NOTE

INADVERTENT DISCLOSURE, THE ATTORNEY-CLIENT PRIVILEGE, AND LEGAL ETHICS: AN EXAMINATION AND SUGGESTION FOR ALASKA

This Note addresses the ethical and attorney-client privilege issues that arise when a confidential document is inadvertently disclosed by one attorney to another. The Author examines the three most common approaches taken by courts in determining whether the attorney-client privilege has been waived in inadvertent disclosure situations, considers the positions taken by the American Bar Association and various state ethics opinions, and examines current Alaska law regarding waiver and professional ethics. The Author concludes by recommending that Alaska take the position that inadvertent disclosure does not waive the attorney-client privilege in most circumstances. Accordingly, the Author proposes that Alaska adopt a non-binding professional guideline stating that lawyers faced with such a situation should refrain from using the inadvertently disclosed document, notify the adversary of the mistake, and follow the adversary's instructions regarding what to do with the document.

I. INTRODUCTION

In today's world of technology and increased efficiency, the demands of a fast-paced environment can take their toll. One click of the mouse, and the email is sent; one push of the button, and the

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fax is sent; one overlooked document in a box, and it is inadvertently produced. Opportunities for efficiency in legal representation are increasing, but along with them comes the danger of inadvertently disclosing privileged documents, and possibly even inadvertently waiving the attorney-client privilege. Currently, there is no rule in Alaska governing whether inadvertent disclosure waives the attorney-client privilege, or how opposing counsel should handle misdirected documents.

This Note first examines the three most prevalent ways of determining whether the attorney-client privilege has been waived as a result of inadvertent disclosure.[1] Second, it looks at how these waiver approaches inform the actions of the receiving attorney by comparing the position taken by the American Bar Association (ABA) and some representative state opinions. Next, the Note examines potential philosophical arguments that may favor one approach over another and discusses current Alaska law regarding waiver and professional ethics. The Note concludes by suggesting that Alaska take the position that inadvertent disclosure does not waive the attorney-client privilege in most circumstances and adopt a professional guideline based on considerations of ethics and professionalism.

An attorney's behavior is governed by the state's rules of professional responsibility, while the rules of evidence govern the attorney-client privilege and its waiver.[2] In other words, the rules of evidence govern what may be admitted into evidence; the rules of professional conduct impose discipline for negligent or reckless behavior on the part of lawyers. In general, violations of privilege rules do not prohibit derivative use of the information.[3] For example, a lawyer who learns certain facts from inadvertently disclosed privileged material may make derivative use of those facts at trial, even if the attorney-client privilege has not been waived. A rule of ethics may ask the lawyer to "forget" what she read, with an added threat of sanctions if she does not.

While the rules of evidence and professional responsibility are separate, they have an effect on one another. The way the court rules on matters of inadvertent disclosure of privileged material under the rules of evidence influences whether the attorney can be sanctioned under the professional rules of conduct for breach of confidentiality[4] or for unfairness to opposing parties and counsel.[5]

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1. For purposes of this paper, the Author assumes the inadvertently disclosed document is privileged.

2. *See* ALASKA R. EVID. § 503; *see also* FED. R. EVID. § 501.

3. *See, e.g.,* ALASKA RULES OF PROF'L CONDUCT R. 1.6 (2001-2002).

4. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

Furthermore, some of the justifications for the inadvertent disclosure rules rest upon notions of professionalism that are outlined in the rules of professional responsibility. So, while the rules of evidence may allow the admission of material that would otherwise be protected by the attorney-client privilege, any discussion involving the use by attorneys or courts of that privileged material necessarily involves reference to attorney behavior and what the profession expects from attorneys when they are dealing with privileged material. Thus, the test that Alaska adopts to govern inadvertent disclosure should be influenced by considerations of confidentiality and zealous representation, which are governed by the Alaska Rules of Professional Conduct.

II. THREE COMMON WAIVER APPROACHES TO INADVERTENT DISCLOSURE

There are three basic approaches to inadvertent disclosure of otherwise privileged documents.[6] The first is a strict responsibility approach, where any disclosure constitutes a waiver of the attorney-client privilege.[7] The second is the no waiver approach, whereby the client's intent to waive the attorney-client privilege governs absolutely, leading to the result that no inadvertent disclosure can result in waiver since inadvertent disclosures are, by definition, unintended.[8] The third is a balancing approach that examines the facts surrounding the disclosure.[9] Each of the three approaches will be examined in light of the goals of ease of application, professionalism, fairness to the parties, respect for confidentiality and the attorney-client privilege, and respect for a lawyer's obligation to zealously represent his or her client. As noted above, although these goals do not decide the admissibility of evidence, the opinions behind them (which arise out of the rules of professional conduct) help determine what evidentiary rule of inadver-

5. ALASKA RULES OF PROF'L CONDUCT R. 3.4 (2001-2002); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.4 (2000).

6. For discussions of the three traditional approaches to the problem of inadvertent disclosure, see generally Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 FLA. L. REV. 159 (1995); Anne G. Bruckner-Harvey, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 BAYLOR L. REV. 385 (1994); James M. Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511 (1985).

7. *See infra* Part II.A.

8. *See infra* Part II.C.

9. *See infra* Part II.E.

tent disclosure and waiver of the attorney-client privilege should be adopted. For purposes of this Note, it will be assumed that the document is privileged on its face—that is, there is a cover sheet naming the sender and intended recipient, as well as a notice of confidentiality and a request to immediately return the document to the sender if it has been mistakenly sent.

A. The Strict Responsibility Approach

Under the strict responsibility approach, as set out by Dean Wigmore[10] and in a number of federal[11] and state opinions,[12] inadvertent disclosure of a privileged document automatically waives the attorney-client privilege.[13] Under this approach, disclosure itself is deemed evidence of the client's intent not to keep the information privileged.[14] Because attorneys have implied authority to disclose confidential information in order to carry out their duties in representing clients, if a document is disclosed, regardless of whether it is stamped confidential, the client implicitly gave the attorney authority to disclose it, and the client cannot then object if the document was inadvertently disclosed.[15] Furthermore, opposing counsel may use the document derivatively to obtain leads to other previously unknown sources and may also use the document itself as evidence.

The strict responsibility approach certainly has the benefit of ease of application. There is no need for a lawyer or judge to exercise moral discretion regarding what to do if a document is missent as the disclosure itself is deemed to evidence a lack of intent to keep the document confidential.[16] Because the privilege is waived,

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10. JOHN HENRY WIGMORE, 8 EVIDENCE § 2292 (McNaughton rev. ed. 1961).

11. *See, e.g.*, Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990); *In re* Sealed Case, 877 F.2d 976, 978-79 (D.C. Cir. 1989); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984); *In re* Horowitz, 482 F.2d 72, 80-82 (2d Cir. 1973); Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 116 (N.D. Ill. 1996); Fed. Deposit Ins. Corp. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992).

12. *See, e.g.*, Farm Credit Bank of St. Paul v. Huether, 454 N.W.2d 710, 722 (N.D. 1990); Aerojet-Gen. Corp. v. Transp. Indem. Ins., 22 Cal. Rptr. 2d 862, 866 (Cal. Ct. App. 1993); Maine Prof'l Ethics Comm. Op. No. 146 (Dec. 9, 1994); Ohio Bd. of Comm'rs on Grievances and Discipline Op. No. 93-11 (Dec. 3, 1993).

13. *See, e.g.*, *In re* Sealed Case, 877 F.2d at 980.

14. *See Carter*, 909 F.2d at 1451.

15. ALASKA RULES OF PROF'L CONDUCT R. 1.6 (2001-2002); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

16. *See* Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988) (explaining that the court, in evaluating if a privilege was waived, need not look at the precautions taken by the party who inadvertently produced

receiving counsel can (and in the view of some, should)[17] use the document. There is nothing for the judge to decide, other than the common questions of relevance and admissibility.[18] Under this approach, the document itself can be admitted into evidence as long as it is relevant. The presence of a cover sheet claiming confidentiality is ineffective because the only inquiry is whether a disclosure took place, regardless of circumstances or intent.[19]

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. In *International Digital Systems Corp. v. Digital Equipment Corp.*,[20] the court reasoned that the strict liability approach "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure."[21] In other words, this approach enhances professionalism because it reminds the attorney of the care that must be taken with her client's documents. As one court put it, confidential or privileged documents must be treated "like jewels—if not crown jewels"[22] by the lawyer who pays attention to high professional standards.

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.[23] A broad judicial approach to privileges

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privileged documents, nor at the party's intent: "unforced disclosure is disclosure," and the privilege is waived) (quoting *In re* Standard Fin. Mgmt. Corp., 77 B.R. 324, 330 (D. Mass. 1987)).

17. *See* Monroe Freedman, *The Errant Fax*, LEGAL TIMES, Jan. 23, 1995, at 26 (supporting the use of documents inadvertently received by facsimile).

18. *See* ALASKA R. EVID. §§ 401-403; *see also* FED. R. EVID. §§ 401-403.

19. Diana P. Scott, *Inadvertent Disclosure of Documents: Penalties and Remedies*, American Law Institute – American Bar Association Continuing Legal Education ALI-ABA Course of Study, July 26-28, 2001, at 1297, 1310.

20. 120 F.R.D. 445 (D. Mass. 1988).

21. *Id.* at 450.

22. *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

23. That privileges are in derogation of the truth is perhaps the strongest argument against them. *See, e.g.*, Jaffee v. Redmond, 518 U.S. 1, 18 (1996) (Scalia, J., dissenting).

is often criticized because it is said that privileges are in derogation of the truth, and tend to conceal relevant evidence in a way that often compromises justice.[24] Furthermore, 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."[25] In other words, a preference for confidentiality benefits those clients who conceal information as to their guilt or culpability, and harms those who are forthright with their information. These are forceful arguments, and the strict responsibility approach would suggest that the narrower the privilege, the more likely it is that the parties will obtain a fair adjudication of their dispute, since the truth will be revealed and the party with the better case will likely prevail.

Adherents to the strict responsibility approach would contend that its application affords as much or as little respect for confidentiality and the attorney-client privilege as attorneys see fit to give them. If privileged documents are to be treated as "crown jewels,"[26] then inadvertent disclosure suggests that the lawyer has violated her duty. Courts have also noted that the strict responsibility approach is not inconsistent with the policy of the attorney-client privilege, since there is no need for the privilege once the opposing party knows the contents of the privileged communication.[27]

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24. *See, e.g.*, *id.* at 24 (Scalia, J., dissenting) (examining the effect of psychotherapist-patient privilege); Upjohn v. United States, 449 U.S. 383, 395 (1981) (explaining that a broad approach to privileges imposes "severe burdens on discovery"). The utilitarian philosopher Jeremy Bentham also argued against privileges, believing that they thwarted justice and that society would be better off without them, since the guilty would be put in jail. If confidences become less frequent, then "a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present." DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 225 (2d ed. 1998) (citing JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 302-304 (Hunt & Clarke eds., 1827)).

25. RHODE, *supra* note 24, at 227 (quoting William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142 (1988)).

26. *See supra* note 22 and accompanying text.

27. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-65 (E.D. Mich. 1954); *see also* Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (stating that inadvertent disclosure "defeat[s] the policy underlying the privilege" and to find there was no waiver "would do no more than seal the bag from which the cat had already esacaped"); *In re Sealed Case*, 877 F.2d at 980 (stating that the court would "grant no greater protection to those who assert the privilege than their own precautions warrant").

Finally, the lawyer's duty of zealous advocacy is perhaps the strongest argument in favor of the strict responsibility approach. It is not the receiving lawyer's responsibility to maintain the attorney-client privilege for his adversary, and a zealous advocate would perhaps say that anything that has been disclosed is fair game.[28] If an attorney does not want an adversary to use information she considers confidential, she should take care not to disclose it in the first place.

B. Criticism of the Strict Responsibility Approach

Although the strict responsibility approach is easy to apply, it fails to treat the values of professionalism and fairness to the parties seriously. In the view of adherents to the strict responsibility approach, lawyers are no more than mercenaries for their clients—the ultimate good for a lawyer is what the client says and if the client says to use a document that was inadvertently disclosed, that is the end of the story. Professor Monroe Freedman, an outspoken advocate for this type of unrestrained adversarialism,[29] suggests that the client is the ultimate voice in determining whether or not information should be revealed.[30] But when one examines the Model Rules of Professional Conduct (Model Rules) and the rules regarding discovery, one finds that the client's view is only a small part of a much larger story.

The Model Rules place limits on zealous advocacy in the name of fairness and justice. For example, the comment to Model Rule 3.3 states that "[t]he advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal."[31] A lawyer may not counsel a client in criminal or fraudulent conduct.[32] Furthermore, the rules of discovery mandate the exchange of documents pertinent to a lawyer's representation of a client.[33] Even Freedman presumably would not suggest that the client could stop his lawyer from complying with dis-

28. *See* Freedman, *supra* note 17, at 45.

29. *Id.* Professor Freedman is famous in part for his position that criminal defense attorneys have a duty to put their clients on the stand even if they know the client will commit perjury.

30. MONROE H. FREEDMAN, LAYWERS' ETHICS IN AN ADVERSARIAL SYSTEM 27 (1975).

31. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. (2000).

32. *Id.* R. 1.2(d) (1998).

33. *See* FED. R. CIV. P. 26, 37.

covery by withholding consent.[34] But it would leave any conduct not proscribed by a rule subject to the client's whim. The result, as one critic of Freedman 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 have the file which he or she left—even if he or she called and asked!"[35] 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."[36] Adherence to the principle of zealous advocacy at the expense of all else leads to absurd results.

It is more difficult to criticize the strict responsibility approach 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 use of the document seems fair, as perhaps it would lead to the most just result. On the other hand, one can just as easily imagine a situation in which one party inadvertently discloses the amount for which he would be willing to settle—possibly even an amount less than what the case is really worth, or less than the opposing party would have been willing to pay. If the receiving party is the one at fault in the litigation, the strict responsibility approach may lead to an unjust result in those circumstances.

Furthermore, the utilitarian philosophy relied upon to justify narrowing the scope of privileges and used to support strict responsibility concerning inadvertent disclosure is not the only way to examine fairness and justice in the legal system. If one accepts that an overarching goal of the legal system is the preservation of individual rights, then utilitarians are "wrong in supposing that only the guilty benefit from the lawyer-client privilege."[37] There are circumstances in which an innocent party may fear disclosure of informa-

34. It is important to note that various rules of discovery and evidence do serve to circumscribe "zealous" advocacy. 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, 1290-91 (1999).

35. Bertram Perkel, *"Errant Fax" Argument Proves Too Simplistic*, LEGAL TIMES, Feb. 6, 1995, at 33.

36. *See* RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 111-12 (1995).

37. RHODE, *supra* note 24, at 226.

tion despite its being legally helpful.[38] Also, under a rights-based approach to privileges, justice is ensured not because all the information is "out there," but because individual legal rights are safeguarded and "certain specific entitlements including privacy, effective assistance of counsel, and the protection against self-incrimination" are preserved.[39] The rules of privilege ensure the criminally accused the full exercise of their Sixth Amendment right to counsel and their Fifth Amendment right against self-incrimination.[40]

The strict responsibility approach also punishes the client for the attorney's mistake. Although the attorney-client privilege belongs to the client, and ostensibly only the client's intentional action can waive the privilege,[41] most jurisdictions recognize that the attorney can waive the right on behalf of the client.[42] Ironically, although the client's affirmative intent is often required to waive the privilege, the strict responsibility approach allows an attorney's mere negligence to waive the privilege.[43] For example, under the strict responsibility approach, even if the attorney's secretary accidentally pushed the wrong speed-dial button, the client would lose the privilege. It seems unjust to punish the client so harshly because of a third party's clerical mistake.

Furthermore, if the client is aware that his attorney could inadvertently waive the privilege, the client may decide to keep some information to himself, thwarting the policy of the free flow of information that lies behind the attorney-client privilege. The strict responsibility view also fails to recognize that "unprofessional or sloppy conduct may not have been the cause of the disclosure."[44]

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38. *Id.* (citing FREEDMAN, *supra* note 30, at 4 (discussing the case of a battered wife who is afraid to acknowledge shooting her brutal husband because she is unaware that her act would qualify as self-defense)).

39. *Id*.

40. *Id.* However, it should be noted that the rights-based view has been criticized: "[C]oncerns about individual privacy and autonomy [do not] explain the extension of such confidentiality protections to corporations. More fundamentally, it is not self-evident why the rights of clients should always take priority over the rights of others, particularly where health and safety interests are implicated." *Id.* at 226-27.

41. ALASKA RULES OF PROF'L CONDUCT Scope; Jones, *supra* note 34, at 1276.

42. Rogers, *supra* note 6, at 164-65 ("An attorney, designated by the client as his agent to comply with a document production request, is deemed to have implicit authority to waive the client's privilege.") (citing Goldsborough v. Eagle Crest Partners, Ltd., 838 P.2d 1069, 1073 (Or. 1992)).

43. RHODE, *supra* note 24, at 233; *see also* Rogers, *supra* note 6, at 189.

44. Rogers, *supra* note 6, at 190 (citing Wichita Land & Cattle Co. v. Am. Fed. Bank, 148 F.R.D. 456, 457-58 (1992)).

The highly professional and careful attorney and her client are punished for one mistake out of a thousand. Lawyers are humans, and it is unrealistic to expect perfection with every document every time, especially in light of complex litigation with the potential production of hundreds of thousands of documents.

Finally, the strict responsibility approach, when taken together with the broad discovery rules, encourages abuse. Lawyers in complex litigation could request many unnecessary documents in the hopes that a privileged one will slip through the cracks. Discovery costs would rise, and the party with the most money could wear down the opponent with this pretrial tactic. Given that discovery is already often abused, the strict responsibility approach to inadvertent waiver only provides an incentive that exacerbates the problem.

C. The No Waiver Approach

The opposite of the strict responsibility approach is the no waiver approach.[45] Under this approach, the client's intent matters the most, and because a client does not intend to waive the attorney-client privilege when a document is inadvertently disclosed, the privilege is not waived.[46] Like the strict responsibility approach, the no waiver approach is easy to apply, and relieves the judge of any burdens in deciding the issue. However, adopting the no waiver approach would not have the effect of increasing professionalism. Although one may not wish to punish the otherwise meticulous lawyer who has made a mistake, one also may not want to reward the sloppy lawyer who does not take care of her client's sensitive documents. However, lawyers still have an interest in protecting privileged documents from adversaries. Although those documents may not be admissible as evidence, the information contained in them can be used for strategic purposes during trial.[47]

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45. *See, e.g.*, Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261 (D. Del. 1995); Fleet Nat'l Bank v. Tonneson & Co., 150 F.R.D. 10 (D. Mass. 1993); Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co., 836 F. Supp. 183 (S.D.N.Y. 1993); Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626 (W.D.N.Y. 1993).

46. Bruckner-Harvey, *supra* note 6, at 391 ("The rationale behind this approach is that waiver should be defined as the 'intentional relinquishment or abandonment of a known right [and] [i]nadvertent production is the antithesis of that concept.'") (quoting Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982)).

47. *Id.* at 392 (stating that "while a recipient may not be allowed to keep the document or introduce it into evidence, he still receives a windfall from the mere knowledge of its contents").

Because the no waiver approach tracks the intent of the client, it appears more fair to the parties than the strict responsibility approach, and it has a higher regard for confidentiality and for the attorney-client privilege. In contrast to the strict responsibility approach, under the no waiver approach, the client is not punished for his attorney's negligence. Thus, the no waiver approach avoids what one court called the "harsh results out of all proportion to the mistake of inadvertent disclosure."[48] The no waiver approach has been held to further the policy of the attorney-client privilege by ensuring that the client "remains free from apprehension that consultations with a legal advisor will be disclosed."[49] One court has reasoned that "[a]n uncertain privilege is . . . little better than no privilege at all"[50] and that the no waiver approach is necessary to "serve the interests of justice by encouraging clients to consult with counsel free from the apprehension of disclosure."[51] Clearly, this approach values confidentiality and the attorney-client privilege more than it does the open search for truth. It is thus more of an individual rights-based approach to litigation than a utilitarian approach.

The no waiver approach does not hamper zealous advocacy any more than the attorney-client privilege does.[52] Although the receiving attorney may not introduce inadvertently disclosed documents into evidence, this is no greater an imposition than if the documents remained undisclosed.[53] Furthermore, under this approach, receiving attorneys may still use the information gleaned from those documents in preparing strategies on behalf of their clients.[54]

D. Criticism of the No Waiver Approach

Like the strict responsibility approach, the no waiver approach has also been criticized. The premium it places on confidentiality and the preservation of the attorney-client privilege comes at the cost of lawyer responsibility.[55] If there is no threat of waiver or sanctions, the lawyer has no incentive to protect her client's confi-

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48. *Mendenhall*, 531 F. Supp. at 955.

49. *Berg Elecs.*, 875 F. Supp. at 261-62 (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

50. *Id.* at 262 (citing *In re* von Bulow, 828 F.2d 94, 100 (2d Cir. 1987)).

51. *Id*.

52. *See* Bruckner-Harvey, *supra* note 6, at 392.

53. *Id.*

54. *Id.*

55. *See* Rogers, *supra* note 6, at 191.

dential documents.[56] The result is a license for sloppy management. The lawyers could actually save their clients money by not taking the time to ensure that privileged documents are not disclosed. Lawyers may also not be as vigilant in maintaining client confidences, since there are no evidentiary consequences in the event of disclosure.[57] Although the client may have recourse if privileged material is disclosed,[58] the client must then bear the burden of enforcement. Moreover, under the no waiver approach, the burden is placed on the recipient of the privileged materials to maintain the confidentiality of an opponent's attorney-client privilege.[59] Surely, an attorney cannot be responsible for guarding the privileges of her adversaries. Under the no waiver approach, even if the sending attorney did not take the relatively minor precaution of attaching a "confidential" cover sheet to the missent document, the receiving attorney would have to assume the document was not for her and try to "forget" the material she had read before discovering that the document had been missent.[60] Of course, the lawyer would have to "forget" the material only if an ethical rule mandated it, because the rules of evidence allow a lawyer to use the facts contained therein, while prohibiting only the introduction of the document into evidence. Zealous representation, then, is watered-down on both sides of the litigation, since one lawyer has fewer incentives to protect privileged documents, and the other is prohibited from using inadvertently disclosed evidence for the client's benefit at trial.

E. The Balancing Test Approach

The balancing test evaluates the circumstances surrounding the inadvertent disclosure to determine whether the attorney-client privilege has been waived.[61] In the event of inadvertent disclosure, courts using this approach often apply the five-factor test set out in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, which considers: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the

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56. *Id.*

57. *Id.*

58. Dorthea Beane & Heath Nailos, *Inadvertent Disclosure of Attorney-Client Privileged Material: Putting the Horse Back in the Barn*, FLA. B.J., Oct. 1995, at 67.

59. *See* Rogers, *supra* note 6, at 191.

60. *See* Beane & Nailos, *supra* note 58, at 67.

61. *See generally* United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995); Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993); Rotelli v. 7-Up Bottling Co. of Phila., 32 Fed. R. Serv. 3d 82 (E.D. Pa. 1995).

overarching issue of fairness and the protection of an appropriate privilege, judged against whether the privilege is guarded with care and diligence or negligence and indifference.[62] All of these factors tend to bleed together, but they provide useful guidelines for assessing whether the attorney-client privilege was waived.

In examining the first *Lois Sportswear* factor—the reasonableness of the precautions taken—courts look at the mechanics of the document disclosure, considering whether the disclosing party had a screening process in place to sort out privileged material, how the screening process was staffed, and what kind of legal expertise the staffers possessed.[63] Thus, this factor attempts both to maintain incentives for the attorney to protect the privilege and to avoid punishing the client for attorney negligence. The more careful the attorney, the less likely the court is to find waiver.

As to the second factor—the time taken to rectify the error—the less time taken, the more likely the court is to maintain the privilege.[64] Some courts begin their analysis at the time of the inadvertent disclosure,[65] while others begin when the disclosing party realizes the mistake.[66] If the receiving attorney refuses to return the document upon request, the usual way for an attorney to address the inadvertent disclosure is a motion for protective order.[67] Thus, the second factor is a way of measuring attorney negligence—the more prompt the action, the less negligence the court will likely find.

The third factor, unique to the context of document production during discovery, examines the scope of the discovery request. The greater the scope of discovery, the more lenient the court will likely be when there is inadvertent disclosure.[68] The number of inadvertent disclosures is often compared to the number of docu-

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62. 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

63. Rogers, *supra* note 6, at 172 (citing *Lois Sportswear*, 104 F.R.D. at 105*; In re* Grand Jury Investigation, 142 F.R.D. 276, 279-80 (M.D.N.C. 1992); and Fed. Deposit Ins. Corp. v. Marine Midland Realty, 138 F.R.D. 479, 483(E.D. Va. 1991); *see also* Jones, *supra* note 34, at 1273 n.62 ("In nearly every case where the court determines that reasonable precautions were in place, the privilege is maintained. In every case where the court determines that reasonable precautions were not taken, the privilege is waived.").

64. *See* Jones, *supra* note 34, at 1273-74 n.6.

65. *See, e.g.*, Central Die Casting & Mfg. Co. v. Tokheim Corp., No. 93-C-7692, 1994 U.S. Dist. LEXIS 11411, at *14 (N.D. Ill. Aug. 15, 1994).

66. *See, e.g.*, Edward Lowe Indus. v. Oil-Dri Corp., No. 94-C7568, 1995 U.S. Dist. LEXIS 9580, at *12 (N.D. Ill. July 10, 1995).

67. *See* Rogers, *supra* note 6, at 174.

68. *See* Jones, *supra* note 34, at 1274 n.64.

ments produced.[69] The case of *Transamerica Computer Co., Inc. v. International Business Machines Corp.*[70] provides a good illustration. In that case, a pretrial order accelerated document production requiring IBM to inspect and copy "approximately 17 million pages of documents" for their opponents within a three-month period.[71] Despite a "herculean effort to review and produce the material,"[72] IBM inadvertently disclosed 1,138 documents totaling approximately 5,800 pages.[73] Although the court resolved the issue by holding that the attorney-client privilege is not waived when a party is compelled to produce documents,[74] in dicta, the court strongly suggested that the extent of the production and the number of documents inadvertently disclosed are factors to consider in determining the reasonableness of the lawyer's precautions.[75]

In examining the fourth factor—the extent of the disclosure—courts look at whether the receiving attorney has learned the contents of the document or has merely learned of the document's existence.[76] If the attorney has only limited knowledge of the contents, there is a greater chance that the court will maintain the privilege.[77] In other words, there is an incentive for the disclosing attorney to act as quickly as possible, before the opponent has examined the document.

The fifth and final *Lois Sportswear* factor is a catch-all provision that looks to underlying considerations of fairness. At this stage of the inquiry, courts will often examine the unique circumstances of a particular case that would justify either maintaining or waiving the privilege.[78] Courts have generally employed the fairness doctrine as a means of considering the policy issues underlying the operation of the attorney-client privilege. For example, in one case, the court concluded that the attorney-client privilege had been waived as to the contents of a number of inadvertently disclosed letters where there was no evidence that the disclosing attorney had taken any precautions to prevent inadvertent disclosure and had not previously objected to the use of those letters by the

69. *Id.*
70. 573 F.2d 646 (9th Cir. 1978).
71. *Id.* at 648.
72. *Id.*
73. *Id.* at 650.
74. *Id.* at 650-51.
75. *Id.* at 652.
76. Rogers, *supra* note 6, at 173-74.
77. Jones, *supra* note 34, at 1274 n.65.
78. *See id.* at 1274 n.66.; *see also* Rogers, *supra* note 6, at 175.

opposing attorney in depositions and for other purposes.[79] The court concluded that it would be unfair to reward the careless behavior of the disclosing attorney by maintaining the privilege.[80] In another case, however, the court determined that the privilege had not been waived because the court believed that it would be unfair to punish the client for its attorney's mistake where the attorney had made every effort to prevent disclosure of privileged information and had been diligent in seeking to rectify the inadvertent disclosure.[81] Both cases indicate that courts tend to use the fairness factor to justify their "gut" feelings about the fairness of the situation and to reward attentive attorneys and to punish sloppy lawyering.

The balancing test is not as easy to apply as the other tests, and the closer one gets to the gray areas, the less likely one would be able to predict a court's ruling. But what the balancing test lacks in ease of application, it appears to make up for in the areas of professionalism and fairness to the parties. Because the test focuses on the actions of the disclosing attorney,[82] there are powerful incentives for attorneys to exercise the utmost care and professionalism when screening documents, to remedy any inadvertent disclosures, and to be cautious about the number of documents produced.[83] Thus, the balancing test attempts to maintain high levels of professionalism while allowing room for human error. Attorneys who are careful are rewarded for their care, and clients are protected from negligence on their attorney's part.[84]

Furthermore, the balancing test retains a high level of respect for both the attorney-client privilege and the lawyer's duty to zealously represent the client. The balancing test approach promotes "fair administration of each case . . . [and has] systemic benefits to society."[85] Not only are clients assured that they will not be punished for potentially minor human errors, but careless attorneys are also not relieved of the consequences of their carelessness "if the circumstances surrounding the disclosure do not clearly demon-

79. Edwards v. Whitaker, 868 F. Supp. 226, 229 (M.D. Tenn. 1994).

80. *Id.*

81. Monarch Cement v. Lone Star Industries, Inc., 132 F.R.D. 558, 560 (D. Kan. 1990).

82. *See* Rogers, *supra* note 6, at 194-97.

83. *Id.* at 195. Rogers asserts that the balancing test should discourage document "dumping" as a litigation strategy, since such an attempt could be examined under the "overall fairness" prong of the test, and the more documents "dumped," the more likely there will be inadvertent disclosures. *Id.*

84. *Id.* at 196.

85. *Id.*

strate that continued protection is warranted."[86] Furthermore, the balancing test approach protects receiving parties by assuring them that they will not be deprived of documents in their possession that are not marked confidential simply because a lawyer later wants to claim that they are confidential, as would be the case under the no waiver approach. Derivative use of the information by the receiving party is permissible under the balancing test approach, as well. If a court finds that the privilege has been waived, the document itself will be admissible into evidence—the same result as under the strict responsibility approach.

F. Criticism of the Balancing Test

The central criticism of the balancing test is its unpredictability.[87] 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."[88] 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. The balancing test approach can also result in higher litigation costs, since the factors would all be "subject to a hearing and litigation, which would require the production of witnesses and evidence."[89] The attorneys would be forced to spend time and resources researching and preparing for trial on the issue of waiver, rather than on the central issues of the case, and these costs would be passed on to the client. Furthermore, one could argue that such procedures would result in more distrust of the legal system as a whole, since lawyers would be seen as quibbling over secondary issues instead of pursuing real justice.[90]

G. Summary

Under all three of the approaches discussed above, the inadvertently disclosed document may be used by the receiving attorney: the strict responsibility approach would allow the document to

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86. Joseph S. Stuart, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know?*, 37 SANTA CLARA L. REV. 547, 561 (1997) (quoting Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993)).

87. *See* Jones, *supra* note 34, at 1277 (observing that "[b]ecause of the fact-specific nature of this test, no rule of general applicability or presumption regarding waiver has evolved").

88. *Id.*

89. Bruckner-Harvey, *supra* note 6, at 391.

90. *See* Jones, *supra* note 34, at 1257-60 (examining the reasons underlying the public's heightened awareness and disdain for the legal profession).

be admitted into evidence, and the other two approaches would allow derivative use of the document to pursue facts and leads in preparation for trial. None of these approaches is entirely satisfactory, yet they are the approaches the courts have taken and lawyers must take heed of whichever approach has been adopted by a particular jurisdiction.

III. GUIDELINES GOVERNING THE RECEIVING LAWYER'S ACTIONS

The rule of waiver adopted by a state will certainly inform the receiving attorney's decision regarding what to do with an inadvertently disclosed document, but that choice is ultimately an ethical issue and cannot solely depend on whether waiver has occurred. While the rules of evidence would permit or even encourage the use of inadvertently disclosed documents, the rules of ethics may ask that the lawyer behave differently than the rules allow. The ABA has issued a formal opinion[91] suggesting the proper action for the receiving attorney, and various states have issued opinions on the same topic. Other states have drafted standards of professionalism or standards governing litigation conduct. These will be discussed in turn below.

A. The ABA Opinion

The ABA's Formal Opinion 92-368[92] begins by acknowledging that "[a] satisfactory answer . . . cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules."[93] The opinion then states that the receiving lawyer should not examine the inadvertently disclosed materials, but should notify the sending lawyer of the mistake and follow the sending lawyer's instructions as to what to do with the documents.[94] The ABA thus wants lawyers to behave with restraint, forsaking the potential rewards offered by the rules of evidence. If the underlying rule were either

91. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992), *reprinted in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 155 (1996) [hereinafter *Formal Op. 92-368*]. This opinion addresses what to do in the event of inadvertent disclosure of documents that "appear on their face to be subject to the attorney-client privilege or otherwise confidential." *Id.* This Note is not concerned with a subsequent opinion (and commentary and state opinions) in which the ABA addressed what an attorney should do with *unsolicited*, privileged documents.

92. For a good summary of the ABA opinion, see Jones, *supra* note 34, at 1267-72.

93. *Formal Op. 92-368*, *supra* note 91, at 155.

94. *Id.*

the no-waiver or the balancing test, the receiving attorney would be allowed to make derivative use of the privileged document, although that same document would be inadmissible as evidence. However, the ABA also places a premium on confidentiality, and the opinion notes that the loss of confidentiality is too high a price for the client to pay for a lawyer's "mere slip."[95] Without the assurance that documents will be kept confidential, the important function of full and frank disclosure between the client and the attorney will be harmed. The ABA's premium on confidentiality leads it to preclude derivative use of the document, even if it would be inadmissible at trial.

The ABA opinion refutes the notion that the strict responsibility approach will encourage lawyers to be more careful, reasoning that there are other incentives for attorneys to keep their clients' secrets, including Model Rule 1.6.[96] The committee also acknowledges the "persistence of human frailty,"[97] and suggests that the threat of punishment will have no effect on whether a person makes a mistake.

In response to the idea that there is nothing left to protect once a document has been disclosed, the ABA opinion contends that this is a moot question if the receiving attorney becomes aware of the privileged documents before reading them.[98] Even if the receiving lawyer has read the documents, the ABA maintains that there is value in preserving whatever confidentiality remains.[99]

Finally, the ABA opinion emphasizes the role of professionalism and the idea of "what goes around comes around."[100] Although zealous advocacy may counsel the use of inadvertently disclosed documents, the ABA suggests there are equal advantages to doing the opposite.[101] Among these is the idea that, while the individual lawyer may benefit from the receipt of materials in one case, he may be the disclosing party the next time around.[102] There is also

95. Jones, *supra* note 34, at 1268.

96. Model Rule 1.6 provides, in pertinent part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

97. *Formal Op. 92-368*, *supra* note 91, at 157.

98. *Id.* The ABA gives an example: "If the facsimile cover sheet says 'to All Defense Counsel' and the receiving lawyer represents the plaintiff, the confidentiality can be completely protected so long as the lawyer refrains from giving in to temptation." *Id.*

99. *Id.*

100. Jones, *supra* note 34, at 1269.

101. *Id.* at 1268-69.

102. *Formal Op. 92-368*, *supra* note 91, at 161.

the danger that the judge will order new proceedings upon finding out that one party based her strategy on missent documents.[103] Finally, the opinion notes that "the credibility and professionalism inherent in doing the right thing can, in some significant ways, enhance the strength of one's case, one's standing with the other party and opposing counsel, and one's stature before the court."[104] The ABA's Formal Opinion reflects the opinion of one commentator, who asserts that "[i]n an interdependent world, the only way to ensure respect for our own commitments is to provide a similar respect for the commitments of others."[105]

B. Criticism of the ABA Opinion

Professor Monroe Freedman, an outspoken opponent of the ABA view, emphasizes the lawyer's duty to zealously represent her client over the importance of confidentiality.[106] He asserts that Model Rule 1.6 binds the receiving lawyer to conceal receipt of privileged or confidential documents from opposing counsel because doing otherwise would be tantamount to revealing information relating to the representation of a client without the client's consent.[107] Only if the client consents can the lawyer send the document back to opposing counsel, but even then Freedman hopes "the lawyer would first make his own determination of whether the document is in fact privileged."[108] Even if there is a cover sheet that names both the intended recipient and sender and says "confidential" in bold letters across the front, Freedman argues that one cannot know a document is privileged unless one reads it because "even a faxed invitation to lunch" is likely to have the same information on the cover sheet.[109] Ultimately, in Freedman's opinion, the ABA rule "holds that you should give more weight to your adversary's obligation of confidentiality than to your own obligation of zealous representation."[110]

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103. *Id.* The ABA gives two examples. First, a Baltimore judge ordered the jury stricken and a new jury selection process upon learning that the plaintiff based jury selection on a document inadvertently sent by the defendant. Second, the law firm of Akin Gump Strauss Hauer & Feld, LLP withdrew from a case due to its exposure to confidential government documents.

104. *Id.*

105. RHODE, *supra* note 24, at 12.

106. *See* Freedman, *supra* note 17, at 45.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

C. Selected State Opinions

Various state ethics opinions generally agree with either the ABA opinion or the view espoused by Professor Freedman. Below are brief examples of states that have adopted each of these competing approaches.[111] It should also be noted that, while the opinions differ as to whether the receiving lawyer may use the documents, the opinions are uniform in requiring the receiving attorney to notify the disclosing attorney of the mistake. Presumably, this maintains the fair practice of allowing each side to adequately prepare for trial.

1. *Virginia Legal Ethics Opinion No. 1702*. On November 24, 1997, the Virginia Ethics Committee published an opinion based on virtually the same fact pattern as the ABA opinion.[112] While acknowledging there is no specific rule to guide the receiving lawyer's conduct, the committee stated that "[t]he absence of an explicit Disciplinary Rule does not create an ethical vacuum."[113] Furthermore, it emphasized that legal ethics is "fraught with gray areas" that cannot be adequately covered by rules, and that under such circumstances, "the ethical polestar is conduct that reflects credit on and inspires public confidence in and respect for the integrity of the legal profession."[114] Like ABA Formal Opinion 92-368, the Virginia opinion places a premium on confidentiality and notes that client confidentiality "should not hinge on someone pushing the wrong number on a facsimile machine or putting documents in the wrong envelope."[115] Even where the opposing attorney has read beyond the confidentiality notice on the cover page, the Vir-

111. For opinions that the receiving lawyer has no ethical duty to return the documents, see D.C. Legal Ethics Op. 256 (1995) (advising that a lawyer may use the documents if she read them before discovering they were privileged); Ky. Ethics Op. E-374 (1995) (holding that a lawyer will not be punished for using inadvertently disclosed documents); Me. Ethics Op. 146 (1984) (stating the receiving attorney was permitted to use the documents as allowed by the rules of procedure and evidence).

For opinions emphasizing the lawyer's duty to notify the sender and return the documents, see Ala. State Bar, Office of General Counsel, Informal Op. (1996); D.C. Legal Ethics Op. 256 (1995) (advising that a lawyer should follow the ABA opinion if she has not reviewed the materials); Fla. Bar Op. 93-3 (1994).

112. Va. Legal Ethics Op. 1702 (1997).

113. *Id.*

114. *Id.*

115. *Id.*

ginia opinion maintains that the document should be returned once it is deemed privileged or not intended for the lawyer.[116]

2. *Kentucky Formal and Informal Opinions KBA E-374*. The Kentucky opinion agrees with ABA Formal Opinion 92-368 in stating that "when a lawyer receives materials under circumstances in which it is clear that they were not intended for the receiving lawyer, the lawyer should refrain from examining the materials, notify the sender, and abide by the sender's instructions regarding the disposition of the materials."[117] However, the Kentucky opinion makes clear that if receiving attorneys do not behave this way, they should not be disciplined, because their loyalty is to their clients, and not to opposing attorneys.[118] Instead, lawyers are strongly encouraged to return the documents unread unless they believe they can make a good faith argument that the disclosure waived the attorney-client privilege as to the erroneously sent documents.[119]

The benefit of this approach is that it maintains the allowance of derivative use of a document under the rules of evidence while providing an aspirational guide for lawyers who receive a document that is clearly not for them and is clearly confidential on its face. Like a pro bono rule,[120] lawyers are strongly encouraged to behave a certain way, but will not be punished for failing to do so. The Kentucky opinion emphasizes professionalism while also allowing room for traditional notions of zealous advocacy, recognizing both the attorney's ethical obligations within the profession and professional obligations to the client.[121]

3. *District of Columbia Legal Ethics Opinion 256*. The District of Columbia opinion draws sharper lines than the Kentucky opinion depending on whether the receiving lawyer knows that the documents are confidential. Where there is no indication that the document is confidential and the receiving attorney reads it in good faith, there is no ethical violation.[122] To find otherwise would place an unreasonable burden on the receiving lawyer and would undermine the usual assumption that documents delivered in the normal

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116. *Id.*

117. Ky. Formal and Informal Op. KBA E-374 (1995).

118. *Id.*

119. *Id.* The opinion goes on to emphasize that such an argument is "made at the risk of exclusion of evidence and disqualification." *Id.*

120. ALASKA RULES OF PROF'L CONDUCT R. 6.1 cmt. (2001-2002); *see also* MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 11 (2000).

121. Ky. Formal and Informal Op. KBA E-374 (1995).

122. D.C. Legal Ethics Op. 256 (1995).

course of business are meant to be delivered.[123] Under the District of Columbia opinion, the lawyer may use the documents and the inadvertent disclosure would constitute a waiver of the attorney-client privilege.[124] Indeed, the District of Columbia states that to suggest otherwise would compromise the lawyer's duty of zealous representation and would create a conflict of interest.[125]

However, the District of Columbia opinion reaches a different conclusion where it is clear that the document is confidential, and the lawyer so knows before reading it. Where the lawyer has knowledge of the inadvertently disclosed document's confidentiality before reading it, it is the lawyer's ethical duty to seek the sending attorney's guidance and to return the material unread.[126] The District of Columbia reasons that in such a case, the document is like a wallet found on the street: if "the finder knows that it does not belong to him, and [appropriates] to himself the wallet's contents, the finder engages in the tort of conversion."[127] Furthermore, there would be no "disclosure," since the receiving attorney has no knowledge of the document's contents.[128]

IV. PHILOSOPHICAL JUSTIFICATIONS

In addition to the reasoning behind the underlying policies of the rules, various philosophical justifications can be advanced in favor of particular approaches to inadvertent disclosure situations. For purposes of brevity, and because the utilitarian justification was touched on above in discussing the strict responsibility approach,[129] this Note will examine only two: a pragmatic, utilitarian theory of justice, and the theory of distributive justice.

A. Pragmatism

In the legal world, pragmatism's most famous advocate is Oliver Wendell Holmes. The school of Legal Realism, an application of pragmatism to the realm of legal thought, has been influen-

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *See supra* Parts II.A and II.B.

tial in American legal theory[130] and has also enjoyed a recent resurgence in legal scholarship.[131]

Under the pragmatic view of law, the debate about who is "right" and who is "wrong" in any universal sense of those words would be abandoned, and instead the focus would be on the practical results of competing positions.[132] The pragmatist "turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins."[133] Instead, the pragmatist turns "towards concreteness and adequacy, towards facts, towards action, and towards power."[134] In other words, pragmatism does not "abstract persons and issues from the flow of history . . . so that real-world issues can be reduced to problems in a moral algebra."[135]

Under this rubric, one could argue that a guideline based on the ABA opinion is justified because the practical results are more beneficial to the legal system as a whole than allowing the receiving party to keep and use the documents. Not only would client confidences be protected against the everyday slips caused by human frailty, but also the goal of societal trust in the system would be furthered. Moreover, a higher standard of professionalism would result; the outcome of cases would depend on the relative strength of the parties and the skill of the attorneys within the adversarial system, rather than luck or misfortune. Expenses would also decrease, as the need to litigate over inadvertent disclosure and attorney behavior would decrease.

B. Distributive Justice

Another relevant ethical position is that of John Rawls's theory of distributive justice. The theory of distributive justice asks the individual to remove him or herself from the fray of interested behavior and decide what would be the best way in which to obtain justice for the greatest number of people. While not a legal theory, *per se*, it is a way of approaching the creation of legal rules and forming solid policy grounds for their enactment.

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130. S*ee, e.g.*, KARL LLEWELLYN, THE BRAMBLE BUSH (1930); Roscoe Pound, *A Call For a Realist Jurisprudence,* 44 HARV. L. REV. 697 (1930); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 467 (1897).

131. *See, e.g.*, STANLEY FISH, THE TROUBLE WITH PRINCIPLE (1999); RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

132. *See* William James, *What Pragmatism Means, in* PRAGMATISM 93, 94-96 (Louis Menand ed., 1997).

133. *Id.* at 97.

134. *Id.*

135. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 11 (1994).

The goal for Rawls is not a uniform moral state, but one which actually avoids "disputed philosophical, as well as disputed moral and religious, questions . . . not because these questions are unimportant or regarded with indifference, but because we think them too important and recognize that there is no way to resolve them politically."[136] Because of the divergence of views, and the difficulty in resolving them politically, Rawls finds it wise to

> focus on such questions and to examine whether some underlying basis of agreement can be uncovered and a mutually acceptable way of resolving these questions [can be] publicly established. Or if [they] cannot be fully settled, as may well be the case, perhaps the divergence of opinion can be narrowed sufficiently so that political cooperation on a basis of mutual respect can still be maintained.[137]

In order to find a mutually acceptable way of arriving at basic principles that will govern a society, Rawls uses the theoretical device of the original position, in which all parties are behind a "veil of ignorance."[138] The veil of ignorance is meant to remove "the bargaining advantages which inevitably arise within background institutions of any society as the result of cumulative social, historical, and natural tendencies," because these tendencies "should not influence an agreement on the principles which are to regulate the institutions of the basic structure itself from the present into the future."[139] The veil of ignorance prevents one from knowing what one's future position in society will be. Because bargaining positions are eliminated, one must act so as to narrow the diversion of religious, moral, or philosophical positions in such a way that the least amount of discord will result.

In applying this view 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 announced in 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 the veil of ignorance.

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136. John Rawls, *Justice as Fairness: Political Not Metaphysical*, *in* KEY CONCEPTS IN CRITICAL THEORY: JUSTICE 48, 53 (Milton Fisk ed. 1993).

137. *Id*. at 50.

138. *Id.* at 57.

139. *Id.*

Of course, one could also argue from the theory of distributive justice that the person who would be worst off is the party whose lawyer does not believe in her case and is not taking the role of advocate seriously. For example, a criminal defendant with an appointed attorney would want the rules to be such that his lawyer should read the inadvertently disclosed document, even if it would be inadmissible under the waiver rules. An ethical rule asking the attorney to return the document unread is giving that attorney yet another chance to fail in her duty of zealous advocacy on behalf of her client. In other words, it is an invitation for the lawyer to shirk her duty to the client in favor of a nebulous ethical goal.

This criticism is not entirely fair, however. Just because lawyers are asked not to read inadvertently disclosed documents does not mean they do not take their clients' cases seriously. Moreover, if lawyers are open to shirking their duties in representing their clients, they will do so even in the absence of a rule asking them not to read inadvertently disclosed documents. Such disclosures are not the norm, so the assumption that asking an attorney not to read an inadvertently disclosed document also asks her to ignore her duty of zealous advocacy does not recognize that advocacy encompasses far more than reading confidential documents from the opposing side. Indeed, many cases run their full course without anyone encountering this particular ethical problem. Asking a lawyer to refrain from reading an inadvertently disclosed document is not the same as asking a lawyer to shirk her duty of zealous advocacy.

Furthermore, these situations involve documents that a lawyer would not have access to under normal circumstances; lawyers are as free to advocate on behalf of their clients within the confines of ethical rules and substantive law as they would have been had the document never been disclosed. Also, by establishing a reputation for "doing the right thing," one also establishes a reputation for being more than a mere "hired gun" who is paid to say whatever the client wishes.

But the "hired gun" view is not uncommon. This view mandates use of the document for a lawyer who ostensibly has the client's interests in mind. The hired gun approach assumes that the lawyer's role is subsumed into the client's wishes. In other words, the lawyer remains "neutral," and the "moral task is to act in such a way as to protect clients from the influence of others, so that clients will make their own moral rules, be their own rulers."[140]

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140. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 17 (1994). The hired gun view was famously stated by Lord Brougham in the 1821 trial of Queen Caroline:

However, this view is not universally accepted, and it grants too much weight to zealous representation without regard to a lawyer's obligation to the legal system as a whole. Although the claim is that the "hired gun" view is neutral,

> [t]o decline to take a moral stance is in itself a moral stance and requires justification as such. Thus the critical question is not by what right do lawyers impose their views, but by what right do they evade the responsibility of all individuals to evaluate the normative implications of their acts? Alternatively, by what right do clients circumscribe counsels' ethical duty?[141]

As a result, the hired gun attorney is, at best, a divided person, and at worst, one with ready-made excuses for immoral behavior.[142] One can think of cases where we would not want lawyers to substitute their own personal discretion for that of their clients. For example, one would hope that an attorney whose underage female client asks to be placed in a mentally, physically, or sexually abusive home would refuse the request. Perhaps this is "shirking" one's duty for ill-defined ethical principles, but it may also be the best result for that client. In other words, lawyers can be zealous advocates on behalf of their clients without subsuming their own morality into that of their clients.

V. PROPOSED GUIDELINE FOR ALASKA

Neither the Alaska courts nor the Alaska Bar Association has had occasion to officially consider the issues presented by inadvertent disclosure of privileged documents.[143] In accordance with principles of confidentiality, professionalism, and zealous advocacy, as

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> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Id. at 18.

141. *Id.* at 28-29 (quoting Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 623 (1985)).

142. *Id.* at 29.

143. However, the Alaska Bar Association has considered the question of whether an attorney is required to notify opposing counsel upon receipt of privileged information where the disclosure was *intentional*. In Ethics Opinion No. 97-1 (1997), a wife in a divorce case purposely sent her husband's attorney confidential documents without informing her attorney. Because the wife had acted intentionally, there was no inadvertent disclosure and no obligation arose on the part of the husband's attorney to inform opposing counsel of the wife's actions. The Alaska Bar Association, however, explicitly declined to express an opinion on the duties of a receiving attorney in an inadvertent disclosure situation. *Id.*

well as the various philosophical points of view discussed above, Alaska would be wise to adopt a general non-binding guideline, much like that expressed in Kentucky's Opinion E-374, in which the receiving lawyer is strongly encouraged to return the documents unread. Although the underlying evidence rule of privilege may allow derivative use of the document, the ethical rule would ask the lawyer to refrain from doing so where it is clear that the document is not intended for her and where it is facially clear that the document is confidential. Against the backdrop of the balancing test approach to inadvertent waiver of the attorney-client privilege, such an approach would allow the most nuance, fairness, and respect for all participants in the legal system.

A. The Underlying Rule of Waiver

When framing the proper approach for Alaska, one must take into account the underlying rule of waiver against which the ethical considerations will function. Rules of waiver often conflict with guidelines that govern the behavior of the receiving attorney.

If the state adopts the strict responsibility approach, the receiving lawyer is essentially absolved of any responsibility and has no incentive to return the document or even notify her adversary. If the strict responsibility approach is adopted, a rule requiring notification should also be adopted in order to avoid any surprises in the litigation process. Since the receiving lawyer can use the document, it is only fair to notify the attorney who inadvertently disclosed the document that it is going to be used at trial, so that the attorney can alter her strategy to fit the new situation.

Adoption of the strict responsibility approach would require Alaska to change its rules surrounding waiver of the attorney client privilege and the work product privilege. Currently, the Alaska Rules of Professional Conduct assert that the "attorney-client privilege is that of the client and not of the lawyer."[144] If Alaska chose the strict responsibility approach, it would de-emphasize the client's intent in waiving the attorney-client privilege, and allow the attorney to waive it through mere negligence. The strict responsibility approach would have the benefit of clarity, would provide clear guidelines to lawyers about their duties upon receiving inadvertently disclosed documents, and would allow attorneys greater leeway to be zealous advocates on behalf of their clients.

The strict responsibility approach also has broad complications. A missent fax is only one way for a lawyer to disclose a document inadvertently. What if a lawyer mistakenly leaves a con-

144. ALASKA RULES OF PROF'L CONDUCT Scope (1999).

fidential document on the table in opposing counsel's building after a deposition? Does it matter if the document is in a folder? A sealed envelope? A briefcase? One could argue, along Professor Freedman's lines, that the lawyer has to look inside the briefcase and read the documents before she can know to whom they belong and whether they are confidential.[145] Of course, even if the briefcase were left, the "finding" attorney would have to ask her client before she could even notify the "leaving" attorney, and even then she cannot return it without her client's permission. This surely is too ridiculous a result to let stand. It also does not take adequate notice of human frailty and the practical reality that lawyers practice in a fast-paced environment, sometimes with hundreds of thousands of documents and often with the assistance of support staff who may not possess legal training or knowledge of the relevant ethics rules. Sometimes things will be missed or forgotten. The strict responsibility rule would do nothing to prevent such actions, because the actions are inadvertent in the first place. Even the most assiduous of attorneys will make mistakes sometimes. The harshest of punishments cannot make them more careful, and this rule would punish attorneys for being nothing more than human. Ironically, Freedman's emphasis on the client of the receiving attorney ignores the client of the sending attorney. Furthermore, Freedman also ignores the tension between the lawyer's obligation to zealously represent her client with the rules limiting the extent to which the lawyer can exercise that duty.[146]

Also, the notion that the recipient cannot know a document is confidential or not intended for her without reading it is overly simplistic. If the usual "To" and "From" are on the cover sheet, one would not have to get past the top page of the document to know it was not intended for her. Once this is discovered, there is no reason to keep reading, even if it is something as mundane as a lunch invitation—unless, of course, zealous advocacy overrides the common sense notion that one should not read what is not intended for her.

If Alaska adopted the no waiver approach to inadvertent disclosure, it would likewise have the benefit of clarity. But, like the strict responsibility approach, the no waiver rule fails to account for the nuances of different levels of care and lacks incentives for the receiving attorney to notify her adversary of receipt of the document. If the receiving lawyer knows the document will not be allowed into evidence, there is no reason for her not to glean as

145. Freedman, *supra* note 17, at 45.

146. *Formal Op. 92-368*, *supra* note 91, at 155.

much information as possible to help prepare an opposing strategy for trial.

While imperfect, the balancing test approach is the best option to use to frame such a rule. The difficulty in writing an ethical rule with the balancing test in the background is the tension between the elements of the test and the potential avenues of conduct for the receiving lawyer. The receiving lawyer may not wish to reveal that she has the document, and may not seek judicial review of the situation. If the disclosing attorney is still unaware of the mistake, she will not be able to raise the issue with the court unless she learns of the disclosure from a means other than opposing counsel. While this argument has some power, it actually illustrates one instance where the disclosing attorney may have waived the privilege under the balancing test. The implication is that making a rule requiring the receiving attorney to notify the disclosing attorney of the mistake is unnecessary, since the burden is on the disclosing attorney to recognize and rectify the error.

In the end, however, no matter what approach the court takes to waiver, it will not be able to provide adequate incentives to influence attorney behavior in favor of not reading and returning the document. That incentive can be provided only by an ethical rule, which will suffer tension with the evidentiary allowance and even encouragement of derivative use of the inadvertently disclosed document.

B. Proposed Guideline for Alaska

Oddly enough, the best rule is no rule at all.[147] Alaska should adopt a non-binding guideline outlining a general set of expectations for attorney conduct during the course of litigation. This guideline would be based on the ABA's recommendation that states adopt a Lawyer's Creed of Professionalism.[148] As noted above, any binding rule requiring a lawyer to refrain from reading an inadvertently disclosed document would conflict with the evidentiary rules of privilege that allow at least derivative use of such

147. *See generally* Jones, *supra* note 34 and accompanying text.

148. ABA Standing Comm. on Professionalism, Annual Meeting 1995, Recommendation and Report. The Standing Committee recommended that states adopt standards by which lawyers recognize a duty to both clients and to a system of justice, a duty of fairness and cooperation to all parties involved in the litigation, and to "a higher level of conduct than observance of rules of professional conduct." *Id.* These standards would be aspirational, and "the recommendation encourages practicing lawyers and the judiciary to identify standards that go beyond the mere upholding of law and ethics rules and codes that sanction misconduct." *Id.*

a document. One would have to rewrite the rules of privilege altogether if a binding rule requiring such professional conduct were enacted. Therefore, a non-binding guideline such as those in the ABA's Model Guidelines for Litigation Conduct[149] is the best solution. An alternative would be a non-binding rule, placed in the Alaska Rules of Professional Conduct. While one could argue such a guideline would be a waste of time and resources because lawyers would not follow it, it would serve to create norms of behavior and a reference point of what considerations should undergird a lawyer's decision-making process.[150] In this way, an ethical guideline is not unlike a pro-bono rule, which asks a lawyer to donate a certain number of hours to the public interest, but does not require disciplinary enforcement of the rule. A few states have suggested that standards on professionalism and courtesy be established.[151]

A non-binding guideline would have other advantages over a rule imposing sanctions. A non-binding guideline allows lawyers to be curious without putting them in the awkward position of facing disciplinary sanctions. Also, it avoids the messiness of having an ethical rule that requires return and an evidentiary rule that may allow use. Furthermore, negligent lawyers are still put on notice that they may suffer because of acts that are negligent, and lawyers on the receiving side are encouraged to send inadvertently disclosed materials back unread. A non-binding guideline gives a lawyer encouragement for restraint without increasing litigation and professional complications if that encouragement is unheeded.

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149. ABA, Guidelines for Litigation Conduct, Aug. 1998.

150. One should not underestimate the power of norms to influence attorney decision-making. Lawyers conform to the actions they see played out in their day-to-day practice. In one study, lawyers ranked collegial practices as the second most significant factor in resolving questions of professional responsibility. RHODE, *supra* note 24, at 42-43 (citing FRAN ZEMANS & VICTOR ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION (1984)).

151. *See, e.g.*, Committee on Federal Courts, Association of the Bar of the City of New York, *A Proposed Code of Litigation Conduct*, 43 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, 738, 739 (1988) (discussing how the committee sought to move beyond merely "following the rules" to instill conduct that fostered good relationships between attorneys, among attorneys and clients, and between attorneys and judges). Part B(K) of the proposed New York code states that "[e]ffective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect." *Id.* The standards go on to say that "[t]hose litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them." *Id.*

A non-binding guideline is a way for lawyers to make appropriate compromises, avoid litigation, and build respect for the profession.

When thinking about a guideline, it is useful to: (1) look at how other states have addressed the issue; (2) use the Alaska Rules of Professional Conduct as a reference point; and (3) keep in mind the values of professionalism, confidentiality, and zealous advocacy, without letting one value unreasonably outweigh the others.

Alaska has adopted the Model Rules of Professional Conduct.[152] Therefore, there should be some reference to the Model Rules if Alaska looks to frame a guideline for its own attorneys. While there is no explicit rule guiding what the receiving lawyer should do, the overall principles embodied in the Alaska Rules and Commentary imply that the receiving attorney has a professional duty to do essentially what ABA Formal Opinion 92-368 suggests: refrain from reading the documents, notify the sender, and follow the sender's instructions about how to proceed. For example, the Preamble to the Alaska Rules of Professional Conduct candidly states that the rules are not exhaustive, nor could they be: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."[153] Moreover, the Preamble asserts that lawyers "should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."[154] The implication is that acting ethically is more than simply following the rules; it is acting in a way that respects all the participants in the legal arena. Therefore, while the rules of evidence may permit derivative use of an inadvertently disclosed document, an aspirational ethical guideline may suggest that the lawyer refrain from doing so.

VI. CONCLUSION

The role played by lawyers in society goes beyond mere advocacy on behalf of a client to that of a policy maker and an embodiment of the legal profession to outside eyes. There is a practical interest in fostering legal ethics so that lawyers treat their clients and their adversaries with professionalism, courtesy, and respect, even while maintaining high standards of zealous advocacy within the framework of adversarial litigation. When an attorney is faced with an inadvertently sent document that is privileged on its face, it

152. ALASKA RULES OF PROF'L CONDUCT Preamble, Scope.
153. *Id.* Scope.
154. *Id.* Preamble.

serves the legal profession, the client, and the lawyer's interest if the lawyer refrains from using the document, notifies the adversary of the mistake, and follows the adversary's instructions as to what to do with the document. While a black letter rule would be too difficult to frame and enforce, especially against the background of the underlying waiver laws, a non-binding guideline to foster legal ethical norms by which the attorney can make decisions is a good way for Alaska to address the problem. Until lawyers take their professional conduct seriously, they will continue to be seen as no more than hired guns, and as technology takes us further into the world of fast-paced litigation and more documents are inadvertently disclosed, the lawyer will be seen as a mere puppet of the client. Establishing a guideline for higher ethical action than that required by the rules of evidence and the rules of professional conduct would be a wise choice for Alaska.

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