the strict accountability rule certainly holds attorneys and clients accountable for their lack of care, it nonetheless diminishes the attorney-client relationship because, in rendering all inadvertent disclosures - - no matter how slight or justifiable - - waivers of the privileges, the rule further undermines the confidentiality of communications. If, when a document stamped ‘attorney-client privilege’ is inadvertently released, it and all related documents lose their privileged status, then clients will have a much greater hesitancy to fully inform their attorney . . .”

Model Rules of Prof'l Conduct R. 1.6(a) Confidentiality of Information “A lawyer shall not reveal information relating to the representation of client unless the client gives

Expanding on this philosophical basis for its decision, the ABA opinion went on to raise a practical issue that would not be addressed simply by sanctioning the erring attorney: the unfair advantage gained by an opponent receiving privileged information.¹⁰ What is worse, the

informed consent, that the disclosure is impliedly authorized in order to carry out the representation . . .”; Model Rules of Prof’l Conduct R. 1.6 cmt. [1] “This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer’s representation of the client.” See Model Rules of Prof’l Conduct R. 1.18 for the lawyer’s duties with respect to information provided to a lawyer by a prospective client; Model Rules of Prof’l Conduct R. 1.9(c)(2) for the lawyer’s duty not to reveal information related to the lawyer’s prior representation of a former client; and Model Rules of Prof’l Conduct R. 1.8(b) and R. 1.9(c)(1) for the lawyer’s duty with respect to the use of such information to the disadvantage of clients and former clients; Model Rules of Prof’l Conduct R. 1.6 cmt. [2] 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. 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer: [a] . . . a lawyer shall abide by a client’s decisions concerning the objectives of the representation . . . A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation; Model Rules of Prof’l Conduct Preamble: A Lawyer’s Responsibilities: [4] . . . a lawyer should keep in confidence information relating to the representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct . . ., [5] . . . a lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer shall demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and the public officials. [8] . . . a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”; Model Rules of Prof’l Conduct R. 1.2 cmt. [2] “. . . Because of the varied nature of the matters about which a lawyer and client might disagree and because of the actions in question may implicate the interest of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. . .”]

¹⁰ Steven D. Glazer, *Special Issues Relating To Third Party Liability For Trade Secret Misappropriation*, 719 P.L.I./PAT 39, 58 (2002), “. . . the U.S. Southern District of New York, citing the ABA opinion [Opinion 92-368], sanctioned an attorney who opened a package and read its contents after receiving a letter directing the attorney not to read, review, or show anyone else the document because it was a privileged communication. [Citing American Express v. Accu-Weather, Inc., No. 91 CIV 6485, 1996 WL 346388 (S.D. N.Y. Jun. 25, 1996)] Similarly, the Ethics Committee of the North Carolina State Bar suggested in a formal opinion that lawyers who receive inadvertent disclosures from an opponent should not examine the materials once it becomes obvious that the materials are confidential or privileged and were not sent inadvertently, but should instead return the materials to the sender.” Citing Ethics Comm. of North Carolina State Bar, RPC 252 (1997) Oregon State Bar Ass’n Board of Governors, Formal Op. No. 1998-150 (1998) and Pennsylvania Bar Ass’n Comm on Legal Ethics and Prof’l Responsibility, Informal Op. No. 99-150 (1999).

ABA opinion notes, using the privileged information would offend peer standards of civility and possibly result in mistrials or disqualification of counsel.

A decade later, the ABA backed down considerably from this extreme position and offered Model Rule 4.4, which requires only that the receiving attorney notify the sending attorney.¹¹

But cf., Diane Karpman, *Unreported Decisions Offer Novel Concepts*, 20 Cal. B. J., June 2003, at 23, “California follows ABA opinion 92-368 as to the duty of the receiver to notify the sender of an inadvertent facsimile. . . . however, that highly controversial ABA opinion was not based on ethic rules, lack citations, is inconsistent with the law governing waiver of attorney-client privilege, and requires actions by the receiving attorney which directly prejudice the rights of his or her client.”

Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601, 614 (Cal. App. 2004), review granted, 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) Work product memorandum outlining discussion with counsel expert, either stolen by plaintiff’s attorney or inadvertently delivered to him by court reporter. “. . . we conclude that [plaintiff’s attorney], upon his discovery of [defense counsel’s] notes, which were plainly privileged, should not have examined the document any more than was necessary to determine that it was privileged, and should have notified [defense counsel] immediately to avoid any potential prejudice.”

¹¹ Model Rules of Prof’l Conduct R. 4.4(b) (2002) (ABA House of Delegates adopted Rule 4.4(b) on February 5, 2002); Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 Geo. J. Legal Ethics 441, 444 (2002) emphasizing the acknowledged fact that the model rules are not binding on licensed attorneys until adopted by jurisdiction in which lawyer is admitted.

Model Rules of Prof’l Conduct R. 4.4(b) lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender; Model Rule of Prof’l Conduct R 4.4 cmt. [1] “Responsibility to a client requires a lawyer to subordinate the interest of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship”; Model Rules of Prof’l Conduct R. 4.4 cmt. [2] “Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit the person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule,

Between these two ABA pronouncements, and since the latest one, numerous bar association ethical opinions¹² and court cases¹³

“document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form. [emphasis added]]

Model Rules of Prof’l Conduct R. 4.4 (2003) “Rule 4.4(b) addresses a lawyer’s receipt of documents sent inadvertently; it does not address the receipt of documents of dubious provenance. ABA Formal Ethics Op. 94-382 (1994) notes that from the receiving lawyer’s point of view, the latter situation is distinguishable: ‘For example, the receiving lawyer may have a legitimate claim that the documents should have been, but were not, produced [in discovery.] Or the receiving lawyer may be able to assert that the documents were receiving from somebody acting under the authority of a histle blowing statute.’ The opinion concludes that the lawyer should review the material only to the extent necessary to determine how to proceed, notify opposing counsel, and either abide by opposing counsel’s instructions or refrain from using the material until a court rules on it . . .”

Model Rules of Prof’l Conduct R. 4.4(b) cmt.: [3] “Some lawyers may choose to return the document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.”

- 12 1. “Alabama State Bar Office of General Counsel, Informal Op. of April 12, 1996 (following Opinion 92-368 in errant fact situation).
2. Board of Responsibility of the Supreme Court of Tenn. Advisory Ethics Op. 92-A-478 (1992) (same).
3. Connecticut Bar Informal Op. 95-4, 96-4 (1996) (citing Op. 92-368 in cases involving duty to forward faxed documents to former partner of law practice and unauthorized release of psychiatric records).
4. District of Columbia Bar Op. No. 256 (1995) (following Opinion 92-368 if recipient of inadvertently disclosed information has not received the information).
5. Florida Bar Op. 93-3 (1994) (recipient of inadvertently misdelivered documents must promptly notify sender).
6. Ill. St. Bar Ass’n. II Adv. Op. 98-04 (1999) (counsel may use information if not notified of inadvertent transmission, if notice of inadvertent transmission and before review, should return materials without examination, counsel has duty to advise her client that confidential information inadvertently transmitted).
7. Kentucky Bar Ass’n. Op. E-374 (revised) (1995) (lawyer who receives material under circumstances in which it is clear that they were not intended for the receiving lawyer should refrain from examining the materials, notify sender, and abide by sender’s instructions regarding disposition of materials, but the lawyer who does use the material is not subject to discipline).
8. Ky. Legal Ethics Comm. Op. E-374 (1995).
9. La. State Bar Ass’n Ethics Advisory Service and Ops., Synopsis 95-00069 (1995) (where an attorney received documents from opposing attorney that are actually privileged, the attorney should return the documents to opposing counsel.)
10. Maine Professional Ethics Comm. Op. No. 172 (3/7/00) “A lawyer clearly obligated by decision or law to return a privileged document inadvertently made available to him by opposing counsel must do so; failure to return a document would prejudice administration of justice . . .”
11. Maryland Bar Ass’n Op. 2000-04 (notify sender and don’t use)
12. N.C. St. Bar. NC Eth. Op. RPC 253 (1997) (follows ABA opinion).

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13. New Hampshire Ethics Article (May 11, 1994) adopted ABA Formal Opinion 92-368.
14. N.Y. Cty. Law Ass'n Comm. Prof. Ethics Op. 730 (2002) (adopts ABA Opinion); Association of the Bar of the City of New York Report.
15. Oregon State Bar Ass'n Board of Governors, Formal Op. 1998-150 (1998) (If the receiving lawyer examines the document before the sending lawyer informs him that its production was inadvertent, the receiving lawyer is still ethically obligated to return the document under DR-1-102(A)(4).
16. Pa. Bar Ass'n Comm. Legal Ethics Prof'l Responsibility Ethics Op. 95-57 (1995) (privilege not waived by inadvertent disclosure).
17. Pa. Ethics Op. 94-11B (1994) (inadvertent disclosure of work-product does not constitute a waiver).
18. Pa. Ethics Op. 95-101A (1995) (adopting ABA Ethics Committee Opinion).
19. Pa. Bar Ass'n Comm. Legal Ethics Prof'l Responsibility Ethics Op. 99-150 (1999) (tentatively approving ABA Opinion, but referencing ABA Ethics 2000 revision of rule 4.4).
20. Inadvertent Disclosures, Pa. Law Rep. No. 2000-200 (22-Oct Pa. Law. 59, 62 (2000) "The waiver of the attorney-client privilege concerning privileged and confidential materials is a matter for judicial determination; however, it is believed that, except in the case of extreme carelessness or indifference, the inadvertent transmission of such materials should not constitute a waiver of privilege."
21. Utah State Bar Ethics Adv. Op. Comm. Op. No. 99-01 (January 29, 1999) (must notify opposing counsel of receipt of confidential information).
22. Va. Op. 1702 (Nov. 24, 1997) ("It is not ethically permissible for a lawyer to keep and use documents inadvertently transmitted to him by opposing counsel.")
23. Va. Op. 1702 (Nov. 24, 1997) adopted ABA Formal Op. 94-382, holding the duty of zealous representation did not require receiving lawyer to read or use information sent in error.
- ¹³ Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601, 613 (Cal. App. 2004), w granted, 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) Plaintiff's counsel obtained a document summarizing a dialogue between defense attorneys and defense experts. Document obtained either accidentally through court reporter's delivery to plaintiff's counsel or memorandum was taken from defense counsel's files when counsel temporarily out of deposition room. "... an attorney who inadvertently receives plainly privileged documents must refrain from examining the materials any more than is necessary to determine that they are privileged, and must immediately notify the sender, who may not necessarily be the opposing party, that he is in possession of potentially privileged documents." The court applied this rule to confidential and privileged documents reflecting an attorney's work product.
- Samson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351, 361-362 (M.D. Pa. 2001), "After weighing the cases from both sides, using the analysis set forth by Chief Judge Rambo in the United States v. Keystone Sanitation Co., Inc., [885 F. Supp. 672 (M.D. Pa. 1994)], and due to the unfortunate and continued lack of clarity by the courts, the American Bar Association, the Pennsylvania Bar Association and Local Bar Associations with respect to the appropriate manner to handle inadvertent disclosure, this court believes that the best procedure is that which has been set out by the American Bar Association in ABA Comm. on Ethics and Prof'l Responsibility, Formal op. 92-368 (1992)."
- State Compensation Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807 (Cal. App. 1999), holding that an attorney receiving inadvertently sent privileged information should refrain from examining the materials, notify the sender, and by agreement or resort to court, determine the disposition of the materials and their contents. In so holding, the court stated, "Although ABA Formal Opinions No. 92-368 is not controlling, its analysis has provided us with guidance in the formulation of a standard for future application to instances similar to that presented here."

have adopted the 1992 ABA opinion and required the receiving attorney to stop, notify and follow instructions—in other words, to shut his eyes and do what his opponent tells him to do. This is a tough thing to ask of a zealous advocate, especially if the information is outcome determinative.¹⁴

Other bar association ethics opinions addressing the issue of inadvertent disclosure as a matter of ethics have taken a conflicting position.¹⁵ Courts looking at the same issue as a matter of law, and

¹⁴ Joshua K. Simko, *Inadvertent Disclosure, The Attorney-Client Privilege, And Legal Ethics: An Examination And Suggestion For Alaska*, 19 Alaska L. Rev. 461, 467 (2002), “It is more difficult to criticize the strict responsibility approach [privilege always waived once document disclosed] when one considers the fairness to both parties. On the one hand, when the receiving party obtains a document, issues may open up that he or she had not thought to pursue, or the document may provide the missing link of evidence required to clinch the case. In such a scenario allowing the use of the document seems fair, as perhaps it would lead to the most just result . . .”

Cf. *Bagley v. TRW, Inc.*, 204 F.R.D. 170, 183 (2001) adopting the “totality of the circumstances approach” to the analysis of inadvertently produced confidential information, the court commented “[t]he potential value of the inadvertently-produced privileged documents to the receiving party is beside the point. *Kansas City Power & Light*, 133 F.R.D. at 174 (indicating that the fact that inadvertently produced documents are relevant, or even helpful to the receiving party, is not dispositive). The waiver determination should not turn on whether the continued availability of the privileged documents would benefit the receiving party, or to what extent . . . (citations omitted).”

¹⁵ For ethics opinion in support of partisan adversary approach, see

1. Maryland Bar Ass’n Op. No. 89-53 (June 23, 1989) (lawyer may use document obtained from unidentified source and is not required to notify court or opposing counsel, but lawyer should keep copies to avoid destruction of evidence).

2. State Bar of Alabama, Office of General Counsel, Informal Op. of April 8, 1996 (distinguishing inadvertent production in the course of routine document production from an errant fax transmission and refusing to apply ABA Op. 92-368 in the former context).

Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege? Exploring the Application of the Crime, Fraud Exception to the Attorney-Client Privilege*, 16 Geo. J. Legal Ethics 583 (2003), “. . . with the understanding of the value inherent in the attorney-client privilege, is a commensurate understanding that this privilege, with the costs it imposes on the judicial system, cannot be absolute.”

Some state bars have concluded that the receiving lawyer may use the materials, but she should notify opposing counsel.

3. Ohio Board of Commissioners on Grievances and Discipline Op. 93-11 (Dec. 3, 1993) (lawyer who obtains inadvertently disclosed privileged memorandum during the course of public records search has no ethical duty to protect an opposing party's

confidence and secrets by refraining from reading the memorandum, but the recipient does have an ethical duty to notify the source and to provide opposing counsel with a copy of the document upon request.

4. Va. Legal Ethics Op. 1076 (May 17, 1988) (concluding that "nothing in the Code of Professional Responsibility would obligate a lawyer to return the materials or [prevent him] from using the materials on [the] court's behalf, but out of professional courtesy, the lawyer should inform the opposing counsel that he received the information." (See, Trina Jones, *Inadvertent Disclosure of Privileged Information and Law a Mistake; Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 Emory L.J. 1255, fn 47 (1999))
5. Philadelphia Bar Ass'n Ethics Op. 94-3 (June 1994) (fax received by adversary containing report of assessment of liability investigation, and value of claim. Report sent inadvertently. [Referring to ABA Opinion Committee said "Opinion 92-368 does not persuade the majority of this committee that failure to follow its guidelines is unethical behavior. In some circumstances (not present here), it may be preferable to return a requested document. It does not follow that failure to return such a document would be in violation of the Rules of Professional Conduct.]
6. Colo. Ethics Comm. Formal Op. 108 (2000) (receiving attorney's only obligation is to notify sending lawyer).
7. Board of Commissioners on Grievances and Discipline, Supreme Court of Ohio, Ohio Adv. Op. 93-11 (1993) ("... there is no ethical duty to refrain from reading the memorandum or to refrain from revealing the contents to the client. Attorney has duty to notify)."
8. State Bar of Mich. Standing Committee on Professional and Judicial Ethics, Mich. Ethics Op. RI-179 (1993) (no ethical obligation to return documents).
9. Philadelphia Bar Association Ethics Op. 94-3 (1994) (no need to return document. ABA Opinion "... does not persuade the majority of this committee that failure to follow its guidelines is unethical behavior."
10. Phila. Bar Assoc. Ethics Op. 96-6 (1996) ("Opining that receiving counsel's highest duty is to his client and he therefore has no ethical obligation to return the privileged document or even notify sending counsel of his mistake.") (See Jonathan M. Redgrave, Kristin M. Nimsgar, *Electronic Discovery and Inadvertent Production of Privileged Documents*, 49-Jul Fed. Law 37 fn. 8 (2002).)
11. Utah State Bar Ethics Advisory Opinion Comm. Ethics Op. 99-01 (1999) (only notice of receipt required).
12. Comm. on Ethics of the Md. State Bar Assoc. Ethics Docket 2000-04 (2000) (An attorney receiving inadvertently produced materials has two alternatives: (1) return the documents or (2) consult the courts).
13. Fla. State Bar Assoc. Comm. on Professional Ethics, Op. No. 93-3 (1994) (An attorney, upon realizing or reasonably believing that he has received a document or documents that were inadvertently misdelivered, is ethically obligated to promptly notify the sender of receipt of the documents).
14. D.C. Bar Ethics Op. No. 256 (1995) Documents with no indicia of confidentiality or privilege may be read and retained; D.C. Bar Ethics Op. No. 318 (Disclosure of privileged material by third party (Dec. 2002).
15. Inadvertent Disclosures, Pa. Law. Rep. No. 2000-200 [22 Oct Pa. Law. 59, 62 (2000)]
"3. In the absence of amendment to the rules or a formal opinion of this committee, the issue of professional responsibility of a lawyer receiving by inadvertence any confidential or privileged information from another lawyer, his client or other third person must, as preamble to the rules indicates, 'be resolved through the exercise of sensitive and moral judgment guided by the basic principles of the rules.' The decision of lawyer will depend

applying standards of duty and predictability, have also taken inconsistent approaches which fall roughly into three camps:

(1) The privilege is never waived unless the holder of the privilege intends to waive it.¹⁶ This approach limits waiver to the client's intentional relinquishment of a known right.¹⁷

on lawyer's view of his or her obligations to client under Rules 1.3 and 1.4, the nature of information, how and from whom the information was received, attorney-client privilege and work product rules, and, common sense, reciprocity and professional courtesy." [Committee went on to opine that the inadvertent transmission of materials should not constitute a waiver of privilege.]

16. State Bar of Mich. Op. CI-970 (1983) (Innocent attorney receiving privileged, admissible, information may use it.)

17. Colo. Ethics Comm. Formal Op. 108 (2000) (receiving attorney's only obligation is to notify sending lawyer).

18. Board of Commissioners on grievances and discipline, Supreme Court of Ohio, Ohio Adv. Op. 93-11 (1993) ("... there is no ethical duty to refrain from reading the memorandum or to refrain from revealing the contents to the client. Attorney has duty to notify)

19. State Bar of Mich. Standing Comm. on Professional and Judicial Ethics, Mich. Ethics Op. Ri-179 (1993) (No ethical obligation to return documents.)

20. Philadelphia Bar Ass'n Phila. Ethics Op. 94-3 (1994) (No need to return document. ABA opinion "... does not persuade the majority of this committee but failure to follow its guidelines is unethical behavior.")

21. Utah State Bar Ethics Advisory Opinion Comm., Utah Ethics Op. 99-01 (1999) (only notice of receipt required.)

¹⁶ Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290 (D. Mass. 2000) "Some courts follow the 'never waived' approach, which holds that a disclosure that was merely negligent can never effect a waiver because, *a fortiori*, the holder of the privilege lacks a substantive intent to forego protection. Citing, Corey v. Norman, Hanson & DeTroy, 742 A.2d 933, 941-42 (Me. 1999), Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990), Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983); and Mendenhall v. Barbar-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982)"; Corey v. Norman, Hanson & Detroy, 742 A. 2d 933, 941 (1999) "... Underlying this rule [the Mendenhall rule that a truly inadvertent disclosure could not and does not constitute a waiver of the attorney-client privilege] is the notion that the client holds the privilege, and that only the client, or the client's attorney acting with the client's express authority, can waive the privilege. . ."

¹⁷ See State Compensation Insurance Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 805 fn. 2 (Cal. App. 1999) In the body of the decision, the court held "Based on the language of Evidence Code Section 912, we hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." This California appellate court seems to adopt the subjective waiver approach. "... Regardless of the approach used, the final determination of whether an assertion of the attorney-client privilege will be upheld in an inadvertent disclosure context depends on whether the client either

(2) The privilege is always waived once the information is disclosed.¹⁸ This view recognizes that one cannot unring a bell.¹⁹

expressly or impliedly waived the privilege.” Citing Ayres, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases* 18 Pac. L. J. 59, 60-61 (1986).

Holland v. Gordy Co., No. 231183, 2003 WL 1985800 at *6 (Mich. App. Apr. 29 2003) holding that “. . . at the very least, waiver through inadvertent disclosure requires a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent. (citation omitted) ‘Thus a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected.’ Accordingly, defendant’s alleged failure to take reasonable precautions to protect the contents of box thirteen from disclosure is not enough to find a ‘true waiver.’ Instead, the disclosure must have been an intentional, voluntary act”; See fn. 4, one could argue that this approach is similar to that taken by ABA Oop. 92-368.

¹⁸ Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290-91 (D. Mass. 2000). “. . . the ‘strict accountability’ rule . . . effects a waiver of the privilege regardless of the privilege holder’s intent or inadvertence. See, e.g., Ares-Serono, Inc. v. Organon Int’l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994); Int’l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988); see also, Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (en banc); In Re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989). In Int’l Digital Sys., the court explained that ‘[w]hen confidentiality is lost through ‘inadvertent’ disclosure, the court should not look at the intention of the disclosing party . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid ‘inadvertent’ disclosure either.’ (citation omitted) In reaching this conclusion, Magistrate Judge Collings reasoned that there would be ‘little benefit’ in continuing to recognize a privilege which has as its foundation the principle of confidentiality when that confidentiality has already been breached. (citation omitted) In addition, the court pointed out that an automatic waiver rule would best encourage attorneys to safeguard their confidences from inadvertent disclosure.”

Joshua K. Simko, *Inadvertent Disclosure, The Attorney-Client Privilege, And Legal Ethics: An Examination And Suggestion For Alaska*, 19 Alaska Rev. 461, 464-465 (2002) “Professionalism, under the strict responsibility approach, centers on tight control over the litigation by the lawyer, and relinquishment of a client’s right if there is negligence in handling privileged documents. The lawyer’s duty is first and foremost to her client, and professionalism would mandate doing everything within the rules to further the interests of the client. Generally, the professional lawyer does not have a duty to protect her adversary from her own mistakes. . . . [Additionally] the strict responsibility approach implies that fairness to the parties is in the open pursuit of justice, and that the narrower the privilege, the greater the chance justice will be served. This approach embodies a utilitarian philosophy that favors the search for truth over confidentiality . . .”

¹⁹ In re Pioneer Hi-Bred Intern. Inc., 238 F.3d 1370, 1374-75 (Fed. Cir. 2001) Pioneer disclosed tax advice to SEC in a proxy statement. “. . . the disclosure of that advice and reliance on that advice waived the attorney-client privilege with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice . . .”; Ray v. Cutter Laboratories Div. Of Miles, Inc., 746 F. Supp. 86, 88 (M.D. Fla. 1990) insufficient precaution to protect the attorney-client memorandum, as well as Florida strict waiver law required disclosure; Claggett v.

(3) The privilege is waived only if the court determines that disclosure resulted from gross negligence, not mere inadvertence. Court following this theme generally examine the “totality of the circumstances surrounding the inadvertent production,” including efforts to avoid and correct the mistake.²⁰

Commonwealth, 472 S.E. 2d 263, 270 (Va. 1996) “. . . the privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said . . .”

Suburban Sew ‘N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981) “Even inadvertent communications to third parties, such as bystanders or eavesdroppers, destroys the privilege. At least where the eavesdropping is not surreptitious and the attorney and client have made little effort to ensure that they are not overheard,” Cf., John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – State Law*, 51 A.L.R. 5th 603, at 668-69 (1997) “In some cases courts make it clear that they will not impute another person’s inadvertence to the privilege holder, although those courts might hold the privilege holder responsible for his own inadvertence, and so where the release has been by someone other than the privilege holder, the following authorities would support an argument that the releasor’s inadvertence should not be imputed to the privilege holder.” (extensive citations omitted)

²⁰ See, Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 291 (D. Mass. 2000); Milford Power Ltd. Partnership v. New England Power Co., 896 F. Supp. 53, 58 (D. Mass. 1995) (considering totality of circumstances surrounding the inadvertent production of documents); “. . . Massachusetts, for example, adheres to ‘middle test’; See In Re Reorganization of Elec. Mut. Liability Ins. Co. Ltd., 681 N.E. 2d 838 (Mass. 1997) (“[A] client may be deemed to have met the burden of establishing that a privilege exists and no waiver has occurred if adequate steps have been taken to ensure a document’s confidentiality.”) This approach empowers courts to consider a number of circumstances relating to 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.

Corey v. Norman, Hanson & DeTroy, 742 A. 2d 933, 940 (Me. 1999) Memorandum summarizing telephone conference between counsel and client placed in boxes of documents that were available to opposing counsel to photocopy. Memorandum was labeled “confidential and legally privileged.” Court protected the privilege.

IV. WEIGHING THE ATTORNEY-CLIENT PRIVILEGE AGAINST OTHER LEGAL OBLIGATIONS

For the client, the law is clear concerning inadvertently disclosed privileged information. A client who voluntarily discloses privileged information to his opponent waives the privilege even if inadvertently;²¹ a client who receives his opponent's inadvertently disclosed confidential information is under no obligation to return it.²²

Most authorities say an attorney must march to a different drummer. An attorney who innocently receives privileged information

²¹ **Hollingworth v. Time Warner Cable**, No. C-030663, 2004 WL 1363847 at *11, (Ohio App. 2004) during a hearing before the Ohio Unemployment Compensation Commission, a Time Warner supervisor inadvertently produced an e-mail from its human resources vice president, damaging to its defense. It produced the same e-mail during subsequent discovery requests. In holding the privilege waived, the court stated, “[C]orporate executives and managers, if endowed with appropriate authority by their employer, may on behalf of the corporation either assert or waive the attorney-client privilege. ¶ 65} The attorney-client privilege is waived where a client discloses communications with his or her attorney to a third party. A client’s voluntary disclosure of privileged communications ‘is inconsistent with an assertion of the attorney-client privilege.’ Such disclosure waives any subsequent claim of privilege with regard to communications on the same subject matter. [Citation omitted.] The ‘same subject matter’ standard is, however, to be applied narrowly, rather than expansively,” **Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.**, 12 Cal. Rptr. 3d 123, 129 (Cal. App. 2004) Corporate officers and lawyers inadvertently failed to disconnect a conference call. Subsequent confidential conversations were left on opponent’s voicemail. “. . . the fact that [corporate client] Marvell did not intend to disclose the information to [opponent] is of no import . . . Marvell was not coerced in any way to make the disclosure, and as such, its disclosure falls squarely within the meaning of sections 912 subdivision (a) . . .” [Calif. Evid. Code 912(a), the privilege may be waived, . . . (1) by the privilege holder making an uncoerced disclosure of the information. . . .”

²² **Geoffrey C. Hazard, Jr., W. William Hodes, The Law of Lawyering** § 30.8 at 30-13 (3rd ed. 2004) “. . . if the client is the recipient [of confidential information misdirected to him], it is difficult to see any legal basis on which the client could be prevented from making use of the information, . . . the consequences of the mistaken delivery can justly be left to rest on the person who made the mistake.”

-- even in response to a perfectly lawful request for unprivileged information -- has additional obligations with respect to that information simply because she is an attorney. Yet, such an attorney may find herself in a dilemma that may threaten serious harm to her client, and may even “require” her to violate professional duties to the client, the court or third parties. Indeed, if she chooses the path recommended by the ABA’s 1992 ethics opinion (no. 92-368), stop, notify and follow, she is in effect incurring professional duties to the opposing side to keep her adversary’s privileged information confidential.²³

²³ See, Model Rules of Prof’l Conduct R. 1.1, “A lawyer shall provide competent representation to a client. Competent representation requires a legal knowledge, skill, thoroughness and preparation reasonably necessary for representation”; Model Rules of Prof’l Conduct R. 1.1 cmt. [5]: “. . . the required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequences; Model Rules of Prof’l Conduct R. 1.3, “A lawyer shall act with reasonable diligence and promptness in representing a client; cmt [1] . . . a lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf; cmt. [2] a lawyer’s workload must be controlled so that each matter can be handled competently”; Model Rules of Prof’l Conduct R. 1.6 cmt. “[15] a lawyer must act competently to safeguard information relative to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision; [16] when transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.”

Model Rules of Prof’l Conduct R. 8.4, “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”; Model Rules of Prof’l Conduct R. 8.3, “Reporting professional misconduct (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to a lawyer’s honesty, truthfulness or fitness as a lawyer in other respects, shall inform the appropriate professional authorities.”

California Bus. & Prof. § 6068(e), A lawyer has a statutory duty to “maintain inviolate the confidence, and at every peril to himself or herself to preserve client secrets.”

Suppose received privileged information reveals something the receiving attorney has a professional duty to disclose to the court, such as future wrongdoing by a party, counsel or witness.²⁴ In those cases, disclosure is required even if it means breaching the privilege held by one's own client, let alone the privilege held by an opponent.²⁵ There is no way to serve both obligations, counsel must choose one to honor and one to breach.

²⁴ Cf. Holland v. Gordy Co., No. 231183, 2003 WL 1985800 at *5 (Mich. App. Oct. 31, 2003) Court denied applicability of the crime fraud exception when a plaintiff read defendant's litigation file that was clearly not intended for plaintiff's review. Plaintiff claimed entitlement to the litigation file on the basis of facts they discovered within that file. The court stated ". . . the attorney-client privilege ceases to operate under this exception where the advice from the attorney refers to future, not past, wrongdoing. In order for the crime-fraud exception to apply, plaintiffs 'must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime of fraud and (2) that the communications were in furtherance thereof.' (citation omitted) 'This showing must be made without reference to the allegedly privileged material.'"

Gomez v. Vernon, 255 F. 3d 1118, 1131 (9th Cir. 2001) noting that the attorney-client privilege does not extend to communications in furtherance of a crime or fraud. United States v. Zolin, 109 S. Ct. 2619, 2632 (1989), "We hold that *in camera* review [of privileged material] may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. We further hold, however, that before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability. Finally, we hold that the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.

Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime Fraud Exception to the Attorney-Client Privilege*, 16 Geo. J. Legal Ethics 583, 589 (2003) In Zolin, the United States Supreme Court put to rest the issue of independent and admissible evidence by holding that the content of the allegedly privileged communication may be used in determining the applicability of the crime fraud exception, and the communication need not be competent or admissible evidence . . ."

²⁵ Model Rules of Prof'l Conduct R. 3.3(b)(c) "(b) A lawyer who represents a client in adjudicative proceeding and who knows the person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures, including, if necessary, disclosure to the Tribunal. . . . (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires the disclosure of information otherwise protected by Rule 1.6.

In the example, judicial values (the need to prevent future harm) trumps the normally absolute privilege of attorney-client confidentiality. Yet, there is no obvious reason why it could not have gone the other way.

A partisan, or client-centered, approach to receiving an opponent's confidential information acknowledges these conflicts and hierarchies of values, and maintains that the adversary system and the right to zealous representation are more important values than protecting the "confidentiality" of inadvertently disclosed privileged information.²⁶ The partisan approach holds that the attorney-client privilege is merely one of many important values that must be weighed against each other in this situation, and that the privileged information, once voluntarily disclosed, becomes part of the available evidence in the case.²⁷

²⁶ See Monroe Freedman, *The Errant Fax*, *Legal Times*, Jan. 23, 1995, at 26 for summary of arguments in favor of partisan advocacy "approach to duty of lawyer receiving inadvertently forwarded privileged information"; Pa. Bar Ass'n Comm on Legal Ethics and Prof'l Responsibility, Informal Op. 95-57 (1995) attaching Monroe Freedman's article *The Errant Facts*, *Legal Times*, January 23, 1995.

Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601 (Cal. App. 2004), review granted, 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) disqualifying attorney who had read and used opponent's interview notes of his expert witness.

²⁷ Craig S. Lerner, *Conspirators' Privilege in Innocents' Refuge: A New Approach To Joint Defense Agreements*, 77 *Notre Dame L. Rev.* 1449, 1476-77 (2002); see also, "... The privilege may exist to induce frank communications from client to attorney, but the limitation imposed by the confidentiality requirement is a recognition of the costs of the privilege in depriving the fact finder of highly relevant evidence. The confidentiality requirement is intended to restrict the scope of communications shielded by the attorney-client privilege to those that would not have occurred but for the existence of the privilege. If a client is willing to communicate in the presence of a third party who may be questioned in a legal proceeding, then he cannot be said to have relied upon the privilege in communicating with an attorney; and if the client, after the fact, discloses the substance of the communication to a third party, this 'constitutes good evidence that the privilege was unnecessary to induce the communications to the attorney,'" *Id.* at fn. 96 "a . . .

justification for the confidentiality requirement, . . . is that it works as a protection against the use of the attorney-client privilege as both a sword and a shield. As courts have often noted, the '[s]elective disclosure [of privileged information] for tactical purposes waives the privilege.'" United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) Selective disclosure can occur in two ways: first, a disclosure to selected persons; and second, a disclosure of selected materials. The confidentiality requirement to the attorney-client privilege is designed to prevent both. Thus, a party cannot disclose privileged documents to certain individuals and then turn around and claim the privilege against other individuals. Nor can a party reveal certain privileged documents with respect to a subject matter but then refuse to produce other documents pertaining to the same subject matter. F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 79 (D. Md. 1998) The court cited with approval Dupan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.C.S.C. 1975), "A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made with limitations of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to the remaining undisclosed communications, is nevertheless waived." See Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 163 (3d ed. 1997); see also, 8 John Henry Wigmore, *Evidence and Trial at Common Law* § 2291 (1961) "Its [privilege of confidentiality] benefits are all indirect and speculative; its obstruction is plain and concrete . . . it is worth preserving for the sake of a general policy, but it is nevertheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."

Geoffrey C. Hazard, Jr., *Quis Custodiet Ipsos Custodes? Defending White Collar Crime By Kenneth Mann*. New Haven and London: Yale University Press 1985. 95 Yale L.J. 1523, 1527 (1986). "The morality of a seriously moral person includes concern for the truth of the matter in things of consequence. The advocate, however, must be concerned with presenting to others of evidence that will be taken as the equivalent of truth. Every trial advocate who is a seriously moral person has to be concerned with this ambiguity . . . as Dr. Mann says: 'The second goal, which can exist only in conjunction with the first, is to keep the client from communicating too much information to the attorney, information that would interfere with his building a strong defense.' Lawyers do not commonly acknowledge that they do not wish always to gather all relevant information concerning a client's matter. To acknowledge that avoiding certain information may be a goal in the attorney-client relationship contradicts the premises of the adversary system and the conventional theory of the attorney-client privilege. Whoever heard of the attorney-client privilege being justified on the ground that it allows the lawyer merely to gather some information about the client? . . ."

Scott v. Glickman, 199 F.R.D. 174, 180 (E.D.N.C. 2001) holding careless efforts to protect privileged document justified privilege waiver. Commenting on the sanctity of the attorney-client privilege the court stated, ". . . since the attorney-client privilege impedes the full and free discovery of the truth, it needs to be narrowly construed, it is not unfair to allow the truth to be made public once inadvertently disclosed. Nor would it be fair to reward carelessness."

Joshua K. Simko, *Inadvertent Disclosure, The Attorney-Client Privilege, And Legal Ethics: An Examination And Suggestion For Alaska*, 19 Alaska L. Rev. 461, 464 (2002) ". . . some commentators believe that 'the priorities underlying the traditional confidentiality rationale are perverse' because they categorically favor clients who withhold information out of irresponsible or guilty motives at the expense of innocent third parties." [Quoting Deborah L. Rhode, *Professional Responsibility: Ethics By The Pervasive Method*, 225, 227

Supporting this view by inference in another context, Associate Justice Sandra Day O'Connor has suggested (in her dissent in Swindler & Berlin, et al. v. United States²⁸) that the privilege of confidentiality is not absolute, as suggested by the 1992 ABA Opinion, and must be narrowly construed:

"In light of the heavy burden that they place on the search for truth (citation omitted), '[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.' (citation omitted). Consequently we construe the scope of privileges narrowly (citation omitted). We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a 'public good' transcending the normally predominate principle of utilizing all rational means for ascertaining the truth."

Chief among the values that might outweigh the privilege, according to Justice O'Connor, are fairness and the pursuit of truth:

". . . When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the

(2nd ed. 1998) (Quoting William Simon, *Ethical Discretion In Lawyering*, 101 Harv. L. Rev. 1083, 1142 (1988)) "In other words, a preference for confidentiality benefits those clients who conceal information as to their guilt of culpability, and harms those who are forthright with their information . . .;"

privilege. . . . A number of exceptions to the privilege already qualify its protections, and an attorney 'who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit.'"²⁹

Indeed, as Justice O'Connor makes clear, the attorney-client privilege is not absolute, for there are many recognized exceptions, each of which trumps the privilege: where the client intends to use the attorney's services to commit a crime or fraud;³⁰ where the

²⁹ Swidler, 524 U.S. at 411, 413

³⁰ Model Rules of Prof'l Conduct R. 1.2(d) "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."

Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 12 Cal. Rptr. 3d 123, 128 (Cal. App. 2004) Failing to disconnect a conference call, a lawyer and three officers of defendant Marvell continued to discuss details of purchase of plaintiff's technology. This conversation was recorded, inadvertently, on plaintiff's voicemail. Court ruled that when client inadvertently discloses privileged information, the privilege is waived, and additionally held that if inferences of both a crime or fraud [theft of trade secrets and unlawful hiring] are discernable in the communication and a reasonable relationship between that crime or fraud and the attorney's communication could be drawn, the privileged nature of the communication is waived and it may be used as evidence during a trial.

Bagley v. TRW, Inc., 204 F.R.D. 170, 186 (C.D. Cal. 2001) quoting In re Grand Jury Proceedings, 87 F. 3d at 381-382, "'A communication between client and attorney can be in furtherance of the client's criminal conduct if the attorney does nothing after the communication to assist the client's commission of a crime, and even though communication turns out not to help (and perhaps even to hinder) the client's completion of a crime.'" (interior quotes omitted)

In re Public Defender's Service, 831 A. 2d 890, 901 (D.C. App. 2003) ". . . the justification for the privilege [attorney-client privilege] evaporates when the attorney-client communication works to further a fraud instead of to prevent one . . ."

Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 52-53 (M.D.N.C. 1987), where court analyzed plaintiff's claim that the inadvertently produced privileged information was discoverable pursuant to the crime-fraud exception to the privilege. "Plaintiff . . . alleged that the Roberts letter is not privileged because it is subject to the crime and fraud exception to the attorney-client privilege. Communications otherwise protected by the attorney-client privilege lose their protection if the lawyer is consulted in furtherance of a continuing and contemplated crime, fraud, or other misconduct. (citations omitted) Court have extended coverage of this exception to the attorney-client privilege beyond instances of fraudulent or illegal conduct and have applied it to business litigation such as patent, antitrust, security matters, and it may even extend to non-business torts . . ."

United States v. Zolin, 491 U.S. 554, 562-63 (1989) ". . . the attorney-client privilege must necessarily protect the confidences of wrongdoers but the reason for that protection

confidential communications threaten imminent or reasonably certain death or substantially bodily harm;³¹ where the client intends to offer false evidence before a tribunal;³² and where the privileged information is necessary to protect a lawyer or defend her against charges of malpractice, ineffective assistance of counsel or charges of excessive fees.³³

– the centrality of open client and attorney communication to the proper functioning of our adversary system of justice - - ‘ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoings, but to future wrongdoings*’ (citation omitted). It is the purpose of the crime-fraud exception to the attorney privilege to assure that the ‘seal of security,’ between lawyer and client does not extend to the communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.”

³¹ Model Rules of Prof’l Conduct R 1.6(b)(1).

³² Model Rules of Prof’l Conduct R 3.3(a)(1).

³³ Model Rules of Prof’l Conduct R 1.6(b)(5) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (5) to establish a claim or 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. (Adopted Aug. 2003) Additionally, the trend is to add further exceptions watering down the confidentiality privilege. The ABA amended Model Rule 1.6 to permit a lawyer to reveal a client’s confidential information. See, 1.6(b)(2), effective August 2003, lawyer may reveal information to, prevent client from committing a crime or fraud that will cause substantial injury to the financial interest or property of another; 1.6(b)(3) to prevent, mitigate or rectify substantial financial injury or property damage caused by client crime or fraud when services of her lawyer are used; 1.13 (c)(1)(2), except as provided in paragraph (d), if (1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law; and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization; George J. Terwilliker III, *Privileged in Jeopardy*, Nat’l L. J., Feb. 9, 2004 at 17 “It (the January 2003 Department of Justice memorandum referred to as the ‘Thompson memorandum’) encourages prosecutors who are considering charging a corporation to evaluate cooperation by looking to the corporation’s willingness ‘to disclose the complete results of its internal investigation, and to waive attorney-client and work product protection’ that would otherwise obtain with respect to relevant communications, reports or other information. As a result, corporations are being pressured to provide otherwise privileged reports, memoranda and records of advice from counsel as a price of trying to avoid prosecution or mitigate penalties.” In re: the Investigation of the Death of Eric Dewayne Miller, 584 S.E. 2d 772 (N.C. 2003) holding, on facts almost identical to Swindler and Berlin, et al. v. United States, 524 U.S. 399 (1998) that statements made by client to his attorney, prior to client’s death, could be reviewed in

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V. CONFLICTING DUTIES CREATE AN ETHICAL DILEMMA

Because the attorney-client privilege is not absolute, as maintained by the ABA Opinion, but rather must be balanced against other social interests, it is fair to ask additional questions. For example, who is charged with protecting the privilege?³⁴ There is no ambiguity in the Model Rules of Professional Conduct: a client's attorney is charged with protecting client's confidences and privileged communications.³⁵ This is based on her duties of competence and

camera to determine if statements related to a third party's interest, not harming the client's interest; 17 C.F.R. 205 (Sarbanes-Oxley Act and SEC regulations allowing attorneys to reveal confidential information relating to violations of SEC regulations.

Jonathan D. Glater, *Lawyers Pressed To Give Up Ground On Client Secrets*, The New York Times, Aug. 11, 2003 at "Earlier this year, the SEC adopted a rule requiring lawyers to report potential fraud to corporate boards and this fall it may well propose additional rules; the Federal Trade Commission has filed suit to force law firms to comply with a 1999 law on disclosing privacy policies to clients; the internal revenue service is trying to make law firms disclose which clients bought questionable tax shelters, and the justice department, which has already said that conversations between lawyer and terrorist suspects are subject to eavesdropping, is also pressing corporate defendants harder to waive their confidentiality privilege in order to avoid prosecution."

³⁴ Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981), "Even inadvertent communications to third parties, such as bystanders or eavesdroppers, destroys the privilege. At least where the eavesdropping is not surreptitious and the attorney and client have made little effort to ensure that they are not overheard,"

³⁵ In re Sealed Case, 877 F. 2d 976, 980 (D.C. Cir. 1989) Confidential memorandum was disclosed to a Defense Contract Audit Agency (DCAA) Company characterized such inadvertent disclosure as "bureaucratic air." In holding that the privilege was waived, the court commented ". . . normally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege. To hold, as we do, that an inadvertent disclosure will waive the privilege imposes a self-governing restraint on the freedom with which organizations such as corporations, unions and like label documents relating to communications with counsel as privilege. To readily do so creates a greater risk of 'inadvertent' disclosure by someone and thereby the danger that the 'waiver' will extend to all related matters, perhaps causing grave injury to the organization. But this is as it should be. Otherwise, there is a temptation to seek artificially to expand the content of privilege matter. In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels . . ." See also, F.D.I.C. v. Singh, 144 F.R.D. 252, 253 (D. Me. 1992)

Restatement (Third) of the Law Governing Lawyers Section 9.9, at 9-34 (2004 Supp.). "A significant measure of a lawyer's duties of loyalty and zealous representation is the co-relative duty to maintain client confidences and to assert the attorney-client privilege

diligence, and on the rules expressly protecting the confidentiality between attorney and her client.

Not so for those who would apply the 1992 ABA ethics opinion guideline, which charges an attorney with the additional responsibility of protecting the privilege of her opponent's client against that client's attorney's inadvertent disclosure of privileged material. This is a duty far greater than any elucidated in the applicable Rules of Professional Conduct.³⁶

A. *Burden On Receiving Attorney: Disqualification*

This "extra" duty is especially onerous when one considers that the sanction for its breach might be to disqualify the innocent receiving attorney from the case.³⁷ Think of that: Because of the

almost as a matter of instinct whenever it might be arguably applied; see §9.7. For the same reason, lawyers should guard against waiver of the privilege with the same vigilance. Not only should the lawyer avoid waiver by failure to assert the privileged when either the lawyer or the client is interrogated, as just noted, but the lawyer should also warn the client about the dangers of inadvertent waiver and assist the client in taking reasonable precautions to prevent it . . ."

Cf., John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – State Law*, 51 A.L.R. 5th 603, 668-69 (1997) "In some cases courts make it clear that they will not impute another person's inadvertence to the privilege holder, although those courts might hold the privilege holder responsible for his own inadvertence, and so where the release has been by someone other than the privilege holder, the following authorities would support an argument that the releasor's inadvertence should not be imputed to the privilege holder." (extensive citations omitted)

Alexander v. F.B.I., 198 F.R.D. 306, 315-16 (D.D.C. 2000). Lower level corporate employee disclosed confidential information generated by corporate counsel to third parties. Holding against waiver, court held that the waiver authority presided only in corporate management.

³⁶ *Supra* note 9.

³⁷ Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601 (Cal. App. 2004), review granted, 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) holding that an attorney who used an opponent's work product memorandum outlining conference with his designated expert obtained accidentally through a court reporter, or intentionally from the opponent's files during a recess of a deposition, should be disqualified, along with the expert who forwarded the information by

other side's inadvertence, the receiving attorney is disqualified, forfeiting fees, and the innocent client is deprived of her choice of counsel,³⁸ and forced to bear the cost of a new attorney's learning curve.³⁹

the receiving attorney. In so holding the court stated “. . . the record shows that Johnson not only failed to conduct himself as required under the *State Fund* [fn. 24] case but also acted unethically in making full use of the confidential document, the liability issues hinged on the technical evidence and the expert's opinions based on the evidence. Johnson's use of the document to undermine the defense expert's opinion placed defendants at a great disadvantage. . . .as the [trial] court found, the damage could not have been undone.”

See, E. Richards v. Jain, 168 F. Supp. 2d 1195, 1309 (W.D. Wash. 2001) The disclosure “of privileged information cannot be undone in these circumstances. Therefore the court finds that the only remedy to mitigate the effects [plaintiff's counsel] eleven month possession and review of the disk is disqualification.”

General Accident Insurance Company v. Borg-Warner Acceptance Corporation, 483 So. 2d 505, 506 (Fla. App. 1986). General Accident forwarded its claims file to the court for in camera inspection. Trial inadvertently forwarded the file to David J. Palgon, counsel for the insured. Not realizing the file had been sent to him inadvertently, Palgon reviewed the file and discussed it with counsel for Borg-Watner. Court held; “. . . while recognizing disqualification of a party's chosen counsel is an extraordinary remedy and should be resorted to sparingly, [citation omitted], we believe the prudent course in this case is to disqualify counsel. Like so many other ethical considerations in the practice of law, perceptions are of the utmost importance. Thus, how much of an advantage, if any, one party may gain over another we cannot measure. However, the possibility that such an advantage did occur warrants resort to this drastic remedy for the sake of appearance of justice, if not justice itself, and the public's interest in the integrity of the judicial process.”

³⁸ Alexander v. Tandem Staffing Solutions, Inc., No. 4D04-224, 2004 WL 1496903 at *1 (Fla. App. July 7, 2004) General counsel for Tandem filed a whistleblower lawsuit against former employer. Tandem filed motion to disqualify general counsel's counsel contending that he had received attorney-client privileged information that gave him a tactical advantage. Denying the motion on the grounds that general counsel had the discretion to disclose privileged information as part of a claim or defense, the court commented; “Disqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly.” (citation omitted) Motions for disqualifications are generally viewed with skepticism because disqualification of counsel impinges on a party's right to employ a lawyer of choice, and such motions are often interposed for tactical purposes. (citation omitted) Confronted with a motion to disqualify, a court must be sensitive to the impeding interest of requiring an attorney's professional conduct and preserving client confidences and, on the other hand, permitting a party to hire the counsel of choice.”

Kusch v. Ballard, 645 So. 2d 1035, 1037 (Fla. App. 1994) criticizing a disqualification order by the trial court. “. . . put simply, one side's lawyer has negligently transmitted a fax communication to the other side's lawyer containing information that has nothing to do with the substance of the dispute but is tactically advantageous to the receiving lawyer's client. The trial court has remedied the situation by disqualifying the entirely

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Even in jurisdictions applying the “totality of circumstances” test the receiving attorney is not necessarily safe from disqualification. Indeed, such an attorney faces a harsh Catch-22. On the one hand, one of the “circumstances” considered by the courts is whether the receiving attorney has relied upon the confidential information and changed positions as a result. If so, a finding of waiver by the other side is more likely.⁴⁰ On the other hand, some courts have held that

innocent receiving lawyer. For doing what? Reading his fax mail? Why must the receiving lawyer’s client lose his entirely permissible choice of lawyer because of the neglect (or, perhaps, purposeful act) of the adversary’s lawyer? I therefore entirely agree with Judge Glickstein in vacating the order disqualifying the receiving lawyer.”

³⁹ See, ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-382 (1994) Acknowledging that mere receipt of inadvertently sent confidential information is not a violation of a lawyer’s professional responsibility, but cautioning that “. . . lawyers should be aware that the receipt and/or initial review of such materials, in certain circumstances, may be the basis for a motion disqualifying the lawyer from continuing to represent its client in the matter at issue . . . a lawyer complying with the procedures outlined above may nevertheless be unjustifiably accused of reviewing the received materials before giving his or her adversary an adequate opportunity to seek appropriate protection from the courts. A court confronted with such allegations on a motion to disqualify may err on the side of caution – by granting the motion – in order to preserve inviolate the attorney-client privileged and in light of the ethical obligation of a lawyer to avoid the appearance of impropriety.

Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601, 617 (Cal. App. 2004), review granted 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004) recognizing the serious effects of the court’s disqualification of receiving attorney’s use of confidential information, stated “Plaintiffs themselves have done nothing to cause the disqualification. In accordance with the trial court’s order, plaintiff must be given ample opportunity to retain new counsel and experts, who in turn should be afforded every opportunity to complete discovery and prepare for trial.”

State Compensation Insurance Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 808 (Cal. App. 1999), recognizing the danger of an opponent intentionally sending confidential information to disqualify the receiving attorney. The court held “. . . mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of the judicial proceeding does not require so draconian a rule. Such a rule would nullify a party’s right to representation by chosen counsel anytime inadvertence or devious design put an adversary’s confidences in an attorney’s mailbox. Nevertheless, we consider the means and sources of breaches of attorney-client confidentiality to be important considerations.” (citation omitted) Having so noted, . . . we do not rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification.”

⁴⁰ F.C. Cycles Intern., Inc. v. Fila Sport S.p.A., 184 F.R.D. 64, 78-79 (D. Md. 1998) “Whether fundamental fairness weighs for or against waiver largely depends on the extent of the reliance the party has made on the document, in its case. See, e.g. Kansas City Power &

disqualification of a receiving attorney is appropriate where the volunteered privileged information affected the behavior of the receiving attorney.⁴¹ Thus, an attorney who considers or acts upon the received information cannot predict whether she will be rewarded with a ruling of waiver or slapped with a disqualification order.

It's a short step from here to the crafty opponent who intentionally includes privileged information within transmitted

Light Co. v. Pittsburgh & Midway Coalmining Co., 133 F.R.D. 171, 174 (D. Kan. 1989) (Fairness weighed in favor of finding non-waiver when the defendant failed to demonstrate that it had relied significantly on the documents inadvertently disclosed by the plaintiff. . .) **Bud Antle, Inc. v. Grow-Tech, Inc.**, 131 F.R.D. 179 (N.D. Cal. 1990) (Fairness requires a finding of waiver because the defendant had analyzed the inadvertently produced privileged document, had possibly disclosed it to experts, and had shown a strong reliance on it for purposes of the defense"; **F.C. Cycles Intern., Inc. v. Fila Sport, S.p.A.**, 184 F.R.D. 64, 78 (D. Md. 1998) In finding subject matter waiver, the court held ". . . the plaintiff has significantly relied upon the disclosed document. It has been used in several depositions and addresses issues that are at the heart of the claim. Thus the weight of this factor supports waiver."

United States v. J. Rigas, 281 F. Supp. 2d 731, 733, 741 (2003) finding no waiver but reciting the general rule "generally, courts hold that fairness dictates finding of waiver in cases where the privileged information at issues has been widely disseminated . . ."

⁴¹ **Richards v. Jain**, 168 F. Supp. 2d 1195, 1209 (W.D. Wash. 2001) involving the receipt of almost a thousand privileged documents. "In determining when to exercise its discretion to disqualify counsel in those cases involving the loss of the protection of privilege, 'the court should resolve any doubts in favor of disqualification.'" (citations omitted) In the instant case, although [plaintiff's counsel] has gone to great lengths and argued stridently that no confidences were revealed to or used by the firm, the undisputed facts of the case create a substantial taint on any future proceedings. Simply returning the Disk and removing the possibility of any future impingement on [defendants] attorney-client privilege will not remove the taint. "A reasonable member of the bar or the public would share . . . the nagging suspicion that plaintiff's trial preparation and presentation of their case had benefited from confidential information obtained from [the Disk]."

In **Re Meador**, 968 S.W. 2d 346, 351-52 (Tex. 1998) involving receipt of confidential information outside the normal course of discovery. The court set up six factors to consider when deciding the disqualification issue. "1) Whether the attorney knew or should have known the material was privileged; 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information; 3) the extent to which the attorney reviews and digests the privileged information; 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice; 5) the extent to which movant may be at fault for the unauthorized disclosure; 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney."

material and then seeks to disqualify a feared attorney who used it to his client's benefit.⁴²

If one ignores this particular "Catch-22," and further analyzes the theoretical underpinnings of the 1992 ABA opinion, one discovers conflicts with ethical duties other than those of zealous advocacy. For example, if the privileged information inadvertently produced shows that the opponent was guilty of discovery abuse, perhaps by disclosing names of witnesses whose identities were improperly withheld, the receiving attorney may have an affirmative duty to use it,⁴³ indeed, if not a duty to tell the court about the discovery violation and to seek sanctions.

⁴² See, **State Compensation Insurance Fund v. W.P.S., Inc.**, 82 Cal. Rptr. 2d 799, 808 (Cal. App. 1999) following ABA opinion 92-368, "We note that whenever a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden must rest on the complaining lawyer to persuasively demonstrate inadvertence. Otherwise, a lawyer might attempt to gain an advantage over his or her opponent by intentionally sending confidential materials and then bringing a motion to disqualify the receiving lawyer. . . ."

⁴³ See, ABA Comm. on Ethics Prof'l Responsibility, Formal Op. 94-382 (1994) Considering the situation where lawyers sent, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or appears to be on their face, subject to the attorney-client privilege. Acknowledging a general duty corresponding to ABA Formal Op. 92-368, the Committee acknowledged that ". . . the sender may be seeking to rectify improper or unjust conduct – for example, the failure to disclose such documents in response to a production request clearly calling for them. In such instance, although the sender has no authority to make the disclosure, the receiving attorney may be entitled to use them."

Pa. Bar Ass'n Comm. on Legal Ethics, Informal Op. No. 99-150 (Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp.) ". . . in certain circumstances, the law may recognize some right to the use of the materials despite the fact that the sender had no authority to transmit them. For example, the receiving lawyer may have a legitimate claim that the documents should have been, but were not, produced by an adverse party in response to pending discovery requests. See, **In Re Shell Oil Refinery**, No. Civ. A. 88-1935, 1992 WL 275426 (E.D. La. Sept. 29, 1992) (ordering that such documents not be used by receiving party unless they 'were the subject of a proper discovery request and were improperly withheld' by adverse parties). Or the receiving lawyer may be able to assert that the documents were received

Suppose the disclosed information indicates that the adversary's client intends to commit perjury during deposition.⁴⁴ Should the deposing attorney counsel the deponent not to commit perjury? (And if so, must the deposing attorney first get permission to talk to his adversary's client, in light of Model Rule of Prof'l Conduct Rule 4.2, which says a lawyer should not communicate with a represented person?⁴⁵) If the deponent does commit perjury, can the deposing attorney report the perjury to the court if the client's lawyer fails to?⁴⁶

from someone acting under the authority of a whistleblowing statute. See, e.g., Whistleblower Protection Act, 5 USC § 1201 et seq. (1988)."

Aerojet-General Corp. v. Transport Indemnity Insurance, 22 Cal. Rptr. 2d 862, 865, 866 (Cal. App. 1993) Aerojet's risk manager forwarded memorandum revealing the existence of a witness to plaintiff's counsel. Memorandum was on plain paper "to: Aerojet File, From: LRAC," in holding plaintiff's counsel had the right to depose the witness and call him as a witness at trial, the court stated ". . . whether the existence and identity of a witness or other non-privileged information is revealed through formal discovery or inadvertence, the end result is the same: the opposing party is entitled to the use of that witness or information . . . If respondents either deliberately or negligently fail to disclose the existence of a relevant witness in response to discovery requests, they would hardly be in a position to take advantage of their conduct if that information was subsequently inadvertently disclosed . . ."; but see, **Rico v. Mitsubishi**, 10 Cal. Rptr. 3d 601, 613 (Cal. App. 2004) severely limiting the holding in *Aerojet*. "While unnecessarily broad in its holding, *Aerojet* was right in its narrow application. In regards to its application, the case essentially involved nonprivileged information, namely, a witness' identity, which was never used to the other party's detriment. . ."

⁴⁴ See, Lawrence J. Fox, *Your Client's Employee Is Being Deposed: Are You Ethically Prepared?* 29 *Litigation* 17, 23 (2003) ". . . it is also possible that counsel at the deposition will be confronted by a lying witness (not his client) and believe that he or she has some obligation to act under Rule 3.3. In that unlikely event, however, the lawyer will not have to act at deposition and will have to act thereafter only if the witness and the witness's lawyer fail to take appropriate remedial action."

⁴⁵ See, Model Rules of Prof'l Conduct R. 4.2, Communication With Person Represented By Counsel.

⁴⁶ See, New York State Bar Ass'n Topic: *Confidentiality; Unauthorized Disclosure; Fraud On Tribunal*, Op. No. 700 1998 WL 957912 (N.Y. St. Bar. Assn. Comm. Prof. Eth. 1998) Attorney contacted by unsolicited phone call by former employee of adversary informing him that documents were altered prior to their submission during discovery. Ethics Committee recommended that attorney refrain from exploiting the willingness of the adversary's former employee to breach the duty of confidentiality, and to seek judicial

guidance regarding its use. The Committee opined that “. . . the attorney here has received information that suggests possible criminal activity or fraud in which opposing counsel may be assisting. There are no documents that can be returned to counsel, and the attorney’s duties to the tribunal may require disclosure. See DR 7-102 (B)(2) (“A lawyer who receives information clearly establishing that . . . [a] person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal”). There is little question here that the information conveyed to the attorney by the former employee of the respondent’s law firm, if true, would constitute fraud that must be revealed to the tribunal under DR 7-102 (B)(2). In such circumstances, we believe it would be appropriate for the attorney, on notice to opposing counsel, to notify the hearing officer presiding over the proceeding of the allegation. Such a course will satisfy the attorney’s possible ethical duties under DR 7-102 (B)(2) and will also allow the tribunal to address the legal issues (such as applicability of crime-fraud exception, and whether the actions of the former employee constitute a civil or criminal wrong) effecting the receiving lawyer’s ability to use a communication and any evidence derived therefrom . . . the inquirer may, however, bring the allegation of document alteration to the attention of another court or other appropriate authority (such as a law enforcement agency or disciplinary authority) on an ex parte basis if the attorney reasonably concludes that it would not be appropriate to notify opposing counsel in the first instance . . .”

F.C. Cycles Intern., Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 80 (D. Md. 1999) “A party may compel production of allegedly privileged communications upon a prima facie showing that the lawyer’s advice was designed to serve his client in the commission of a fraud, crime, or tort (citation omitted) . . .”

Df. Kathleen Maher, *Don’t Fax, Don’t Tell: Differing Opinions About ABA Opinions 92-368 and 94-382*, 12 No. 4 Prof. Law 2 (2001) “Two years after issuing Formal Opinion 92-368, the ABA Standing Committee addressed the ethical obligation of a lawyer who receives an adverse party’s privileged and/or confidential materials not as a result of opposing counsel’s inadvertent disclosure, but rather, from someone not authorized to provide them. According to Formal Opinion 94-382, [1994] the receiving lawyer should either refrain from reviewing the materials or only review them to the extent necessary to determine how to proceed. The lawyer should also notify the opposing counsel and either follow opposing counsel’s instructions with respect to the disposition of the materials, or refrain from using materials until there is a definitive court ruling on the proper disposition of the materials;”

Steve Morris, *Ethical Conflicts Facing Litigators*, SH009 ALI-ABA 449 (2002) Information obtained by questionable means: “Receiving proprietary documents ‘leaked’ by an adversary’s employee has been held to be ‘inappropriate and contrary to fair play’ without regard to the relevance of information in the materials. Accepting purloined proprietary information is ‘more than informal fact gathering.’ This activity is ethically condemnable because the discovery process is ‘effectively circumvented’ and the opponent is denied the opportunity to argue against production of the information. In Re Shell Oil Refinery, 143 F.R.D. 105, 106 , amended opinion, 144 F.R.D. 73 (E.D. La 1992) (ex parte contact with disloyal employee prohibited; all information from him not publicly available or produced by employer suppressed, including notes made from information and documents); accord, X Corp. v. Doe, 816 F. Supp. 1086 (E.D. Va. 1993) (lawyer who alleged but failed to show he was fired for ‘whistle blowing’ ordered to return 4,300 copies of documents taken by him from X Corp., and he is “permanently enjoined from voluntarily disclosing X Corp.’s confidences and secrets”); GTE Prods. Corp. v. Stewart, 610 N.E. 2d 892 (Mass. 1993) (lawyer who took papers from ex-employer that he believed supported his claim for wrongful termination prohibited from ‘disclosure of communications arising out of the employment relationship that had to do with his rendering legal services, advice, or

If one ignores these doctrinal inconsistencies and contradictions, perhaps the most troubling dilemma a lawyer faces with respect to an adversary's privileged information is whether to tell his own client about it. The Rules of Professional Conduct require a lawyer to communicate with his client and abide by the client's decision concerning the lawful objectives of the representation.⁴⁷

opinions.');

Restatement 2000 § 60 cmt. (receiving lawyer must return information obtained deceitfully or illegally and must keep such information confidential from client); Maryland Bar Comm. on Ethics Op. 2000-4 (documents should be returned unexamined, or, if inadvertent disclosure learned of after examination, lawyer must inform client and counsel and then return documents or seek court ruling.)”

See, Model Rules of Prof'l Conduct R. 8.3, Reporting Professional Misconduct: (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, truthfulness or fitness as a lawyer in other respects, shall inform the appropriate professional authority . . . (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6; Model Rules of Prof'l Conduct R. 1.6 Confidentiality of Information “(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent. Whether 1.6 applies to another of attorney's client is the subject of this article; see also, Model Rules of Prof'l Conduct R. 3.3, Candor to the Tribunal “(c) The duty stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

⁴⁷ Model Rules of Prof'l Conduct R. 1.2, Scope of Representation and Allocation of Authority between Client and Lawyer “(a) . . . a lawyer shall abide by a client's decisions concerning the objectives of representation . . . as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued”; Model Rules of Prof'l Conduct R. 1.2 cmt. [1] . . . (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations”; Model Rule of Prof'l Conduct R. 1.4 Communication “(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules; (2) reasonably consult with a client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable request for information.”

Kusch v. Ballard, 645 So. 2d 1035, 1037 fn. 4 (Fla. App. 1994) Lawyer receiving inadvertently released information has duty to disclose it to his client; Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 99-107 (1999) (Lawyer required to keep client abreast of potential waiver of attorney-client privilege).

ABA Standing Comm. on Ethics and Prof'l Responsibility Formal Op. 95-398, No. 162 (1995) “. . . should a significant breach of confidentiality occur within a computer maintenance company, accounting firm, or the like, a lawyer may be obligated to disclose such breach to the client or clients whose information has been revealed. See Rule 1.4(b) (“Communication”) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Where the

They also require counsel to act on behalf of his client to carry out the goals of the representation.⁴⁸ These duties include consultation

unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).

Cf. Model Rules of Prof'l Conduct Rule 4.4 cmt [3] In a situation where the lawyer learns *before* receiving the document that it was inadvertently sent to the *wrong address* then, “. . . the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.”

Md. St. Bar. Ethics Op. 2000-4, “The District of Columbia, Illinois and Oregon state bars have also concluded that a lawyer's duty to represent his or her client zealously does not obligate a lawyer to read an unexamined privileged document that had been inadvertently produced, and that a lawyer is ethically required to return the privileged document without first examining it . . . Under such circumstances, it is as if no actual disclosure of privileged material had ever occurred: the material was simply transmitted or sent, but not disclosed or reviewed. Therefore, the committee finds that the receiving attorney is not ethically obligated to inform his or her client that the error occurred and was corrected. Clearly, Rule 1.4 requires communications sufficient for the client to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . [h]ere no decision on the part of the client is necessary, since the lawyer's obligation under the Rules are clear . . .” Nevertheless, the committee also found that “once you have reviewed the material, you also have an obligation under Maryland Rules of Prof'l Conduct 1.4, Communication to inform your client promptly that you have reviewed privileged documents received from another party, and that you have certain obligations under the Rules of Professional Conduct. This will permit your client to make informed decisions regarding your representation of him/her, or it in the litigation. . . . if you have already reviewed the documents, your second alternative would be to consult the Courts regarding the permissible use of the inadvertently disclosed privileged material before using or further disclosing the information to anyone. For example, once you have realized the information you have reviewed might be privileged, you might seal the documents in an envelope without further reviewing them, and apply to the Court in a sealed motion, for a ruling as to whether or not disclosed materials might be used.”

⁴⁸ Pa. Bar Ass'n Rep. No. 2000-200, Inadvertent Disclosures (2002) 22 Oct. Pa. Law. 59 (2000) “Lawyer's Obligation to Act Zealously and Keep Client Informed: Rule 1.3 (Diligence) provides that lawyer ‘shall act with reasonable diligence and promptness in representing a client.’ There is an argument implied in some of the decisions and ethics opinions that to forego capitalizing on helpful information, however received, would compromise this obligation . . . referencing ABA opinion 92-368, Pennsylvania Bar also commented, Model Rule 1.3, “. . . which provides that lawyer is not hard pressed for every advantage that might be realized for a client. Favoring restraint on uncontrolled advocacy, the opinion advised that the zealous representation does not include capitalizing on every error of opposing counsel.”

concerning the specific means that should be employed to accomplish these goals.⁴⁹

It is hardly a reach to suppose that a client informed that her attorney had received case-breaking privileged information from the other side would direct her attorney to use that information in the defense of her cause, whatever the lawyer's apparently equivocal ethical duty.⁵⁰ Again, the attorney must choose between obligations to her client and her perceived duty however awkward and discomfoting.⁵¹

⁴⁹ Thomas Ross, *Lawyers and Fraud: A Better Question*, 43 Washburn L.J. 45, 52 (2003): "... this idea of the lawyer as loyal and fearless champion of his client has always resonated with the profession. Thus, the idea of the lawyer as a 'gatekeeper,' putting the interests of third parties ahead of the client's interests, runs against both the bar's sacred stories and the essential nature of law practice as lived by lawyers across the various practice domains. . . . moreover, the conception of the lawyer as loyal partisan possesses real force and resonance. Who among us would want our lawyer to be less than fully committed to us, especially when we must face the imposing resources of the state? It seems right, as a general principle, that a lawyer should place his client's interests ahead of others. Thus, the suggestion that the lawyer should see himself as concerned with the public interest rather than his client's interests collides with a deeply rooted professional self-conception that has an intrinsic sense."

⁵⁰ D.C. Bar Legal Ethics Comm. Op. No. 256 (1995) "... if the receiving lawyer were under some ethical inhibition from using that information, (inadvertently received confidential information) the lawyer could have a prohibited conflict of interest under rule 1.7(b)(4), [conflict of interest: which could require withdrawal under rule 1.16(a) declining or terminating representation]. Rule 1.7(b)(4) prohibits a lawyer from representing a client in a matter if 'the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interest.' If the receiving lawyer were under some ethical inhibition from using the inadvertently disclosed information to the fullest in a particular case, his professional judgment 'reasonably may be adversely affected' in that case . . ."

⁵¹ Model Rules of Prof'l Conduct R. 1.2 cmt 1 The client has final authority concerning the lawful goals of the representation, "... within the limits imposed by the law and the lawyer's professional obligation;" Model Rules of Prof'l Conduct R. 2.1: Advisor in Representing a Client, a lawyer shall exercise independent judgment and render candid advice. In rendering professional advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Ultimately the lawyer makes a personal ethical choice.⁵² As in so many situations, the choice here implicates further conflicts.

When faced with a threat of discipline for failing to vigorously pursue the goals of the representation,⁵³ together with her client's insistence that the information be used affirmatively, the receiving lawyer may decide, in the face of this conflict, to withdraw from the representation.⁵⁴

But here again additional problems arise. Even if the lawyer assures that his resignation will not cause material adverse effects on the interests of the client,⁵⁵ withdrawing from the case may not solve the real problem.⁵⁶ To withdraw from the representation, he must

⁵² Model Rules of Prof'l Conduct R. 1.2 cmt 1 The client has final authority concerning the lawful goals of the representation, ". . . within the limits imposed by the law and the lawyer's professional obligation;" Model Rules of Prof'l Conduct R. 2.1 Advisor "In Representing a Client: a lawyer shall exercise independent judgment and render candid advice. In rendering professional advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

⁵³ See, Model Rules of Prof'l Conduct R. 1.2 cmt [2] ". . . lawyers usually defer to the client regarding . . . concern for third persons who might be adversely affected . . ." by decisions concerning the means to accomplish the client's objectives.

⁵⁴ See Model Rules of Prof'l Conduct R. 1.16(a)(1) a lawyer shall withdraw if: the representation will result in violation of the Rules of Professional Conduct or other law; Model Rules of Prof'l Conduct R. 1.16(b)(4) a lawyer may withdraw if: "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

⁵⁵ See Model Rules of Prof'l Conduct R. 1.16(b)(1).

⁵⁶ See, Robert M. Contis, Jr. *Ethical Considerations: Independent Professional Judgment, Candid Advice, and Reference to Non-Legal Considerations*, 77 Tul. L. Rev. 1223, 1227 (2003) commenting on lawyer's obligation, under Model Rule of Prof'l Conduct R 2.1 to exercise independent judgment. ". . . but there are other aspects of independence to consider; those aspects are the ability and willingness to look critically at what the client seeks to do (with the lawyer's assistance) and to assess the client's quest dispassionately, free from the client's bias and apart from the lawyer's interest in preserving the relationship in collecting the fee. While the zealous partisan paradigm is appropriate for the lawyer as an advocate participating in the legal system and interacting

take steps to reasonably protect the client's interests, including surrendering papers and property . . . " to which the client is entitled . . . ,"⁵⁸ all the while maintaining client confidentiality. Thus, he will have to turn the confidential documents, including the opponent's privileged documents, over to the client and her new lawyer, and he would clearly violate his client's attorney-client privilege if he voluntarily revealed to third persons that he had done so.

If the attorney believes that his client is not entitled to her opponent's privileged papers, and further believes that failure to disclose the possession of these documents constitutes a fraud,⁵⁹ he may then contemplate whether he has the ethical discretion to reveal this fraud.

with third parties on the client's behalf, partisanship is inappropriate for the lawyer as counselor assessing the merits of that client's cause"

⁵⁷ See Model Rules of Prof'l Conduct R. 1.16(b)(1); See Model Rules of Prof'l Conduct R. 1.16(d).

⁵⁸ See Model Rules of Prof'l Conduct R. 1.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable, to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled"

⁵⁹ See Model Rules of Prof'l Conduct R. 1.6(b)(3) "A lawyer may reveal information related to the representation of a client to the extent the lawyer reasonably believes necessary: (3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;" ABA Standing Comm. on Ethics and Prof'l Responsibility Formal Op. 92-368 (1992), while acknowledging that its prior informal opinion 86-1516 is not on all fours, nevertheless opined that its position informs counsel's proper conduct upon the inadvertent receipt of confidential information. Opinion 86-1518 entitled "Notice to Opposing Counsel of Inadvertent Omission of Contract Provision (Feb 9, 1986), concluded that 'error is appropriate for correction between lawyers without client consultations.' In reaching this result the opinion was concerned that to do otherwise and 'capitalize on the clerical error' might violate postscript of Model Rule 1.2(d) not to counsel the client to engage in conduct the lawyer knows is fraudulent as well as the admonition of Model Rule 4.1(b) not knowingly to fail to disclose a material fact when disclosure is necessary to avoid a client fraud."

The Maryland Committee on Ethics has suggested that keeping and using privileged information is a fraud:⁶⁰

. . . if the sending attorney indicates a transmission was inadvertent and asks the return of the document, they should be returned unopened and unreviewed immediately . . . in such situations the receiving attorney may violate *Rule 8.4(c)* dishonesty, fraud, deceit or misrepresentation, if, he or she fails to inform the sending attorney of his or her error, or opens the package after being

⁶⁰ Md. St. Bar Ethics Op. 2000-4 The duties of a Maryland attorney who receives inadvertently produced privileged documents from opposing counsel in discovery; D.C. Bar Ethics Op. No. 256 (1995) “. . . where, . . . the receiving lawyer knows of the inadvertence of the disclosure *before* the documents are examined, rule 1.15(a) [safekeeping property] requires the receiving lawyer to return the documents to the sending lawyer; the receiving lawyer also violates rule 8.4(c) [engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation] if the lawyer reads and/or uses the material; see Lipin v. Bender, 644 N.E. 2d 1300, 1304 (1994). . . . Rule 1.15(a) & (b) Safekeeping of Property, might also be violated if, contrary to the request of sending attorney, the lawyer subsequently opens and reviews the content of the materials. Rule 1.14(a) &(b) require a lawyer to safeguard the property of another which comes into his possession, to promptly notify the person, and except as otherwise permitted by law, deliver the property to the person entitled to receive it. Materials inadvertently produced in discovery fall into this rule.” ABA Standing Comm. on Ethics and Prof’l Responsibility Formal Op. 92-368 (1992) analogizing unauthorized receipt of privileged information to bailment, the committee opined “. . . the receiving lawyer lawfully possesses the missent materials, but the sending lawyer clearly did not intend to relinquish title to them, either the physical objects or the ideas reflected on each page, such that they would become the “property” of the receiving attorney. The common law bailments characterizes such mistaken possession as a bailment implied by law, or a constructive bailment . . . an essential element of the bailment relationship is the absolute obligation of the bailee to return the subject matter of the bailment upon termination of the bailment. (citation omitted) This obligation to return the property is necessarily implied from the mere fact of lawful possession of personal property of another . . .” Acknowledging the bailment analogy as flawed, since the parties did not intend the bailment, the committee went on to characterize “. . . any attempt by the receiving lawyer to use the missent letter for his own purposes would thus constitute an ‘unauthorized use.’”

instructed not to do so. Reading inadvertently produced material you know is privileged after learning of an error is similar to copying papers from an opposing lawyer's file folder during a break in the deposition. Such conduct is found to be dishonest," citing Lipin v. Bender, 84 N.Y. 2d 562, 644 N.E. 2d 1300, 1304 (N.Y. 1994).

Following this reasoning, if the receiving attorney believes he has a professional duty to safeguard his adversary's attorney-client confidences, then concealing his receipt of confidential information is a fraud by a person under a duty to communicate concealed facts,⁶¹ especially if the nondisclosure to the other side is reasonably certain to cause substantial injury to financial interests or property.⁶² In that case, disclosure might be tempting, but it would be wrong.

Leaving aside the absurdity of sacrificing your own client's confidences to protect those of the other side, a lawyer who wants to violate the attorney-client privilege will find no refuge in the crime-

⁶¹ Wright v. Brooke Group Ltd., 652 N.W. 2d 159, 174 (Iowa 2002) Iowa Supreme Court responding to certified question in cigarette case. "Under Iowa law, the failure to disclose material information can constitute a fraud if the concealment is made 'by a party under a duty to communicate the concealed facts.'" This duty is dependent on prior misleading statements or true statements of fact that influence behavior that new information subsequently rendered untrue; Restatement (Second) of Torts § 551, *Liability for Non-Disclosure*; Involving non-disclosure of a fact that is the defendant's duty to disclose.

⁶² See, Md. St. Bar Ethics Op. 2000-4, "The Committee also opined that 'Rule 1.15(a) and (b), Safeguarding Property, might also be violated if, contrary to the request of sending attorney, the lawyer subsequently opens and reviews the content of the material. Rule 1.15(a) and (b) require a lawyer to safeguard the property of another which comes into his possession, to promptly notify the person, and except as otherwise permitted by law, deliver the property to the person entitled to receive it.'"

fraud exception. For one thing, unlike Maryland, most jurisdictions examined in this article do not characterize using an opponent's volunteered privileged information as a crime or fraud.⁶⁴

Secondly, just as we have asked at the commencement of this article, whose privilege is it, and who is charged with the duty to preserve it, we now ask, "whose fraud is it?" If the client received this information directly, he would be under no obligation not to use it or to return it.⁶⁶ If the fraud is the attorney's, and only the attorney's, then discretionary exceptions to confidentiality such as the crime-fraud exception, or exceptions based on substantial injury to financial interests or property of another, would not apply because these

⁶³ But see, Thomas Ross, *Lawyer and Fraud: A Better Question*, 43 Washburn L.J. 45, 52 (2003) ". . . This idea of the lawyer as loyal and fearless champion of his client has always resonated within the profession. Thus, the idea of the lawyer as a 'gatekeeper,' putting the interests of third parties ahead of the client's interests, runs against both the bar's sacred stories and the essential nature of law practice as lived by lawyers across the various practice domains."

⁶⁴ Barry R. Temkin, *Ethics, Errant E-Mail, Inadvertent Disclosure of Confidential Material Poses Dilemma*, N.Y.L.J., Oct. 14, 2003 at 5 "Unlike the ABA Model Rules, the New York Code does not explicitly obligate an attorney to notify the sender upon receipt of an inadvertently sent confidential document. Interestingly, the code does address a lawyer's obligation upon receipt of funds or other property belonging to another. DR 9-102(c) obligates an attorney to 'promptly notify a client or third person of the receipt of funds, securities or other property in which the client or a third person has an interest'" . . . however, the code does not define what is meant by 'other property,' and it does not appear that this rule was initially intended to apply to the type of intellectual property or attorney work-product likely to be found in an errant fax or e-mail."

⁶⁵ Barry R. Temkin, *Ethics, Errant E-Mail, Inadvertent Disclosure of Confidential Material Poses Dilemma*, N.Y.L.J., Oct. 14, 2003, at 5,) "Unlike the ABA Model Rules, the New York Code does not explicitly obligate an attorney to notify the sender upon receipt of an inadvertently sent confidential document. Interestingly, the code does address a lawyer's obligation upon receipt of funds or other property belonging to another. DR 9-102(c) obligates an attorney to 'promptly notify a client or third person of the receipt of funds, securities or other property in which the client or a third person has an interest'" . . . however, the code does not define what is meant by 'other property,' and it does not appear that this rule was initially intended to apply to the type of intellectual property or attorney work-product likely to be found in an errant fax or e-mail."

⁶⁶ *Supra* note 21, 22.

exceptions demand two things: First, that the client commits a fraud, and second, that the client uses the attorney's services to effectuate the fraud.⁶⁷ Here, professional duties, or one's opinion of them, would make the refusal to return an opponent's privileged information a fraud that only an attorney could commit. Therefore, discretionary exceptions allowing disclosure of a client's privileged information, in this case receipt of an opponent's privileged information, to prevent fraud or crime, would not apply.

VII. LOOK BEFORE YOU LOOK: GUESSING AT PRIVILEGE

Additional dilemmas face the attorney who contemplates withdrawal: Until he reveals the information and litigates the issue, the lawyer cannot really know whether a court will consider his opponent's attorney-client privilege to have been waived, or whether the information is privileged at all. Additionally, it may be far from clear that there was mere inadvertence, rather than gross negligence; and the production could turn out to be a shady opponent's tactic to provoke a disqualification.

Civility and rules of conduct, according to 1992 ABA opinion, direct that an attorney should neither read nor use privileged information produced inadvertently, but should return it to the sender.⁶⁸ But following this advice, as we have seen, could result in

⁶⁷ **Supra note 24, Model Rules of Prof'l Conduct § 1.6(b)(2)(3).**

⁶⁸ **Model Rules of Prof'l Conduct R. 4.4 cmt [3] "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by**

the practitioner being charged with ethical violations, incompetence, or legal imprudence.

Prudence demands that the receiving lawyer question whether the information was privileged at all. Opponents can intentionally waive a privilege of confidentiality.⁶⁹ Attorneys, as agents of their clients, are authorized to waive their clients' privilege of confidentiality. Thus, even if a document is privileged, perhaps the adversary meant to waive the privilege and disclose it.

For instance, one can hypothesize that an opponent, knowing of the circumstances of the preparation of the document and its contents, or desiring to use it affirmatively,⁷⁰ or knowing of its circulation to other parties, might well despair of a court holding it to be privileged and so forward it to an opponent without confidentiality notices to avoid costly challenges.⁷¹

applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

⁶⁹ In re Kagan, 351 F.3d 1157, 1163 (D.C. Cir. 2003) Committing on D.C. Board Legal Ethics Comm. Op. 256 (1995): “. . . the opinion concluded that where the receiving counsel has reason to believe the disclosure is deliberate, and is unaware that it was inadvertent, receiving counsel ethically may utilize the information . . .”

⁷⁰ In re Snell, 232 B.R. 684, 685 (Bkrtcy. S.D. Ohio 1999) A party who asserts advice or counsel as justification for actions taken causes a waiver of the attorney-client privilege.

⁷¹ D.C. Bar Legal Ethics Comm. Op. No. 256 (1995) “Where a lawyer has inadvertently included documents containing client’s secrets or confidences in material delivered to an adversary lawyer, the receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer’s attention, the receiving lawyer engages in no ethical violation by retaining and using those documents . . .”; Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 163 (4th ed. 2001) “It has become increasingly common to see parties enter into agreements to disclose privileged materials provided the disclosure is not taken to entail waiver as to all privileged matters . . .” (Citations to authorization omitted.) . . .”failure to make an adequate or timely objection to disclosure either in responding to interrogatories, giving

If, on the other hand, the document is clearly labeled "confidential and legally privileged," and also admonishes the unintended recipient not to read it and notify the sender of its receipt, does that change the picture markedly? Nowadays, *all* faxes, e-mails etc. are labeled with this admonition, without the sender intentionally segregating the truly privileged from all other communications.⁷² It is not unusual to receive a "labeled document" of this description inviting one to lunch, passing on an inappropriate joke, or transmitting information, vital to litigation, but unprivileged.⁷³

testimony in deposition or in producing documents may well be fatal to any successful assertion of the privileged matter at trial." (citations to authority omitted)

⁷² Sampson Fire Sales, Inc. v. Oaks, 201 F.R.D. 351, 360 (M.D. Pa. 2001) "Despite the explicit instructions on the fax cover sheet, it should be noted that the ABA's Ethics 2000 Committee in the proposed comments to amend Rule 4.4(b) state: 'The use of general warnings on fax cover sheets advising that the information is intended only for the use of the individual named on the cover sheet may not be sufficient to put a receiving lawyer on notice that the fax was inadvertently sent. . .'"

Jason Krause, *Guarding the Cyberfort*, 89 A.B.A. J., July 2003, 42, 45 "Almost every lawyer uses these disclaimers; some firm computer systems are even programmed to automatically put one at the end of e-mail message that leaves their office. The result is that even innocuous e-mails that say things like 'meet me at two in the lobby for lunch' now come with a disclaimer claiming to be privileged information. 'By claiming attorney-client privilege every time a lawyer sends e-mail, those disclaimers are now probably overboard,' Says Poley [Chair of the ABA Cyberspace Law Committee.] 'If you say something every single time, you might as well say it never.' But not only are these disclaimers overused, lawyers also point out that – unlike similar disclaimers used on faxes – they appear at the end of a message. 'A lot of people end their e-mails with these disclaimers telling you not to read it if you are not the intended recipient.' Hoffman [Vice President and loss prevention counsel for Attorney Liability Assurance Society, Inc.] says: 'The obvious problem with that is if you've already read the message and then get to the notice at the end, you are supposed to forget you read it?' . . . these disclaimers have not been tested in any high profile cases, but Polley and others say that it would be very hard to argue in court that such notices protect privileged information if an e-mail is accidentally sent to the wrong person. In short, lawyers need to take e-mail messages as seriously as a memo or opinion letter. Disclaimers are common practice, but no one should expect them to offer much of a defense should an e-mail be carelessly misdirected."

⁷³ Employer's Reinsurance Corp. v. Clarendon National Ins. Co., 213 F.R.D. 422, 430 (D. Kan. 2003) "This ABA opinion [92-368] is not binding on this court. Moreover, this court's five factor inadvertent production test largely would be displaced if the court applied this

This label of privilege covering all communications ends up, in the real world, covering none of them. It is a customary heading, as common as letterheads, that is not understood as significant to the question of confidentiality. How can such labeling alert the receiving attorney to her proposed obligation not to read or use particular information?⁷⁴

Furthermore, no matter what is stamped on a document or what its contents, the receiving attorney often cannot know merely by reading it whether it is privileged.⁷⁵ To decide that question, counsel must know many facts she cannot learn from the document itself.⁷⁶

ABA opinion to every document marked 'confidential' that a party inadvertently produces in discovery. Labels such as 'Attorney Client Privilege' and 'Attorney Work Product' are overused on documents that do not truly qualify for protection. To impose an obligation on opposing counsel to notify the adversary of every document that is produced during discovery with such a label is overkill. It would provide an incentive for commonplace use of these types of labels and would be a wholly inefficient method to monitor document production. Thus, in this case, the court is unpersuaded that ERC was ethically required to notify Clarendon that Clarendon had produced the Weller [expert] affidavit." Court nevertheless, ordered return of confidential affidavit.

⁷⁴ ABA's Ethics 2000 Committee in proposed comment to amended rule 4.4(b) stated: "The use of general warnings on fax cover sheets advising that the information is intended only for the use of the individual named on the cover sheet may not be sufficient to put a receiving lawyer on notice that the fax was inadvertently sent . . ."

⁷⁵ But cf., David Stanoch, *Finders . . . Weepers? Clarifying a Pennsylvania Lawyer's Obligation to Return Inadvertent Disclosures, Even After ABA Rule 4.4(B)*, 75 Temp. L. Rev. 657, 672 (2002) suggesting that "the other step a lawyer might take is to read the inadvertent disclosure completely. This makes the disclosure complete, and tilts the third factor in favor of finding a waiver of the attorney-client privilege. Also, a lawyer that files the inadvertent disclosure in the public domain destroys the attorney-client privilege attached thereto. This, of course, makes any waiver argument moot because the very act of entering the inadvertent disclosure into public domain vitiates the attorney-client privileged. The law is firm that entering an inadvertent disclosure into the public domain through a court motion or pleading destroys the attorney-client privilege . . ."

⁷⁶ Jerold S. Solovy, Robert L. Byman, *Discovery in the E-Age*, National Law Journal, March 15, 2004 at 11 ". . . Since most courts are going to consider whether reasonable precautions have been taken to prevent inadvertent disclosure, the definition of reasonable is going to change each time a case gets reported. It was perfectly reasonable for the government not to realize it had a backup program. It would be less reasonable to rely on the same excuse twice. In fact, even in the lenient jurisdictions where any

Even in a jurisdiction that follows “totality of circumstances” law, the question of whether a privilege has been waived may depend on facts and circumstances existing outside the subject documents,⁷⁷ especially whether the forwarding attorney took reasonable precautions to protect the confidentiality of the information in them. When asked this question, courts typically weigh five factors:⁷⁸

- (1) The reasonableness of precautions taken to prevent disclosure.⁷⁹
- (2) Laches in seeking return of the information.
- (3) The scope of discovery that produced the information.

inadvertent production is given back, there still must be a showing that the production was inadvertent. If production is made recklessly without any attempt to learn from past mistakes, might not a court decide that the mistake is not inadvertent at all?”

⁷⁷ Simon Property Group LP v. mySimon, Inc., 194 F.R.D. 644, 650 (S.D. Ind. 2000). “. . . first, how excusable or inexcusable was the neglect that led to the inadvertent disclosure? Second, is it possible to provide effective relief from the inadvertent disclosure? Third, is there any serious prospect of harm to the interest of the opponent or to the interest of justice if waiver is not found?”

⁷⁸ But cf., David Stanoch, *Finders . . . Weepers? Clarifying a Pennsylvania Lawyer’s Obligation to Return Inadvertent Disclosures, Even After ABA Rule 4.4(B)*, 75 Temp. L. Rev. 657, 671 (2002) “. . . the balancing test is cumbersome because it requires a court to weigh five different factors to determine whether there was a waiver of the attorney-client privilege. Often, there is considerable overlap among these factors themselves. More significantly, courts are not uniform in their application of each factor.

⁷⁹ See, Jonathan M. Redgrave, Kristin M. Nimsger, *Electronic Discovery and Inadvertent Production of Privileged Documents*, 49-Fed. Law, Jul. 2002, at 37, 39 suggesting counsel check to see if, “. . . computer searches for potentially privileged information broad enough, . . . [secure] software available that can analyze extensive word matches to locate potentially privileged documents . . . procedures for human review [that will] assure the necessary inspection of documents to identify and assert privileged claims . . . [insure that] the review and production systems well organized . . . review the production set completed before shipment . . .” Authors also recommend securing court order that inadvertently produced privileged documents do not constitute a waiver of privilege, that clients be alerted to the possibility of production of privileged documents so there are no surprises, and client can aid in the protection of privileged information.

- (4) The extent of the inadvertent disclosure.
- (5) The overriding issue of fairness.⁸⁰

This five-part test has been adopted by the Restatement of the law governing lawyers:

Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure. What is reasonable depends on circumstances . . . [o]nce the client knows or reasonably should know that the communication has been disclosed, the client must take prompt and reasonable steps to

⁸⁰ Walter W. Steele, Jr., *Shoot Out at the Not-O.K. Corral or Privileged Client Communications — Lost and Found in Texas*, 33 St. Mary's L. J. 739, 743 (2002); *Id.* fn 20. See also *Transamerica Computer Co. v. Client'l Bus. Mach. Corp.*, 573 F.2d 646, 651 (9th Cir. 1978) (finding no waiver of privilege to certain documents accidentally delivered in discovery when discovery included 17,000,000 pages of documentation).

Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 288-89 (D. Mass. 2000) Defendant reviewed over 200,000 pages of documents, set aside four small boxes of privileged information, and placed on a shelf separate from the documents to be produced. Paralegal working for the copy vendor picked up all boxes, including those privileged boxes on the shelf, copied and forwarded them to plaintiff. In holding that the privileged nature of the documents was lost through inadvertent disclosure, the court pointed out that the ease with which the boxes could have been completely segregated from discoverable material constituted gross negligence.

Herman Goldner Co., Inc. v. Cimco Lewis Industries, No. 3501, 2002 WL 1880733 (Pa. Com. Pl. Jul. 19, 2002) Court ordered return of 21 separate privileged documents that were inadvertently produced. Producing party promptly notified opposing counsel of their privileged nature and demanded their return. Citing with approval ABA Op. 92-368, the court quoted Judge E. Stanton Wettick's opinion in *Minatronics Corp. v. Buchanan Ingersoll*, No. GD92-7496, 1995 WL 520686 (Pa. Com. Pl. Feb. 14, 1995) to the effect that "there really are not three separate approaches to the issue of whether the inadvertent disclosure waives the attorney-client privilege. The case law has developed two different approaches. Under one approach, the privilege is waived only if counsel intended to produce the privileged document; an inadvertent disclosure does not waive the privilege. The major variation within this approach deals with the extent to which the courts will scrutinize counsel's assertion that the disclosure was inadvertent. Under the other approach, the privilege is lost when the document is disclosed. The variations within this approach range from an absolute 'strict responsibility' approach to an approach which restores the privilege if counsel can show the documents were inadvertently produced despite the exercise of reasonable care."

recover the communication, to re-establish its confidential nature, and to re-assert the privilege.⁸¹ (emphasis ours)

Among the things courts have said constitute “reasonable precautions” are these:

1. Having the issue of inadvertent disclosure governed by a stipulated protective order.⁸²

⁸¹ Restatement (Third) of The Law Governing Lawyers § 79 cmt h (1998).

⁸² VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 10 (D. Mass. 2000) Although court was inclined to hold that inadvertent disclosure always constitutes a waiver, it accepted the party’s precaution of having issued an inadvertent disclosure stipulated protective order which provided, in part, “. . . that the producing party shall promptly notify the receiving party in writing of such inadvertent production after the producing party learns of such inadvertent production.” If prompt notification is made and the producing party establishes the circumstances surrounding the document’s inadvertent production.” in this case the receiving party did challenge whether the documents were in fact confidential, and the court held that they were and that their production was inadvertent, timely objected to, and therefore ordered the documents returned.

Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 412 (D.N.J. 1995) Court rejected plaintiff’s counsel’s suggestion that the Protective Order included a “blanket” inadvertent disclosure provision that would permit the parties to turn over documents without a privilege review, and then assert claims of privilege after production. Court admonished that to preserve a claim of privilege, parties would have to conduct a privilege review prior to document production despite a stipulated protective order.

David J. Stanoch, “*Finders . . . Weepers?*” *Clarifying A Pennsylvania Lawyer’s Obligations to Return Inadvertent Disclosures, Even After New ABA Rule 4.4(B)*, 75 Temp. L. Rev. 657, 659 (2002) “A non-waiver agreement is essentially a contractual protective order that permits the parties to define what will and will not constitute a waiver of the attorney-client privilege during the course of discovery, including inadvertence. In Cardiac Pacemakers, Inc. v. St. Jude Medical Inc., No. IP 961718, 2001 WL 699850 (S.D. Ind. May 29, 2001) the plaintiffs inadvertently produced a massive 3,500 pages of documents. . . the defendants returned the documents, but then immediately moved to compel the production of these documents. The defendants argued that the protective order did not trump the common law principles that support a finding of waiver of the attorney-client privilege in light of such an unreasonably large number of inadvertent disclosures. The court, . . . made the defendants adhere to the language of the protective order that they themselves initially wanted. So long as the plaintiffs’ inadvertent disclosure was not ‘completely reckless’ the protective order was enforceable. . .”

VLT, Inc. v. Lucent Technologies, Inc., 54 Fed. R. Serv. 3d 1319 (D. Mass. 2002) “In determining whether the disclosures were inadvertent demands a two-pronged inquiry. First, this court must determine the correct legal standard for evaluating the term ‘inadvertent production’ in the protective order . . .” [I]n light of the case law in this

2. Establishing a two-layered system of pre-production review, in which clerks or paralegals screen for privileged information, but experienced in-house or outside lawyers make final decisions about which documents to produce.⁸³

district, the use of the word ‘inadvertent’ could be interpreted that the parties intended to protect only negligent disclosures.

See, *Electronic Discovery Standards – Draft amendments to ABA Civil Discovery Standards: American Bar Association, Section on Litigation (2003)* for suggested language of protective order page in e-discovery.

⁸³ *United States ex rel. Bagley v. TRW, Inc.*, 204 F.R.D. 170, 179 (C.D. Cal. 2002) Defendants inadvertently produced 29 privileged documents including their issue summary memorandum. Supporting the two-layered system of pre-production review, the court stated “. . . in addition to providing meaningful protection for privileged documents, such an approach reduces the transaction cost of litigation by allowing individuals with less experience and training – and, if the review is performed by outside counsel, correspondingly lower billing rates – to perform the most time-consuming and routine tasks. Punishing defendant for adopting this common, reasonable, and cost-effective strategy would not make sense. It would also unwisely discourage other litigants from adopting economical procedure in the future.” The court also noted authority suggesting that only attorneys should perform substantive aspects of privilege review, indicating that using paralegals instead of attorneys to conduct a privilege review was inadvisable, and only permitted if properly supervised, and suggesting that post-it notes should not be used because they could be easily overlooked or dislodged. Nevertheless, the court held that “. . . the reasonableness of the precautions adopted by the producing party must be viewed principally from the standpoint of customary practice in the legal profession at the time and in the location of the production, not with the 20-20 vision of hindsight . . .”

See also, *Scott v. Glickman*, 199 F.R.D. 174, 179 (E.D. N.C. 2001) Confidential communications from client to attorney contained in box turned over to defendants. In holding privilege lost, the court commented on the reasonableness of protective measures taken. “In the instant case, plaintiff asserts that an attorney reviewed the box of documents prior to its production; however, there is no showing that this review was extensive, time consuming, or embraced protective measures devised to prevent inadvertent production of material deemed privileged. It appears from the record undisputed that the contents of the box were not subjected to the additional inspection which comes about through a protocol of numbering and identifying documents in response to a particular request, in advance production. This suggests an inattentiveness particularly where the plaintiff acceded control of the original documents to the defense by allowing the inspection and copying of the unmarked contents of the box take place outside of plaintiff’s counsel’s presence . . .”

Local 851 of Intern. Broth. of Teamsters v. Kuehne & Nigel Air Freight, Inc., 36 F. Supp. 2d 127, 131 (E.D.N.Y. 1998) where court found that defendant’s counsel did not take reasonable precautions to avoid disclosure. “. . . most notably, defendants’ counsel failed to label the letter as confidential or to employ a procedure for separating confidential communications from non-privileged material. Additionally, there is no evidence in the

3. Attempting to limit the scope of production, either by objection or by agreement, especially with electronic files.⁸⁴

Whatever steps an attorney takes to prevent the production of privileged documents should be recorded in a log, as evidence of due diligence.⁸⁵ And attorneys should develop a plan to react

record that counsel adequately instructed subordinate employees regarding confidentiality, or performed a reasonable and thorough review of the opposition papers and attachments before they left the office, in order to ensure confidentiality . . .”

See, Cal. Rules of Prof'l Conduct R. 3-110, Failing to Act Competently “Discussion: Duties of Competency include “ . . . duty to supervise the work of subordinate attorney and non-attorney employees or agents”; Model Rules of Prof'l Conduct R. 5.3 Responsibilities Regarding Nonlawyer Assistants.

Martin A. Little, *Inadvertent Disclosure of Privileged Information: One Lawyer's Nightmare, Another's Dream?*, 9 Nev. Law, Sept. 2001, at 10, 11 “A good discussion of practical ways to minimize the risk of inadvertent disclosure can be found in the book entitled “Attorney-Client Privilege in Civil Litigation,” which is published by the American Bar Association (ABA). According to the author, the careful lawyer should make a practice of identifying privileged communications as such (e.g., by stamping the documents as privileged) and keeping them segregated from unprivileged documents. The careful lawyer should also employ two stage screening process for documents . . . the initial screening should be done by someone with legal training, such as a paralegal, who is instructed to err on the side of privilege. During initial screening, separate lists of privileged and unprivileged documents should be prepared. For each document, the author and recipient should be identified by name and position, along with the date and general subject matter of the document . . . the next level of review should be by counsel who, at a minimum, must review the list of documents, and resolve any uncertainties about whether a document is privileged. Finally, the author suggests that all documents sent to opposing counsel be marked such that it will be possible to tell after the fact what was disclosed. Counsel should also retain an exact set of anything disclosed, and review that set to make sure nothing was inadvertently disclosed.”

⁸⁴ Richard J. Heafey, Don M. Kennedy, *Product Liability: Winning Strategies and Techniques*: § 6.06 “Where Discovery Really Starts for the Plaintiff: Electronic Records and Other Documents” (2003).

⁸⁵ For example: Place wholly privileged documents in a separate database from non-privileged documents. Each document assigned a “P” prefix to its bates number. All coded data for privileged documents was colored red in the database. A watermark indicating privilege appeared whenever privileged documents were printed to further highlight the privilege. Partially privileged documents were appropriately redacted, and placed in a non-privileged database with a “P” prefix, and data associated with partially privileged documents was also colored red. To further protect privileged documents from production, the privilege database was “locked down” so that the ability to modify data was limited to a handful of people. Finally, standard operating procedures for production

immediately in the event they determine that a privileged document has been inadvertently produced.

The catch here is this: No matter how exhaustive a list of “reasonable precautions” we provide, the *receiving* attorney cannot know which ones were implemented by reading the privileged documents.⁸⁶ Therefore, it would be imprudent to assume that reasonable precautions were taken. Any prudent attorney would put the forwarding attorney to her proof of reasonableness under the “circumstances,”⁸⁷ before unilaterally waiving her client’s right to that information.

VIII. CIVILITY VERSUS COMPETENCE:

WHOSE SIDE ARE YOU ON?

required that the production index be sorted to reveal any “P” bates numbers and checked for red colored data prior to production.

⁸⁶ Joshua K. Simko, *Inadvertent Disclosure, The Attorney-Client Privilege, And Legal Ethics: An Examination And Suggestion For Alaska*, 19 Alaska L. Rev. 461, 477 (2002) “A central criticism of the balancing test [the five-part test] is its unpredictability. Even if the receiving attorney knows the court will apply the balancing test, ‘she may lack sufficient information upon which to rest a conclusion because the balancing test turns on the precautions taken by the other side.’ [citation omitted] And, even if a receiving attorney were aware of the other side’s actions, she would not be able to predict how a court would apply the balancing test to her situation . . .”

⁸⁷ John Blair Communications, Inc. v. Reliance Capital Group, L.P., 182 A.D. 2d 578, 579 (N.Y.A.D. 1992).

Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 289 (D. Mass. 2000). “The party claiming the protection of a privilege bears the burden of demonstrating, by a fair preponderance of the evidence, not only that the privilege applies, but also that it has not been waived.”

Cf, Steven D. Glazer, *Special Issues Relating To Third Party Liability For Trade Secret Misappropriation*, 719 P.L.I./PAT 39, 42 (2002) citing the rule of constructive notice used in trade secret misappropriations cases. “. . . according to the Restatement, (1) ‘should know of [facts] if, from the information which he has, a reasonable man would infer the facts in question, or if, under the circumstances, a reasonable man would be put on inquiry and an inquiry pursued with reasonable intelligence and diligence would disclose the facts.’”

Asking a litigator who receives the other side's privileged information to protect its confidentiality is as unfair as it is impractical. After all, who should be responsible to review documents and evaluate their confidentiality: the lawyer producing them, or the one who receives them? Must a lawyer spend time—and the client's money—to second-guess an opponent's decision and analyze all information received to be sure the opponent really meant to forward it?

In short, should the duty of diligence imposed by the Rules of Professional Conduct upon the recipient of confidential information be higher than that placed by the sending lawyer?⁸⁸

In other situations in the law, having access to an opponent's privileged information does not require the recipient lawyer to notify the careless lawyer of his mistake, or to refrain from using the information. Take, for instance, an attorney discussing case-specific confidential information in a public lavatory, in the courthouse elevator, or on a plane,⁸⁹ or even when forwarding privileged

⁸⁸ **Supra note 9, Model Rules of Prof'l Conduct R 1.1: Competence.**

⁸⁹ **See, Aerojet-General Corp. v. Transport Indemnity Ins., 22 Cal. Rptr. 2d 862, 867 (Cal. App. 1993), holding that inadvertently disclosed witness could be deposed and called as a witness at trial, the court stated "we think that the manner in which DeVries (receiving attorney) obtained the information in this case – through documents inadvertently transmitted to his client – is irrelevant to the resolution of the issue. Assuming no question of waiver, the problem would be no different if DeVries had obtained the same information from someone who overheard respondent discussing the matter in a restaurant or a courthouse corridor, or if it had been mistakenly sent to him through the mail or by facsimile transmission. Once he had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf."**

documents to a testifying expert witness.⁹⁰ No one claims that such inattention or indifference to the privacy of the information should be met by holding one's ears or notifying an opponent of his carelessness.

Similarly, if in deposition or trial a witness is asked for the details of her conversation with her attorney and the question is unobjected to—whether as a tactic, inadvertently, or through carelessness—the privilege is waived and the testimony stands.⁹¹ No

But see, Rico v. Mitsubishi, 10 Cal. Rptr. 3d 601 (Cal. App. 2004), review granted, 14 Cal. Rptr. 3d 210 (Cal. June 9, 2004)

⁹⁰ Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 644, 647 (S.D. Ind. 2000) “. . . the more persuasive decisions hold that at least intentional disclosure of opinion work-product to a testifying expert waives the privilege (citation omitted). . .”

⁹¹ Walter W. Steele, Jr., *Shoot Out at the Not-O.K. Corral or Privileged Client Communications – Lost and Found in Texas*, 33 St. Mary's L.J. 739 (2002) “. . . perhaps the best known of the few problematic instances and voluntary waiver arises when a client reveals confidential information while testifying during a deposition.” Citing Goldman Sachs & Co. v. Blondis, 412 F. Supp. 286, 288-89 (N.D. Ill. 1976) (holding that disclosure made during a deposition waived the attorney-client privilege with regard to the subject matter disclosed.); see also, United States v. El Paso Co., 682 F. 2d 530, 539-41 (5th Cir. 1982) (finding a disclosure to outside auditors of internal tax analysis in which attorneys participated constituted waiver of the privileges).

State v. Savage, 506 N.E. 2d 196 (Ohio 1987), marital privilege waived; Cote v. Knickerbocker Ice Co., 290 N.Y.S. 483 (N.Y. Mun. Ct. 1936) attorney-client privilege waived.

State ex rel. Tracy v. Dandurand, 30 S.W. 3d 831, 835-36 (Mo. 2000) Designated expert inadvertently provided with privileged documents waived discovery of these documents.

In re Kagan, 351 F.3d 1157, 1163-64 (C.A.D.C. 2003) “. . . In Opinion 318 (Disclosure of Privileged Material by Third Party) (December 2002), the D.C. Bar Legal Ethics Committee appears to conclude that it would not be an ethical violation for a lawyer to use privileged information of an adversary even where the lawyer receiving the information in circumstances where the privilege was not waived: ‘If the privilege status of the document does not become apparent to receiving counsel until after the document has been reviewed, . . . it is too late for receiving counsel to take corrective action because the information cannot be purged from his mind and his obligation of zealous representation under Rule 1.3 at that point *trumps* confidentiality concerns.’” (emphasis ours)

matter what the merits of the excuse an attorney might mount to have the evidence stricken, it stands.⁹²

No one can or would unring these bells. Once the other side's privileged and confidential information is sent to his opponent, a substantial amount of the protected information is lost.⁹³ If there is

⁹² See, Cal. Evid. Code § 912(a) “. . . the right of any person to claim a privilege . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct or the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege and any proceeding in which the holder has the legal standing and opportunity to claim the privilege . . .”

People v. Barnett, 74 Cal. Rptr. 2d 121 (Cal. 1998) attorney-client privilege waived in court by witness's testimony.

⁹³ See, Jonathan M. Redgrave, Christine M. Nimster, *Electronic Discovery and Inadvertent Production of Privileged Documents*, 49 Fed. Law, Jul. 2002, at 37, “A privilege or protection from discovery . . . can be waived if its holder voluntarily discloses the confidential matter to a third person, either explicitly or implicitly through actions inconsistent with the reasonable maintenance of confidentiality. Thus, the implications of an inadvertent production are significant: (1) at the outset, even if you obtain return of the document, you can never ‘unring’ a bell. (2) If a waiver is upheld, the client confidence or attorney work product may be used throughout the immediate proceedings and even in other proceedings. (3) In some jurisdictions, there is also a risk that the waiver will be extended to all documents pertaining to the same subject matter as the inadvertently produced document. (4) For a client, the attorney's negligence may offer recourse to retrieving inadvertently produced documents.” [numbers added]

VLT, Inc. v. Lucent Technology, Inc., 54 Fed. R. Serv. 3d 1319 (D. Mass. 2002), citing with approval In re Grand Jury Subpoena, 925 F. Supp. 849, 855 (D. Mass. 1995) “Holding that ‘waiver of the privilege in an attorney-client communication extends to all other communications relating to the same subject matter.’” Also citing Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs, 60 F. 3d 867, 833 (1st Cir. 1995) opining that “[I]n general, a waiver premised on inadvertent disclosure will be deemed to encompass ‘all other such communications on the same subject,’ . . .”

Heidi McNeil Staudenbaier and Sarah Vrotos, *The Inadvertent Disclosure of Privileged Documents: Current State of the Law*, 32 Brief, Spring 2003, at 30, 32 “The Fourth Circuit found that a waiver through an inadvertent disclosure of privileged documents The 4th Circuit found that a waiver through inadvertent disclosure of privileged documents constitutes a waiver to the entire subject matter of the disclosed communication (citing F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 73 (D. Md. 1998).

But see, United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 184 (C.D. Cal. 2001) quoting with approval note *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 Mich. L. Rev. 598, 608, 609 (1983) “It is true that confidentiality can never be restored to communication that has been disclosed. This loss of confidentiality can be particularly harmful when disclosure of documents is made to one who is an adversary outside the context of litigation such as a business competitor. But the damage

any value to this “disclosed-confidentiality privilege,”⁹⁴ surely it must be outweighed by the value of a trial on the merits with access to all evidence.⁹⁵

need not extend to the litigation at hand. Litigation takes place in a controlled environment where lack of confidentiality outside the courtroom is relevant to the proceedings within. For all special purposes, a court can repair the damage done by disclosure of a confidential document by preventing use of that document at trial. Indeed, recipients of disclosed material can be prohibited even from facing questions on them. Thus, courts can ensure that the inadvertent disclosure does not affect the outcome of litigation. It appears, then, that maintenance of the privilege despite disclosure can be a significant benefit to the client. The value of maintaining the attorney-client privilege despite disclosure extends beyond litigation at hand. The client may become involved in future lawsuits where adversary seek discovery of arguably privileged materials. If the attorney-client privilege covering the specific documents was waived in prior litigation, the client will be unable to assert the privilege with regard to those documents. Thus, maintaining the attorney-client privilege despite disclosure in one lawsuit preserves the privilege for future lawsuits.” Compare *Id.* 204 F.R.D. at 176 holding inadvertently produced documents should be returned, all summaries or references to them destroyed, and any mention, use, or disclosure of the documents or their contents prohibit it. On the question of the unringing of the tolled bell, the court commented “The totality of the circumstances approached does not destroy the beneficial effect of a rule empowering the court to find a waiver in some situations. The risk of waiver remains to discourage carelessness in the handling of privileged documents, as well as to prevent unfairness to the receiving party if, through no fault of the receiving party, the privileged information has been integrated into the case. In addition, even if inadvertently produced privileged material cannot be used formally, it may be used informally, at least in the sense that the receiving party’s view of the case unavoidably will be informed by it . . .”

⁹⁴ Michael L. Brody, *Reading Other People’s Mail*, 25 *Litigation* 27, 28 (1999) “Frequently, the most illuminating moment in a lawsuit comes when you read your opponent’s documents. Put the interesting ones in chronological order, and read the novel that you have created. The key characters, their conduct, and their motives will leap off the page. The subplots that introduce bit players and propel the narrative will emerge. The contours of the case will become clear . . . you will still have questions, but they will be framed by the documents. Those documents create a factual structure for the trial and define the gaps that must be filled by testimony or inference . . .”

⁹⁵ *Amgen, Inc. v. Hoechst Marion Roussell, Inc.*, 190 F.R.D. 287, 290-291 (D. Mass. 2000) where court quoted with approval Magistrate Judge Collins reasoning “. . . that there would be ‘little benefit’ in continuing to recognize the privilege that has as its foundation the principle of confidentiality when that confidentiality has already been breached . . .

D.C. Bar Legal Ethics Comm. Op. No. 265 (1995) “. . . once read, the inadvertently disclosed information becomes part of the body of knowledge residing in the mind of the receiving lawyer, who may wish to use it to further the interests of that lawyer’s client. For example, under the facts of this inquiry, if the assertively privileged information revealed that the securities arbitration claimants (whose lawyer produced the documents) possessed actual knowledge of the truth of matters alleged to have been misrepresented to them, and if this were relevant to the defense of their claims, respondents’ counsel (the receiving lawyers) would not likely be able to accord confidential status to the information

IX. RIGHT AND WRONG AND LEGAL RIGHTS

Parents teach children not to read other people's mail, eavesdrop on private conversations, or take another's property.⁹⁶

and still properly represent the client . . . an interpretation of the ethical rules that required the receiving lawyer to protect the confidentiality of these materials, would, we believe, place too much of a burden on the exercise of a lawyer's obligation to represent his client zealously and diligently (rule 1.3). As the ethics committee of another jurisdiction observed in concluding that the lawyer may use inadvertently disclosed confidential information: 'once confidential material has been examined, even if briefly, the information cannot be purged from the mind of the lawyer who inadvertently received it [Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 93-11 (Dec. 3, 1993).']"

Cf. Myers v. City of Highland Village, Texas, 212 F.R.D. 324, 327 (E.D. Tex. 2003) ". . . plaintiff asserts that the 'cat is already out of the bag.' This argument rests on a narrow conception of the interest protected by the privilege. The privilege protects both disclosure and use. Although the harm that the City has suffered to its inadvertent disclosure cannot entirely be undone, that is not an adequate reason why the Court should refrain from doing what it can to limit its use."

⁹⁶ Walter W. Steele, Jr., *Shoot Out at the Not-O.K. Corral or Privileged Client Communications – Lost and Found in Texas*, 33 St. Mary's L.J. 739, 740 (2002) "A very rudimentary, and perhaps crude, approach to the problem of leaks is to analogize inadvertently released confidential information to lost personal property. In other words, think of inadvertently released confidential information as a wallet that one inadvertently dropped to the ground. Now, assuming that the wallet has been found, just as the confidential information has now been 'found' by the lawyer who received it. In the case of the wallet, the finder is a thief if the intent to deprive the known owner of the wallet, and to appropriate to the finder's own use, existed at the time the property was found and taken into possession." Citing Williams v. State, 268 S.W. 2d 670, 672 (Tex. Crim. App. 1994).

See also, Perna v. Electronic Data Systems, Corp., 916 F. Supp. 388, 403 (D.N.J. 1995) Complaint dismissed for wrongfully obtaining information. Three briefcases containing attorney's documents, impressions and strategy in preparation for trial, were left in plaintiff's office during lunch break. Plaintiff surreptitiously took documents from briefcase, photocopied them, then turned them over to his counsel. Court characterized plaintiff's activities as deliberate, willful, and intentional acts to gain unauthorized access to his adversary's documents.

See also, Joshua K. Simko, *Inadvertent Disclosure, The Attorney-Client Privilege, And Legal Ethics: An Examination And Suggestion For Alaska*, 19 Alaska L. Rev. 461, 467 (2002) Characterizing Monroe Friedman's "partisan view" and his unrestrained adversarialism. ". . . the result, as one critic of Friedman noted, is that if 'my adversary left a file in my office, I am not only required to look at it, but also I could not return it without my client's consent . . . I could not even tell my adversary that I had the file which he or she left - - even if he or she calls and asks!' [Citing Bertram Prekel, "Errant Facts" Argument Proves Too Simplistic, Legal Times, Feb. 6 (1995, at 33)] It seems zealous advocacy is tantamount to a 'finders keepers' rule. One could even argue it is like refusing to return a found purse to its rightful owner on the reasoning that 'if you really wanted to keep it, you would have taken more care of it.'"

Why should it be different if the child eventually is licensed to practice law?

What you would not have others do to you should have some bearing on what you do to others.⁹⁷ Peer esteem and the collegial cooperation of the community of lawyers, which may help one better serve one's clients, present and future, should weigh heavily in any joint decision about what to do with another's confidential information.⁹⁸

⁹⁷ Joshua K. Simko, *Inadvertent Disclosure, The Attorney-Client Privilege, And Legal Ethics: An Examination And Suggestion For Alaska*, 19 Alaska L. Rev. 461, 484 (2002) "In applying this view [citing John Rawl, *Justice As Fairness: Political, Not Metaphysical*, in *Key Concepts in Critical Theory KCCT: Justice*, 48, 53 (1993)] to the receiving attorney's decision as to how to handle a privileged document not meant for her, one is placed in the position of possibly being the inadvertently disclosing attorney or client where use of the document would lead to an unfair result and public distrust of the system. In such a circumstance, it becomes clear that a rule such as that announcing ABA Opinion 92-368 would seem most desirable. Asking that the receiving attorney not read or use the document, and notify the disclosing party of its mistake becomes a useful baseline from which attorneys can evaluate the circumstances and act in a way that would best serve all interests from behind [Rawl's] veil of ignorance."

⁹⁸ ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 92-368 (1992) "... many difficult issues of professional discretion . . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules."

Model Rules of Prof'l Conduct R. 4.4 cmt. [3] "Some lawyers may choose to return a document unread, . . . when the lawyer learns before receiving a document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer; Model Rules of Prof'l Conduct R. 1.2, cmt. [2] "... lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for the third persons who might be adversely affected. Because of the very nature of the matters about which a lawyer and client might disagree and because of the actions in question may implicate the interest of a tribunal or other persons, this rule does not prescribe how such agreements are to be resolved . . ."; Model Rules of Prof'l Conduct Preamble: A lawyer's responsibility. "... [7] . . . a lawyer is also guided by professional conscience and the approbation of professional peers . . ."

Gomez v. Vernon, 255 F. 3d 1118, 1134 (9th Cir. 2001) Prison officials found attorney's letter to inmates summarizing the strengths and weaknesses of the inmate's claim stored in a restricted-access section of the prison library by inmates litigating against prison officials. Documents, and other confidential documents, were turned over to Ohio

The American Bar Association Model Rules of Professional Conduct give a narrow, circumspect answer to this problem. Rule 4.4 cmt [3] observes that:

"Some lawyers may choose to return a document unread, for example, when the lawyer learns *before receiving the document* that it was inadvertently sent to the wrong address. Where a lawyer is not required by act of law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4." (Emphasis ours.)

This would suggest that the current "ethical" recommendations of the American Bar Association concerning returning confidential documents apply only where the lawyer knows before receiving the information that it was inadvertently sent to the wrong address. But even here, competence would require an examination of the

Department of Correction attorneys. Position of documents kept confidential by department attorneys for five months, over which additional documents were obtained from prisoner's private files. Over a year later, department attorney sought advice from Ohio State Bar concerning a section of the documents. Counsel was advised not to read any more documents and to turn over to the court those documents that were in counsel's possession. Thereafter, department attorneys continued to receive and read case related documents supplied to them by prison employees. Approving sanctions against counsel, the court stated "Department counsel's actions in this case do not pass even the most lenient ethical 'smell test.' They knowingly disregarded advice from the bar counsel and bypassed questions of ethics in an effort to again advantage in this litigation. Despite their roles as officers of the court, they failed to inform the court of their possession of the privileged materials until eight months after the first acquisition . . . [D]istrict court did not abuse its discretion in finding that the attorneys acted in bad faith and in imposing sanctions under the Court's inherent power."

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“circumstances” of the production, as well as consultation with the client.⁹⁹

⁹⁹ Model Rule of Prof’l Conduct 4.4 cmt. [3] does not discuss what an attorney should do if applicable law does not require the return of the document, or why and how an attorney can refuse to comply with Rules 1.2 and 1.4 when deciding to return the document, without court order, as a “. . . matter of professional judgment. . .”

X. CONCLUSION: THE SOCIAL CONTRACT

A client who voluntarily discloses privileged information to a third party clearly waives that privilege.¹⁰⁰ A client directly receiving an opponent's voluntarily disclosed privileged information has no legal obligation to return it or refrain from using it.¹⁰¹

The rule is different in some states and jurisdictions for the professional in the same circumstance. A lawyer, as an officer of the court, and owing obligations of civility to her peers, is viewed by some commentators and in some jurisdictions as a custodian of the attorney-client doctrinal privilege. Under this view an attorney has a general duty to protect privileged communications, including that of her opponent when such communications have been inadvertently shared.

This distinction between the client's duties and her attorney's creates a logical disconnect that frustrates attempts at a coherent legal justification for the rule and creates direct conflicts with other ethical obligations owed by the attorney to her client.

By definition, all evidentiary privileges keep some information hidden. In the context of inadvertent disclosure, the 1992 ABA Opinion, and court decisions to the same effect, recommending

¹⁰⁰ **Supra note 21.**

¹⁰¹ **Supra note 22.**

disclosure and return of inadvertently transmitted materials conflicts with numerous other duties attorneys owe their clients and the courts.

We conclude that the doctrinal justification for maintaining privilege protection for confidential information inadvertently forwarded to an opposing attorney is flawed. A correct analysis of the ethical obligations owed to the court, and one's own client, dictate that the evidentiary protection of privileged information is lost if voluntarily forwarded to a third party, including an opponent's attorney.