HOW SHOULD LAWYERS HANDLE THE UNINTENDED DISCLOSURE OF POSSIBLY PRIVILEGED INFORMATION?

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ABSTRACT

The inadvertently sent email that contains opposing counsel’s settlement strategy, the opposing party’s client opinion letter negligently included in a discovery response, and the opposing party’s work papers taken by a whistle blowing client all share a common theme – the materials were not intended to be disclosed by the opposing party to the recipient lawyer. Notwithstanding the similarities, case law, commentary, and ethics opinions have tended to treat the issues as separate. This separation has not, however, helped lawyers who are subjected to conflicting and inconsistent opinions as to how they should respond in situations when they have received information that may possibly be privileged.

This article makes two contentions. First, with respect to the privileged status of the disclosed materials, all disclosures unintended from the standpoint of the privilege holder should be treated under a single standard that asks whether the privilege holder exercised reasonable care in maintaining the confidentiality of the materials. Second, with respect to the receiving lawyers professional obligations, lawyers who receive materials that are possibly privileged should be allowed to read the materials (1) to determine whether the materials are privileged and (2) to better argue the contention to the court that the materials are not privileged. A lawyer who reads the materials, even past the point when the privileged status of the materials is arguably apparent, should not be deemed to have engaged in professionally improper behavior as long as (1) the lawyer notifies opposing counsel of receipt of the materials and (2) makes no surreptitious use of the materials until their status has been clarified by the court.

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INTRODUCTION

Email and E Discovery, along with complex litigation involving large, dispersed support staff, contribute to an environment in which the unintended disclosure of privileged information is always a lurking possibility.\(^1\) The best defense against the unintended disclosure of privileged information is the establishment of protocols, training, and practices that help ensure that client privileged information is preserved and protected against unintended disclosure. Few systems, however, are fool proof and no system is “damn fool proof.” Moreover, even the best information management systems may fail to catch the disaffected employee or principled whistleblower who believes that disclosure is necessary to redress personal injustices or advance the public good.

The consequences of disclosure must also be considered. The recipient of the information disclosed may be sanctioned if the disclosure is deemed improper.\(^2\) The person responsible for protection the information from disclosure may be liable for failing to prevent disclosure.\(^3\) Aside from the possibility of sanction or liability, the

\(^1\) Information may be privileged or confidential in many ways, e.g., attorney-client privilege, work product, client confidential, etc. Information may also be proprietary, e.g., trade secret. I will generally refer to all such protections as “privileged” information. I use the term “materials” inclusively to encompass the myriad ways information may be unwittingly communicated, such as by voice mail, fax, email, regular mail, etc.

\(^2\) Rico v. Mitsubishi Motors Corp., 171 P.3d 1092 (Cal. 2007) (disqualifying lawyer who received inadvertently disclosed privileged information, used the information, and failed to disclose receipt of the information until after information was used).

\(^3\) Elkind v. Bennett, 958 So.2d 1088, 1092 (Fla. App. 2007) (stating that breach by attorney of duty of confidentiality that causes harm to client (or former client) may be redressed by legal malpractice action); cf. Poway Land, Inc. v. Hillyre & Irwin, (Cal. App. 2002) (non-published) 2002 W.L. 31623603 (Cal. Rules of Court, Rule 8.1115 restricts citation of unpublished opinions in California courts) (stating that expert testimony was unnecessary on issue whether attorney’s role in transmission of misdirected fax containing confidential legal strategy was improper; matter would be clear even in absence of expert testimony). The court ultimately affirmed summary judgment for the law firm because the client could not establish that the disclosure caused it any actual harm; Thiery v. Bye, 597 N.W.2d 449 (Wis. 1999) (holding that the failure to redact the
release of privileged information may affect the dynamics of the representation. Inadvertent disclosure (1) may cause the lawyer to lose the respect and confidence of the client; (2) may affect the lawyer’s ability to achieve the goals of the representation; and (3) may affect the reputation of the lawyer.

With the stakes involved it is not surprising that the issue of unintended disclosure of privileged information has generated significant interest among commentators, bar associations, and the courts. Recently, Federal Rule of Evidence Rule 502 was enacted, which provides that, in general, an inadvertent disclosure made in a federal proceeding or to a federal officer or agency does not operate as a waiver of the attorney-client or work product privilege if the holder of the privilege took reasonable precautions to prevent disclosure and takes reasonable steps after disclosure to rectify

client’s identity constituted breach of lawyer’s duty of confidentiality even though client consented to lawyer’s use of client’s file for public disclosure in connection with education purposes).


Pennsylvania Bar Association Formal Opinion 2007-200 Inadvertent Disclosures, reported in 29 Aug. Pa. Law. 50 (July/August 2007); Maryland State Bar Ass’n Comm’n on Ethics, Op. 2000-04 (stating that lawyer who receives privileged documents from opposing counsel in discovery and learns before examining them that they were inadvertently produced must immediately return documents unopened and unreviewed; lawyer who learns of inadvertent production only after reviewing documents must inform client and opposing counsel and consider whether to return documents or seek ruling from court).


the error. While new Rule 502 provides some clarification as to the evidentiary consequences of an inadvertent disclosure, it does not directly address the lawyer’s professional obligations when confronted with the issue of disclosure of possibly privileged materials. Moreover, Rule 502 simply prescribes a balancing test (reasonable precautions) when analyzing whether disclosure results in a waiver of privilege; Rule 502 does not resolve the current uncertainty over the lawyer’s actions when presented with materials that may be privileged. Should the lawyer notify the holder that the lawyer has possibly privileged materials? Should the lawyer review the materials to ascertain whether they are privilege? Which should come first – notice or review?

This paper seeks to summarize and pull together the discussion that has arisen around this topic. It does so by first examining in Part 2 the current state of the law regarding inadvertent disclosure and unauthorized disclosure as separate topics. Part 3 of this paper takes the position that the distinction between inadvertent and unauthorized disclosure is artificial and should be rejected in favor of a unified term – unintended disclosure.

When we disaggregate the disclosure cases along the lines I suggest above, we see a much richer and thicker problem than one might initially discern. Because the inadvertent disclosure cases dominate the cases and commentary, this distinction may be missed. Looking at the larger landscape of disclosure cases allows the reviewer to

\[\text{Rule 502(b), Fed. R. Evid:}\]
\[
\text{(b) Inadvertent disclosure. – When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(13).}\]

\[\text{Rule 502(a), Fed R. Evid. reaffirms that waivers of privilege must be intentional, but does not resolve the debate whether intent may be inferred from a failure to exercise reasonable care. See text and notes 63-66, infra (discussing Rule 502(b)’s emphasis that whether the holder took “reasonable steps to prevent disclosure” determines whether disclosure results in a loss of privilege).}\]
see similarities that are missed and dissimilarities that are confused. In this paper, I aim to take stock of the opportunity to view the disclosure cases broadly to identify similarities that call for analogous treatment and material dissimilarities that warrant distinctions in the approach to the issue of disclosure of privilege information and its consequences.

I conclude by offering four suggestions for resolving claims of unintended disclosure that I believe better reconcile the competing considerations than current efforts. In advancing these suggestions I concede that my primary concern is to provide a clear, clean set of rules that lawyers may apply in lieu of the incomplete and uncertain guidelines and balancing tests that currently exist. First, a lawyer should be able to review without limit or constraint materials that are received by the lawyer without the lawyer’s active connivance in adding or abetting a breach of a duty of confidentiality. The right to review the materials would not attach, however, to materials the lawyer knows were stolen or misappropriated from the privilege holder. Second, a lawyer should promptly notify the privilege holder whenever the lawyer receives apparently privileged materials that reasonably appear to have been sent unintentionally from the standpoint of the privilege holder. Third, a lawyer should not use materials for evidentiary purposes that are apparently privileged or claimed to be privileged until the claim of privilege has been resolved by the parties or by the tribunal. Fourth, a lawyer who innocently receives privilege materials should not be disqualified unless the lawyer fails to comply with one of the above requirements, absent exceptional circumstances.

2

FORMS OF UNINTENDED DISCLOSURE

A. Inadvertent Disclosure

The errant fax or email, or the discovery document that should not have been included in the response, are classic examples of what is generally described as the “inadvertent” disclosure problem. The basic assumption is that the sender of the information did not intend the disclosure. Here the operative word is “Oops!”\(^\text{10}\) The

\(^{10}\) WSJ Law Blog (February 20, 2008) Email Gremlins Strike Skaddens Sheila Birnbaum (discussing lawyer’s dissemination of confidential response to journalists that she intended to go only to specific recipients); WSJ Law Blog (February 5, 2008 Report:
modern approach to the inadvertent disclosure is exemplified by Model Rule 4.4(b), which instructs the receiving lawyer to notify the sender of the errant disclosure.\textsuperscript{11} Comment 2 to Model Rule 4.4 suggests that it is the responsibility of the sender to affect a resolution of any problem(s) raised by the disclosure.\textsuperscript{12}

Model Rule 4.4(b) works if the facts are clear, e.g., the information is privileged and the disclosure was inadvertent. Here, the rule imposes a professional obligation of notification. The problem is that Model Rule 4.4(b) is largely silent as to how a lawyer knows that the duty of notification has been triggered? All the Rule says is that the lawyer must know (actually or constructively)\textsuperscript{13} that the information was inadvertently sent, but the Model Rule provides no guidance as to how the lawyer gains the requisite knowledge to trigger the professional duty of notification. Prior ethics opinions by the

\begin{quote}
Lawyer’s Email Slip-Up Leads to Zyprexa Leak (discussing transmission of confidential documents to journalist who had similar name to that of intended lawyer recipient; email system matched incorrect name to prompt).
\end{quote}

\textsuperscript{11} ABA Model Rules of Professional Conduct, Model Rule 4.4(b) (2002) ("Model Rule"): A 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.

\textsuperscript{12} Model Rule 4.4(b) cmt.2 provides in pertinent part: 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 that person to take protective measures.

\textsuperscript{13} Model Rule 1.0(f): “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

Model Rule 1.0(j): “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
ABA had focused on the presence in the document of privileged information.\textsuperscript{14} The operative assumption was that a lawyer will at least suspect that the document was inadvertently sent when it contains the adversary’s privileged information that the lawyer was not expecting to receive. Privileged information is not usually given without strings or reasons, on a silver platter, to one’s adversaries.

Model Rule 4.4(b)’s silence, and implicit rejection of the prior ABA position, on this point is deliberate.\textsuperscript{15} Model Rule 4.4(b) adopts a neutral rule that is not tied to collateral issues, such as whether the recipient of the document must return the document. Model Rule 4.4(b) treats the issue of document return as a legal rather than a professional question.\textsuperscript{16} Model Rule 4.4(b) is silent as to why “notification” is a professional duty, but “returning the original document” is a legal question. The drafters

\textsuperscript{14} ABA Formal Opinion 92-362. This opinion was withdrawn by Formal Opinion 05-37 because of the adoption of Model Rule 4.4(b) in 2002.

\textsuperscript{15} Comment 1 to Model Rule 4.4(b) suggests that the absence of a consensus as to how to organize and order the issues raised by inadvertent disclosure led to the truncated Rule. See Margaret Colgate Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 Geo. J. Legal Ethics 441, 469 (2002):

A news provision in Rule 4.4 (“Respect for Rights of Third Persons”) deals with the currently controversial issue of the “errant fax.” It provides that a lawyer who receives a document relating to the representation of the lawyer’s client, and knows or reasonably should know that it was inadvertently sent, must promptly notify the sender. Beyond this, however, the Commission decided against trying to sort out a lawyer’s possible legal obligations in connection with examining and using confidential documents that come into her possession through the inadvertence or wrongful act of another.

\textsuperscript{16} Model Rule 4.4(b) cmt.2 provides in pertinent part:

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 whether the privileged status of a document has been waived.

(emphasizes added).
may have been influenced by the issues of privilege and waiver, but these issues are related to use of the information, not the functional issue of return. Model Rule 4.4(b) simply classifies, without explanation, the issue of retention or return as one of privilege and waiver, and hence an issue of law, whereas receipt is deemed by the rule to not involve issues of privilege or waiver.

Model Rule 4.4(b) does not address the connection between review of the information to ascertain whether the duty to notify was triggered and review of the information as tainting the lawyer and subjecting the lawyer to sanction or disqualification. Model Rule 4.4(b) elides these issues by disaggregating the method by which the document was obtained (inadvertent vs. deliberate) from the content of the document (privileged vs. non-privileged). Model Rule 4.4(b) instructs that the lawyer’s duty to notify turns solely on the fact of apparent inadvertent disclosure. This is surprising. One would think that whether a disclosure requires notice to the sender should be tied to whether the content of the disclosure is arguably privileged. Disclosure alone is innocuous; disclosure of possibly privileged materials is dangerous. Model Rule 4.4(b), however, is not tied to that view. Any inadvertent disclosure, privileged or not, triggers a duty of notification. The difficulty, however, is whether the two concepts (inadvertency and privilege) can, or should be, separated in the manner envisioned by Model Rule 4.4(b).

In Rico v. Mitsubishi Motors Corp. the California Supreme Court addressed this question. A lawyer came into possession of his adversary’s litigation notes. The court had no difficulty characterizing the notes as absolutely protected from disclosure under California’s Work Product rules. California does not presently have a professional rule of conduct that corresponds to Model Rule 4.4(b), although prior California cases have addressed the issue.

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17 171 P.3d 1092 (Cal. 2007).
18 Id. at 815.
19 California is in the process of revising its rules of professional conduct so that they more closely follow the ABA Model Rules. The status of the California revision is reported (and regularly updated) on the California State Bar website (http://www.calbar.ca.gov).
The California Supreme Court adopted in Rico a two prong test that addressed both issues of information content and method of information disclosure. As to content, the court held that the receiving lawyer does not have a notification obligation unless the information received “obviously” and “clearly” appears to be privileged. As to the method by which the materials came into the possession or attention of the receiving lawyer, it must be “reasonably apparent” the information was produced inadvertently.

The California Supreme Court in Rico implicitly accepted that “inadvertency” cannot usually be discerned from the method of transmission of the information alone. Lawyers deal with mounds of paper and oral communications. Should a lawyer “know” from a cursory review of a cover sheet, heading, or salutation, that the information that follows was inadvertently transmitted? Take the case when the communication clearly states that it is addressed to someone other than the receiving lawyer. The fact that the communication is addressed to another does not, without more, make it “reasonably apparent” that the communication is erroneously in the possession of the recipient.

Lawyers often receive documents addressed to the attention of other lawyers because of notice requirements in litigation or information distribution protocols in transaction matters. Appreciating the content of the material is a necessary and inherent aspect to determining if the transmission is inadvertent even in the most apparent of cases, e.g., the correctly labeled and addressed package is delivered to the wrong recipient. It is not unusual for lawyers to take a liberal approach to claiming that information is

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21 171 P.3d at 1098-99.

22 Id.
attorney-client privileged; letters, e-mails, and faxes from lawyers are customarily adorned with pretextual, boilerplate claims of privilege, which are attached both to confidential communications with clients and to lunch orders to the corner delicatessen. Even when the document is labeled as privileged, some content review is warranted to test the pro forma claim. Review of the materials is almost always necessary to confirm that a mistake in distributing the document to the recipient was made.\(^{23}\)

Both the California Supreme Court in Rico v. Mitsubishi Motors Corp. and the ABA in Model Rule 4.4(b) address what a lawyer should do when the lawyer receives materials inadvertently transmitted to the lawyer; however, neither Rico nor Rule 4.4(b) provide guidance beyond requiring that the receiving lawyer notify the sender of the receipt of the materials. The additional guidance the California Supreme Court provided in Rico was loose and injected incoherence into the analytical framework the court sought to establish to resolve the problem. Rico stated that the lawyer should refrain from reading or examining any more of the materials received than necessary to ascertain whether the materials are privileged or confidential.\(^{24}\) The necessarily implicit

\(^{23}\) I address the issue of prereview notification by the sender that the materials were inadvertently sent at text and notes 108-126, infra. The California Supreme Court did not address this issue in Rico, although other courts have. See, e.g., American Express v. Accu-Weather, Inc. (S.D.N.Y. 1996) 1996 WL 346388:

In light of [ABA Ethics Opinion 92-368], and the important policy concerns it embodies, Milakovic's conduct constituted an ethical violation. Potter explicitly stated that the package should not be opened and that document XX-173 was privileged. Milakovic and Beckley did not abide by Potter's instructions, and instead "g[a]ve into temptation." According to the Opinion, they should have adhered to the instructions and not decided for themselves if the document warranted the attorney-client privilege.

(Brackets added).

\(^{24}\) 171 P.3d at 1099:

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
admonition here is that the lawyer should not review or examine the documents further after reaching the “apparently privileged” threshold. Although Model Rule 4.4(b) is silent on this point, the concept that a lawyer should not examine materials the lawyer knows to be privileged is fairly well accepted in the United States, although there are contrary views. I will address this point later in Part 2B of the paper. For now, I will focus to the view adopted in Rico that further exploration of the materials by the lawyer after determining that the materials are “apparently” privileged is improper.

Neither Rico nor Model Rule 4.4(b) require the lawyer to return the materials to the inadvertent sender.25 Both Rico and Model Rule 4.4(b) operate under the assumption that the lawyers will either resolve the issue or seek judicial assistance to resolve the matter. As an abstract proposition, that’s good advice. As a practical matter, the lawyers has been left between the proverbial rock and the hard place because both Rico and Model Rule 4.4(b) are silent as to how the lawyer can resolve the status of information in her possession if she can only read part of what she has in her possession. Both Rico and Model Rule 4.4(b) instruct the lawyer that she can only read to an imprecisely defined point, with potentially draconian consequences (disqualification, sanction) if she reads past that point; however, unless the lawyer reads the entire information package she will be unable to formulate an accurate opinion as to whether the claim of privilege is valid. This uncertainty will hamper both private and judicial resolution of a dispute over the status of the information.

Consider a disclosure that suggests that a material witness testified inaccurately or that certain documents were not produced in response to discovery because opposing counsel interpreted the request to produce “very” narrowly. The receiving

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 possess material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

Comment 3 to Model Rule 4.4(b) treats the decision whether to return the inadvertently disclosed materials as committed to the professional discretion of the lawyer.
lawyer notifies the sending lawyer (opposing counsel) of the receipt of the inadvertently disclosed information and the sending lawyer demands its return. What does the receiving lawyer do? There is no turnover obligation, but without reviewing the information to ascertain whether the privilege has been waived or an exception applies, e.g., crime-fraud, how does the receiving lawyer discuss the matter responsibly with the sending lawyer? Unless the receiving lawyer reviews the contents of the materials, how does the lawyer ascertain whether the confidentiality of the materials was adequately protected to preserve the privilege from loss? Without reviewing the contents of the materials, how does the receiving lawyer ascertain whether the privilege was lost because the materials were also transmitted to non-privileged persons?

This problem is augmented if the lawyer seeks judicial assistance to resolve an impasse -- an approach recommended by the California Supreme Court in Rico v. Mitsubishi Motors Corp. Unless the receiving lawyer reviews the material, the lawyer

26 ABA Formal Opinion 92-368 did contain a turnover obligation and courts relied on that duty to sanction lawyers who read on after the privilege status of the information was claimed or became apparent. See American Express v. Accu-Weather, Inc., supra note 23 (refusing to consider whether disclosure had waived privilege status of information inadvertently disclosed because receiving lawyer read on after sending lawyer asserted claim of privilege); cf. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290 n.2 (D. Mass. 2000) (commending party for not reading inadvertently sent materials until court resolved the claim of waiver).

27 171 P.3d at 1099 (“The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified”) (quoting and adopting language from State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr.2d 799 (Cal. App. 1999)). Model Rule 4.4(b) is silent on this point, but comment 2 states that the notice obligation permits the sender “to take protective measures.” This would appear to include private resolution or if that fails judicial assistance to resolve the issues raised by the inadvertent transmission of the materials. This option is not open-ended. In Bak v. MCL Financial Group Inc., 88 Cal. Rptr.3d 800 (Cal. App. 2009) a lawyer received, during arbitration proceeding, 112 pages of documents. The sending party demanded their return claiming both privilege and inadvertent disclosure. The receiving lawyer complied with the demand, but before doing so he reviewed the materials, made a copy, and sent the copy to the arbitration panel. The court found that sending the materials to the panel before being instructed to do so by the panel was sanctionable conduct:

[W]here, as here, defendant’s objected to plaintiffs’ demand for immediate return of the privileged documents, objector should have
is not well positioned to argue that the claim of privilege has been lost due to the inadvertent transmission and partial reading of the privileged materials. Unless the facts supporting waiver become known before the communication’s apparent inadvertent transmission became known, the receiving lawyer has no basis, other than the fact of transmission itself, to claim waiver or that the information is not privileged as the sending lawyer claims.

The situation is different from the usual claim when a document is registered in a privilege log and the parties contest the status of the document. When the document has never been disclosed, the holder’s right to keep the contents from others until the status of the document has been determined is at its highest. While courts have the power to compel limited disclosure for in-camera inspection, that powers is not usually exercised when a proper privilege log is prepared. Once, however, the privilege holder discloses the communication, but seeks its return, the situation changes. The privilege holder has affected the status quo. Contrary to the usual case, the inadvertent

sought guidance from the arbitration panel rather than unilaterally copying the materials and sending it to FINRA

Id. at 807.

28 United States v. Zolin, 491 U.S. 544, 568-69 (“This court has approved the practice of requiring parties who seek to avoid disclosure or documents to make the documents available for in-camera inspection”); Kerr v. District Court, 426 U.S. 394, 405-06 (1976) (“This Court has long held the view that in-camera review is a highly appropriate and useful means of dealing with certain claims of privilege”). This is a departure from the common law. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE §5507 (2008) (noting that at common law, a judge could not require disclosure of communications in order to make a determination of their privileged status); see also Cal. Evid. Code §915 (same, and extending limit on production to attorney work product).

Disclosure case represents a situation when the information, whose status is to be determined, has been disseminated outside the ranks of privileged persons.\textsuperscript{30}

Courts have permitted communication contents review when applying the crime-fraud exception to the attorney-client privilege to disclosed communications.\textsuperscript{31} When the underlying communication has remained confidential, courts generally require that the party seeking disclosure establish a prima-facie case that the exception applies without recourse to the contents of the communication: a court should first determine that the prima facie case exists independent of the contents of the communication before receiving the communication \textit{in camera} to adjudicate the claim.\textsuperscript{32} When, however, the

\begin{itemize}
\item \textsuperscript{30} “Privileged persons” encompass those individuals among whom privileged information may be shared without causing the privilege to be lost. Restatement (Third) Law Governing Lawyers §70 (2000); cf. TruckStop.net, LLC v. Sprint Corp., 547 F.3d 1065 (9th Cir. 2008) (holding that appeal, pursuant to “collateral order doctrine” would not lie as to district court’s disclosure order involving allegedly privileged material because “information had already been disclosed”)
\item \textsuperscript{31} Compare Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., 12 Cal. Rptr.3d 123, 129-30 (Cal. App. 2004) (ordered non published pursuant to Cal. Rules of Court, Rule 977) (holding that disclosure of information operated as legally significant fact that permitted court to consider information in determining whether party established prima facie case that crime-fraud exception applied); with Cunningham v. Connecticut Life Ins. Co., 845 F. Supp. 1403, 1412-1413 (S.D. Cal. 1994) (stating that prima facie case for application of crime-fraud exception must be established by non-privileged evidence).
\item \textsuperscript{32} United States v. Zolin, 491 U.S. 554, 572 (1989):
\begin{quote}
In fashioning a standard for determining when in camera review is appropriate, we begin with the observation the “in camera inspection . . . is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure.” We therefore conclude that a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege. The threshold we set, in other words, need not be a stringent one.

We think that the following standard strikes the correct balance. Before engaging in camera review to determine the applicability of the crime fraud exception, “the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person, that in camera review of the
\end{quote}

15
communication has been disclosed, the requirement to establish the prima facie case independently of the contents of the communication may not be imposed.\textsuperscript{33} The court should allow the party seeking disclosure to use the contents of the communication to establish the prima-facie case for application of the crime-fraud exception.\textsuperscript{34}

A lawyer who receives an inadvertent disclosure is often advised not to use the information disclosed until the status of the information is resolved, after notification, by the parties or by the court, which complicates the receiving lawyer’s ability to demonstrate that the privilege has been waived or never properly attached in the first place. Use of the information to show that it is not, or no longer, privileged does not, however, entrench on the concern expressed in the cases that the recipient will seek to exploit the inadvertent disclosure by using the information without the other side’s appreciation of the disclosure. For example, in Rico v. Mitsubishi Motor Corp. the receiving lawyer used the information to cross-examine an expert witness retained by the sender of the disclosure.\textsuperscript{35} In State Compensation Insurance Fund v. WPS, Inc. the materials may reveal evidence to establish the claim that the crime fraud exception applies.

\textit{Id.} at 572 (citations omitted). State practices as to this point may vary from the federal approach. See PAUL RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, §8.9 (2007 Rev.) (stating that most courts have rejected the “independent evidence” requirement and permit courts to examine the contested communication when considering the application of crime-fraud exception prima facie case).


\textsuperscript{34} For Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr.2d 906, 924-25 (Cal. App. 2001) (holding that when privileged material is at the heart of the issue before the court, “fundamental fairness requires that it be disclosed for the litigation to proceed;” the privilege holder cannot restrict disclosure to the opposing party by submitting the claimed privileged materials under seal for the in camera, ex parte review by the court); \textit{cf.} In re Myers, 130 P.3d 1023 (Colo. 2006) (reversing order disqualifying counsel because counsel’s paralegal has obtained unlawfully a trustee’s credit report through a ruse). The court found that the lower court in ordering counsel’s disqualification relied solely on the wrongful acquisition of the report and failed to “identify the contents of the credit report or assess its discoverability or the impact of its release.” \textit{Id.} at 1026.

\textsuperscript{35} 171 P.3d at 1095-96.
receiving lawyer attempted to use the disclosure for discovery purposes against the sending party. 36 Few courts expressly adopt approve of this “use first, ask permission later” approach. 37

The transmission of possibly privileged materials implicates the professional obligations of counsel. Did the sending lawyer exercise appropriate care in maintaining the information? Did the receiving lawyer act professionally on receipt of the information? Even if these questions can, to some extent, be answered independently of the contents of the information, the question remains whether they should be. Some may argue that an attorney’s duty to one’s client in an adversary culture requires that counsel always exploit the adversary’s mistakes when it is in the client’s lawful interest to do so. 38 Professional obligations are, however, always bounded. Courts and the bar may define counsel’s options in more limited ways and, absent a higher law, counsel must comply with professional obligations or suffer an appropriate sanction for noncompliance. 39

Emphasizing counsel’s professional obligations, however, tilts the resolution in favor of the return of the materials and their non-use. If the focus stays on the “method and means” by which the materials were transmitted rather than the “content” of the materials transmitted, it will reduce the likelihood that a court will find that the materials

36 82 Cal. Rptr.2d at 802.

37 But cf. Grenada Corp. v. Honorable First Court of Appeals, 844 S.W.2d 223, 226-27 (Tex. 1992) (concluding that dispensing with notice and return requirement was consistent with approach of many courts treating inadvertent disclosure in general as a waiver and with principle that failures to interpose timely objection to discovery amounted to waiver of claim of privilege absent a showing of good cause).


39 Monroe Freedman, Henry Lord Brougham – Advocating at The Edge For Human Rights, 36 Hofstra L. Rev. 311, 312 n.6 (2007):

Zealous (as distinguished from over-zealous) advocacy has always meant advocacy within the law and the disciplinary rules, in the same way that “at the edge” does not mean “over the edge.”
could be used, e.g., that the privilege was lost or never attached in the first place. If the receiving lawyer returns the materials after ascertaining “apparent privilege,” the matter is concluded. If the receiving lawyer uses the materials without securing the right to do so, the lawyer risks sanction. Interestingly, when confronted by error on the part of both the sending lawyer and the receiving lawyer, it is the receiving lawyer who is sanctioned, usually by disqualification. Courts and the bar apparently perceive the receiving lawyer’s conduct (failure to notify and surreptitious use) as more serious professional error than the sending lawyer’s conduct (failure to adequately protect the materials).

Examining the content of the communication emphasizes the status of the materials rather than the professional conduct of the attorneys. If the court determines that the privilege did not exist or was waived, the lawyer’s use of the material is not improper. The California Supreme Court effectively conceded this point in Rico by its treatment of Aerojet-General Corporation v. Transport Indemnity Insurance. In Aerojet-General Corp., the court had refused to sanction a lawyer who received an inadvertent disclosure and used it without notifying the sender. The Rico court noted that the receiving lawyer in Aerojet-General Corp. was blameless in his acquisition of the material and the information was not privileged. How is this concept of blamelessness to be understood? One construction of Rico suggests that “blameless” includes a notify protocol and a “do not use until clarified” protocol. This assumes, however, that we emphasize conduct of the sender and the recipient. If we emphasize the content of the information sent, the status of the information becomes central and the issue of blame morphs into asking whether the lawyer was complicit in obtaining the materials, i.e., was the disclosure “unauthorized” as opposed to “inadvertent?” This alternative construction is supported by Rico’s construction of Aerojet General Corp., with the latter case’s emphasis on the recipient lawyer’s innocence in obtaining the information, coupled with

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40 171 P.3 at 1098 (discussing Aerojet-General Corp. v. Transport Indemnity Insurance, 22 Cal. Rptr.2d 862. 865 (Cal. App. 1993) and 171 P.3d at 1098 (discussing State Compensation Insurance Fund v. WPS, Inc. 82 Cal. Rptr.2d 799 (Cal. App. 1999).
the conclusion that the information was not privileged. Rico, thus, introduces some incoherence because on the one hand the court tells lawyers they should not read inadvertently disclosed materials past the trigger point and should not use possibly privileged materials without an ex ante judicial determination that the privilege has been lost, but if the court determines ex post that the materials used were not privileged the lawyer should not be sanctioned even if the lawyer read and used the materials without notifying the adversary.

The Rico court may or may not have perceived this dilemma. It had the opportunity to confront directly this question in Jasmine Networks, Inc. v. Marvell Semiconductor, Inc. Jasmine involve a sale of Jasmine Networks, Inc. (seller) to Marvell Semi-conductor, Inc., (buyer). At part of the sale the parties agreed to share information and data. While the transaction was still executory and incomplete the defendant (Marvell) left, inadvertently, a voicemail that indicated that it (Marvell) had acted fraudulently towards Jasmine. Jasmine sought to use the information in subsequent litigation against Marvell and Marvell sought an injunction barring Jasmine “from disclosing disseminating, or referring to the contents of the recorded voicemail conversation.” The lower courts had focused on whether the voicemail message was a privileged communication and, if so, whether the privilege was lost due to its dissemination to Jasmine. The California Supreme Court granted review along with

41 In Aerojet-General Corp, the court concluded that the information was not privileged because the information merely identified the existence of a witness: “Nor can ‘the identity and location of persons having knowledge of relevant facts’ be concealed under the attorney work product rule....” 22 Cal. Rptr. 2d 862, 866 (citations omitted); see Rico v. Mitsubishi Motors, 171 P.3d 1092, 1098 (Cal. 2007) (citing and approving Aerojet Transport.


43 12 Cal. Rptr.3d at 126. The “use” of the material to refuse to conclude the executory transaction with Marvell was not addressed.
Rico; however, after Rico was decided, the California Supreme Court dismissed the Jasmine appeal and remanded the matter for reconsideration in light of Rico.44

The trial court in Jasmine had initially addressed the privilege issue without considering the content of the voice message left on the Jasmine Network Inc. telephone. Without the content evidence, Jasmine was unable to present a prima facie case for application of the crime-fraud exception or the claim of waiver of attorney-client privilege.45 The court of appeal reversed the trial court’s ruling that the voicemail message was privileged. It used the content of the voicemail to establish that at least one speaker on the recorded message was a constituent of Marvell whose status and responsibilities could allow him to make an “uncoerced disclosure” that could (and did) waive the privilege.46 Alternatively, the court of appeal held that the contents of the recorded message could be examined to determine if the crime-fraud exception applied, which the court concluded it did.47

44 94 P.3d 475 (Cal. 2004) (granting review); 182 P.3d 513 (Cal. 2008) (dismissing review pursuant to Cal. Rules of Court, Rule 8.528(b)(3)).

45 The voicemail left inadvertently on the Jasmine telephone involved a discussion between Marvell constituents, one of whom was a lawyer, as to how to proceed with the acquisition of Jasmine by Marvell.

46 12 Cal. Rptr.3d at 128-129. The court of appeal in Jasmine construed California authorities as precluding a waiver of the attorney-client privilege by the attorney; rather, waiver had to be based on words or conduct by the privilege holder. 12 Cal. Rptr.3d at 128; see Harold Sampson’s Children’s Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794 (Wis. 2004) (holding that lawyer cannot waive privilege by voluntarily producing information in response to discovery request); RICE, ATTORNEY-CLIENT PRIVILEGE, supra note 32, §9.10, at 9-28; Grace M. Giesel, Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship, 86 Neb. L. Rev. 346, 386 (2007) (collecting decisions and authorities regarding lawyer’s power to waiver client’s privilege through inadvertent disclosure).

47 12 Cal. Rptr.3d at 131-132; compare Howell v. Jeffe, 483 F. Supp. 659 (N.D. Ill. 2007) (holding that voicemail message inadvertently left on answering machine did not lose its privileged status); United States v. Rigas, 281 F. Supp.2d 723 (S.D.N.Y. 2003) (holding that inadvertently sent computer file did not lose privileged status when privilege holder had taken adequate precautions, including storing files in password protected accounts).
In this light, the California Supreme Court’s remand order becomes enormously interesting. Did the court intend that the lower court should focus on the receiving lawyer’s conduct exclusively, or, in addition to examining the content of the inadvertent recording. The facts in Jasmine evidence that the receiving lawyer did not immediately notify Marvell of the recording; on the other hand, the lawyer did not attempt to surreptitiously exploit the information in litigation. Jasmine sought a judicial declaration of the right to use the information. Does that amount to a Rico v. Mitsubishi Motors violation because the lawyer did not immediately notify? Should there be a misuse or harm requirement or is the failure to notify promptly sufficient? For the purpose of imposing litigation sanctions such as disqualification, significant misconduct or harm is often required, as the cost of the sanction may be severe.

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48 In re Nitla, S.A. de C.V., 92 S.W.3d 419 (Tex. 2002) (stating that harm to privilege holder is a critical factor in assessing whether lawyer who has innocently reviewed inadvertently disclosed privileged documents should be disqualified); cf. Bak v. MCL Financial Group Inc., 88 Cal. Rptr.3d 800, discussed supra note 27 (holding that lawyer who unilaterally forwarded copy of documents claimed to have been inadvertently produced and also claimed to be privileged could be sanctioned for his conduct).

49 Courts often note that granting a disqualification motion will operate to deprive a party of the lawyer of its choice and that this right of selection is highly valued and prized. Comden v. Superior Court, 576 P.2d 971, 974-75 (Cal. 1976) (noting that disqualification of counsel motions affect the client’s right to counsel of choice; interfere with the attorney’s interest in the representation, impose a financial burden on the client who must select replacement counsel; and, raise the prospect of tactical abuse); cf. Estate of Myers, 130 P.3d 1023, 1025 (Colo. 2006) (stating that “disqualification is a severe remedy that should be avoided whenever possible. . . . disqualification for an attorney may not be based on mere speculation or conjecture, but only upon the showing of clear danger that prejudice to a client or adversary would result from continued representation”) (citation omitted). The problem is that this value is counterbalanced with the interest of protecting a party’s right to have privileged materials remain confidential. It is not always clear which value will be seen by a court as dominant. The ability to predict the outcome of a disqualification motion is complicated by the often abstract principles courts apply. Roush v. Seagate Technology, LLC, 58 Cal. Rptr.3d 275, 281 (Cal. App. 2007) (“The ‘paramount’ concern in determining whether counsel should be disqualified is ‘the preservation of public trust in the scrupulous administration of justice and the integrity of the bar’”) (citations omitted); see Geoffrey C. Hazard, Jr., Imputed Conflicts of Interest in International Law Practice, 30 Okla. City U.L. Rev. 489, 505-506 (2005):
B. Unauthorized Disclosure

A lawyer may receive materials from a source who deliberately sends them to the lawyer. This situation is not uncommon in wrongful termination and qui tam proceedings when the client or third party (an employee or a whistleblower) brings information the provider believes shows wrongful conduct by another. Here the operative word is unauthorized rather than inadvertent; the disclosure is deliberate on the part of the provider of the information, not mistaken or inadvertent. Unlike the inadvertent disclosure case when, for example, the information provider hits the “reply” icon when intending to hit “forward,” the provider here intends that the recipient of the information receive it.

Although there is no professional rule directly on point, the general understanding is that a lawyer should not attempt to pry or elicit confidential or privileged information from others:

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Disposition of a motion to disqualify is conventionally and properly laid to rest in the trial court’s judicial discretion. The motion can be considered as an injunction, and accordingly is subject to the traditional equitable requirement of timeliness and the defense of laches, particularly the effect on the client of the lawyer whose disqualification is sought. Alternatively, the motion can be considered an incident of the court’s authority to control its docket and the conduct of advocates appearing before it. Under either approach, the court has substantial discretion to refuse a remedy in the absence of demonstrable injury or risk to the complaining party.

50 E. Scott Reckard, Mozilo Gets Flak Over An E-Mail Misfire, Los Angeles Times, Section C, p.2 (Wednesday May 21, 2008):

Apparently clicking “reply” when he meant to hit “forward,” Countrywide Financial Corp. Chairman Angelo Mozilo ignited an online furor Tuesday by describing a mortgage customer’s plea for help as a “disgusting” example of form letters inundating the Calabasas home lender.

51 The closest rules are Model Rules 4.2, 4.4, and 8.4(c). Model Rule 4.2 bars ex parte contacts with represented persons regarding the subject matter of the representation. The rule has numerous exceptions and limited applications, particularly when the represented person is an entity. It is when the lawyer meets with a present or former constituent of a represented entity that the general duty to avoid prying into or
A lawyer communicating with a non-client in a situation permitted under §99 may not seek to obtain information that the lawyer reasonably should know the non-client may not reveal without violating a duty of confidentiality to another imposed by law.\textsuperscript{52}

The same principle has been extended to a lawyer’s conduct with another lawyer\textsuperscript{53} and with the lawyer’s own client.\textsuperscript{54} What should a lawyer do, however, when the materials are “thrust upon” the lawyer by the client or a third party?

eliciting confidential or privileged information is raised. Model Rule 4.4 addresses a lawyer’s duty to respect the rights of third parties. The rule prohibits a lawyer from using means of “obtaining evidence that violate the legal rights of such a person.” Model Rule 4.4, thus, suggests some, undefined limit on a lawyer’s right to obtain privileged material; however, the rule does not expressly address the issue of unauthorized disclosure and comment 2 of the rule expressly disclaims to cover the situation:

[T]his 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.

Model Rule 8.4(c), which generally instructs the lawyer to abjure from acts of dishonesty, deception, and the like, may also apply to the extent the materials were acquired by such means. Model Rule 8.4(a) (stating that lawyer may not use another to do indirectly what the lawyer cannot do directly).

\textsuperscript{52} Restatement (Third) Law Governing Lawyers §102 (2000). Valassis v. Samulson, 143 F.R.D. 118, 124-25 (E.D. Mich. 1992); In re Shell Oil Refinery, 143 F.R.D. 105, 106, 108 (E.D. La. 1992) (stating that it is “inappropriate and contrary to fair play” for a lawyer to accept confidential information from an employee of the adversary); cf. Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 347 (D. Conn. 1991) (Cabrines, J.) (involving Model Rule 4.2 (no-contact rule): “It goes without saying that plaintiff’s counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy”). The approach was bolstered by the ABA when it added to comment 1 of Model Rule 4.4 in 2002 that “privileged relationships” were among those protected against lawyer intrusion.

The traditional view was that the failure to protect privileged information from unauthorized disclosure caused the protected status to be lost. This approach has

conversation). Whether this surreptitious taping should be deemed unethical in jurisdictions where it is not illegal has provoked significant disagreement within the legal community. The ABA which has initially chastised the practice reversed itself in the face of significant state refusal to follow its read. See ABA Formal Opinion 01-472 (2001) (withdrawing Formal Opinion 337) (1974). The Restatement (Third) Law Governing Lawyers (2000) condones surreptitious taping when it is not illegal. Id. at 106 cmt.f:

When secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in as reliable a form.

In re Wisehart, 721 N.Y.S.2d 356, 361 (App. Dept. 2001) (per curiam) (holding that lawyer who condoned the use of privileged documents obtained by the lawyer’s client’s theft of those documents, failed to advise the adversary or the court of the theft, and sought to use the documents to extract a settlement engaged in conduct that involved dishonesty, fraud, deceit or misrepresentation in violation of DR1-102(A)(4)); Lipin v. Bender, 644 N.E.2d 1300 (N.Y. 1994) (upholding dismissal of complaint for misconduct of plaintiff’s counsel in deliberately reading and copying defense counsel’s notes and files (same attorney as in Wisehart, supra); cf. Stephen Slesinger, Inc. v. Walt Disney Co., 66 Cal. Rptr.3d 268 (Cal. App. 2007) (upholding trial court’s imposition of termination sanction based on private investigator’s use of ruse to gain access to defendant’s garbage containers, which he then rifled through and recovered several confidential communications, which he, in turn, delivered to the plaintiff).

8 WIGMORE ON EVIDENCE §2325 (McNaughton rev. 1961):

All involuntary disclosures, in particular, through the loss or theft of documents from the attorney’s possession, are not protected by the privilege, on the principle that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take the measures of caution sufficient to prevent being overheard by third parties. The risk of insufficient precautions is upon the client. This principle applies equally to documents.

See People v. Rittenhouse, 206 P.86 (Cal. App. 1922) (defendant left an incriminating note in his jail cell that he had intended to deliver to his attorney. The note qualified for the privileged, but the privilege was waived because the defendant did not protect the note from discovery by third parties); See generally David S. Smallman, The Purloined
largely abated in favor of the modern view that unauthorized (e.g., theft, misappropriation) disclosure of privileged information does not cause the protected status of the information to be lost automatically.\textsuperscript{56} Three views have developed as to whether the disclosure of privileged information causes the information to lose its protected status. One view retains the traditional focus that any breach of confidentiality though disclosure to an unprivileged person cause the protection to be lost.\textsuperscript{57} The opposite of this easy waiver approach is the deliberate waiver approach that requires that the waiver be knowing and intentional, i.e., that the holder of the confidence or privilege actual intend to waive the information’s protected status.\textsuperscript{58} Under this test waivers will be infrequent. Most courts today, however, have adopted an intermediate, Goldilocks stance that rejects each extreme position in favor of a middle ground, “not

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\textsuperscript{56} 2 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S EVIDENCE \¶502(B)(04).

\textsuperscript{57} In re Sealed Cases, 877 F.2d 976, 880 (D.C. Cir. 1989) (stating that no legal distinction exists between deliberate and inadvertent disclosure of privileged information). This is sometimes euphemistically referred to as the “Crown Jewels Test” i.e., privileged documents must be protected as if they were Crown Jewels. Id. at 980. Why the allusion to “Crown Jewel’s” warrants the loss of protected status rather than its retention – after all they are “Crown Jewels” – is unexplained. A cleaner analogy is to strict liability. Federal Election Com’n v. Christian Coalition, 178 F.R.D. 61, 72 (E.D. Va. 1998), order aff’d in part, modified in part, 178 FR.D. 456 (E.D. Va. 1998) (“Under the common law of attorney-client privilege, the parties privy to the communication must zealously and carefully guard against disclosure to third parties. Courts in this area take almost a strict liability approach to third party disclosure. If the information ends up in the hands of a third party, courts don’t want to hear how it got there. Once in the hands of a third party, the privilege, if it ever existed, is lost.”).

\textsuperscript{58} Georgetown Manor v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991); cf. Harold Sampson Children’s Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 788-98 (Wis. 2004) (holding that only client can waive privilege; conduct by lawyer is ineffectual as to that issue unless client authorizes disclosure by lawyer).
too hot, not too cold” approach.59 When applied to instances of inadvertent disclosure, this approach relies on a series of factors or guidelines to determine whether the disclosure has caused the information’s protected status to be lost,60 and, if so, the extent of the loss, e.g., partial (the information disclosed)61 or entire (all related information even though it was not disclosed).62 When applied to unauthorized disclosure cases, the inquiry focuses on the reasonableness of the efforts undertaken by the holder of the privilege to protect the information from unauthorized use.63 Both

59 Alldred v. City of Grenada, 988 F.2d 1425, 1433-34 (5th Cir. 1993); Harp v. King, 835 A.2d 953, 966 (Conn. 2003); see Smallman, Purloined Communications, supra note 55, 32 Tort & Ins. L.J. at 48 (collecting cases and authorities).


(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the production;
(2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and, (5) whether the overriding interests of justice would or would not be severed by relieving a party of its error.


62 Drimmer v. Appelton, 628 F. Supp. 1249, 1252 (S.D.N.Y. 1986) (holding that disclosure of a significant part of privileged information waives the privilege as to the entire matter); cf. In re Sealed Cases, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982) (stating that it is a matter of judicial discretion whether “to impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it”); see generally 2 RICE, ATTORNEY-CLIENT PRIVILEGE, supra note 32, §9.80.

63 In re Grand Jury Proceedings, Involving Berkeley & Co., 466 F. Supp. 863, 870 (D. Minn. 1979); cf. Sitterson v. Evergreen School Dist. No. 114, 196 P.3d 735 (Wash. App. 2008) (holding that 3 year delay in asserting claim of privilege after inadvertent disclosure, failure to show than any precautions were taken to prevent inadvertent
approaches adopt a balancing, case-by-case test. These considerations remain after the recent enactment of Rule 502 of the Federal Rules of Evidence. Rule 502’s explicit reference to “reasonable steps to prevent disclosure” and “reasonable steps to rectify” as factors relevant to whether disclosure resulted in privilege waiver\textsuperscript{64} essentially adopts a balancing approach using “reasonableness” as the fulcrum.

It is unclear whether the specific factors identified in the inadvertent disclosure cases are supposed to be applied in the unauthorized disclosures cases.\textsuperscript{65} Although Rule 502 applies only by its terms to instances of inadvertent disclosure, it would not be surprising if courts look to the rule for guidance in cases of unauthorized disclosure.\textsuperscript{66} In both case, the disclosure in unintended from the standpoint of the privilege holder.

Unauthorized disclosure, because of its “intended” transmission element, also bears some similarity to “selective” disclosure cases where the disclosure is “intended” but the audience for the disclosure is also intended to be limited.\textsuperscript{67} Here courts have also formulated a middle ground test, albeit one that is worded somewhat differently.

disclosure, and absence of large scale discovery demand (only 439 documents produced) supported finding of waiver).

\textsuperscript{64} See supra note 9. The Advisor Comment Note to Rule 502 identifies several factors as assisting the determination whether a disclosure is “inadvertent” such that it should not be deemed a waiver of any privilege: (1) the reasonableness of the precautions taken; (2) the time taken to rectify the disclosure; (3) the extent of discovery undertaken; (4) the scope of disclosure; and, (5) fairness. These factors substantially duplicate the judicially developed factors.

\textsuperscript{65} See supra note 60.

\textsuperscript{66} See Part 3, infra (arguing that inadvertent and unauthorized disclosure should be treated similarly.

\textsuperscript{67} This type of waiver has also proven to be contentious, Compare Saito v. McKesson HBOC, Inc. (Del. Ch. 2002) (unpublished) (2002 WL 31657622) (holding that common interest doctrine preserved privilege against claim of waiver by third parties arising out of privilege holder’s sharing of information with the Securities Exchange Commission (SEC) in order to resolve inquiry instituted by SEC against privilege holder); with McKesson HBOC, Inc. v. Superior Court, 9 Cal. Rptr. 3d 812, 821 (Cal. App. 2004) (holding that transmission of privileged information to SEC waived privilege status of information as to third parties notwithstanding confidentiality agreement entered into between privilege holder and SEC).
from the inadvertent disclosure test. The critical considerations in the “selective disclosure as waiver” cases appear to be fairness (should selective disclosure be allowed), burden (has disclosure enhanced the ability of third parties to access the material) and need (was disclosure necessary to enable the lawyer to competently advise the client). The selective disclosure cases involve, however, deliberate relinquishment of the privilege by the privilege holder. The issue in these cases is not intent, but the legal consequences of the intended disclosure by the privilege holder. This is structurally different from the unauthorized disclosure case. For that reason the selective disclosure cases do not assist in the resolution of this issue.

Cases and commentary attempt to distinguish between inadvertent and unauthorized disclosure, but the distinction is difficult to maintain. Model Rule 4.4(b) states in comment 2 that it “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.” The comment is, however, silent as to the reason for the distinction. Smallman also notes the distinction in his “Purloined Communications” paper:

68 See supra text and notes 60-61 (discussing consequences of inadvertent disclosure in terms of scope of waiver).

69 John Doe Co. v. United States, 350 F.3d 299, 302 (2d Cir. 2003); In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (9th Cir. 1993). Initially Rule 502, Fed. Rules of Evidence would have significantly opened up the use of selective waiver when information was provided to government officials. That provision was, however, dropped from the final version of the bill. Alvin F. Lindsay, New Rule 502 to Protect Against Privilege Waiver, National Law Journal (September 2, 2008) (stating that provision was dropped at urging of corporate privilege holders who were concerned that inclusion of provision authorizing selective waiver would legitimize government approach that cooperation requires privilege waiver).


71 Gramm v. Horsehead Industries, Inc., 1990 WL 142404 (S.D.N.Y. 1990) (attorney-client privilege is waived by disclosure of privileged document to client’s accountants, “unless the transmission was for the purpose of enabling the accountant to assist the attorney in rendering legal services.”)
Although the implied waiver approach is understandable in the context of negligent disclosures by the holders of the privilege or their agents, its application to cases in which disclosure arises from tortuous, criminal, unethical, or otherwise wrongful acts of others is far less compelling. Accordingly, courts have distinguished inadvertent disclosures from involuntary disclosures, recognizing that cases involving privileged information obtained due to the actions of a third party are inapposite to cases in which disclosure of privileged information arises from unilateral error by the part asserting the privilege.\footnote{Smallman, Purloined Communications, supra note 55, 42 Tort & Ins. L.J. at 722-723, citing James M. Grippando, Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents, 39 U. Miami L. Rev. 511, 512 n.6 (1985).}

The decisions relied on by Smallman for the distinction involved coerced disclosures, which are distinct from the type of “unauthorized” disclosure discussed here (misappropriated or stolen materials). Courts have treated coerced compliance as not constituting a waiver;\footnote{Compliance with judicially compelled disclosure of privileged documents/information is not a waiver. Hopson v. Mayor, 232 F.R.D. 228, 232 (D. Md. 2005); cf. Regents of the University of California v. Superior Court, 81 Cal. Rptr.3d 186, 194-95 (Cal. App. 2008) (holding that disclosure to Department of Justice, pursuant to Department’s policy of requiring waiver of attorney-client privilege in considering whether criminal indictment would be sought, was sufficiently coercive to preclude extending waiver to civil proceeding brought by third parties even though civil proceedings involved same matter as before Department of Justice). John M. Facciola, Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure, 2 Fed. Cts. L. Rev. 57 (2007). The failure, however, to seek promptly judicial relief from the coercion may itself be deemed a waiver. See United States v. Ary, 518 F.3d 775-785 (10th Cir. 2008) (involving information obtained pursuant to search warrant).} however, coerced compliance is meaningfully different from unauthorized disclosure based on misappropriation or theft by an insider. This leads us to the question whether the distinction between unauthorized and inadvertent disclosure should be maintained?
Initially, the ABA Standing Committee on Ethics and Profession Responsibility identified inadvertent disclosure as categorically different from unauthorized disclosure. In Formal Opinion 92-368 the committee addressed the issue of inadvertent disclosure. The opinion was clear that it was addressing the problem of errant disclosure not unauthorized disclosure. Several years later in Formal Opinion 94-382 the committee separately addressed the issue of unauthorized disclosure.

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**Formal Opinion 92-368** provides in pertinent part:

The Committee has been asked to opine on the obligations under the Model Rules of Professional Conduct of a lawyer who comes into possession of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer. The question posed includes situations in which the sending lawyer has notified the receiving lawyer of the erroneous transmission and has requested return of the materials sent as well as those situations in which the inadvertent sending lawyer and his client remain ignorant that the materials were missent. It also extends to situations in which the receiving lawyer has already reviewed the materials as well as those in which the sending lawyer intercedes before the receiving lawyer has had such an opportunity. This opinion is intended to answer a question which has become increasingly important as the burgeoning of multi-party cases, the availability of xerography and the proliferation of facsimile machines and electronic mail make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine.

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**Formal Opinion 94-382** provides in pertinent part:

The Committee has been asked to consider the obligations of a lawyer under the Model Rules of Professional Conduct (1983, as amended) when the lawyer is offered or sent, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or that appear on their face to be, subject to the attorney-client privilege of an adverse party or
Notwithstanding the classification distinction, the committee expressly acknowledged that the issues would be resolved similarly:

The present issue is similar to that considered by the Standing Committee in Formal Opinion 92-368, Inadvertent Disclosure of Confidential Materials (November 10, 1992) .... The instant case is analogous.\textsuperscript{76}

The committee offered that the two situations were similar to the extent that in both situations the disclosure is nonconsensual from the adverse party’s perspective. The committee did note what it considered two dissimilarities. First, in the case of inadvertent disclosures the transmitting party does not intend to send the materials to the receiving party; the situation is just the opposite in the case of unauthorized disclosure. Second, the committee suggested that unauthorized disclosure may involve situations evidencing “improper or unjust conduct,” which may give the receiving lawyer more leeway to use the materials. Notwithstanding these perceived categorical differences, the committee concluded, as noted above, that a lawyer’s obligations in either case were the same – notify the adverse party of the disclosure and abide by that party’s instructions.\textsuperscript{77}

\footnote{\textsuperscript{76} \textit{Id.}}

\footnote{\textsuperscript{77} When the committee revisited the issues after the 2002 revision of the Model Rules, it disavowed both opinions. The committee concluded that Formal Opinion 92-368 (Inadvertent Disclosure) was no longer consistent with amended Rule 4.4(b).}
The approach by both courts\textsuperscript{78} and ethics committees\textsuperscript{79} has been generally the same. The issue is more complicated with unauthorized disclosure because the analysis may include questions of deception (e.g., surreptitious taping)\textsuperscript{80} or complicity in client misconduct (theft).\textsuperscript{81} Nonetheless, when the issues of inadvertent and unauthorized disclosure are laid side-by-side, the general approach is to notice the classification distinction, but resolve the issue the same way.\textsuperscript{82}

Should inadvertent disclosure be distinguished from unauthorized disclosure? As noted previously, the ABA Standing Committee stated that both forms of disclosure were similar because both were nonconsensual. That is true, but it is a meaningless statement. If a disclosure is consensual it is of little interest insofar as the dissemination to or use by the receiving party is concerned. A lawyer does not violate professional

\begin{itemize}
  \item Restatement (Third) Law Governing Lawyers §102, cmt.d, Reporter’s Note at 109-111 (2000) (collecting cases disqualifying lawyer who acquired privileged information through an unauthorized disclosure and failed to notify the privilege holder of the disclosure).
  \item See, e.g., Connecticut Bar Assn Informal Ethics Opinion 96-4 (applying both ABA Formal Opinion 92-368 and 94-382 to question whether lawyer may allow client to obtain or copy confidential records of client’s ex-wife that client fraudulently induced holder of records to send to lawyer); New York State Bar Association Ethics Opinion 749 (2001) (citing both ABA Formal Opinions 92-368 and 94-382 in analysis whether lawyer engages in improper conduct by surreptitiously tracing electronic documents).
  \item See supra note 53.
  \item See supra text and notes 52-54.
\end{itemize}
norms by using, much less receiving, consensually disclosed information. The issue always is over nonconsensual disclosures.

The Standing Committee offered that inadvertent disclosures and unauthorized disclosures were different in two ways: (1) in the case of inadvertent disclosure the sender did not intend to transmit the disclosure to the receiving party; and (2) in the case of unauthorized disclosure the transmitted materials are more likely to evidence wrongful or unjust conduct. The first distinction is a difference but one that is irrelevant unless the identity of the sender is critical to the issues under consideration. The Standing Committee did not state that it is and it is hard to see why the identity of the sender would be a relevant factor, except in cases when the receiving lawyer deliberately caused the unauthorized disclosure, which would raise independent issue of professional conduct, or the identity of the sender might implicate the issue of waiver. The identity of the sender may also be relevant when we examine whether

83 Rule 8.4(c); Dubois v. Gradco Sys., Inc., 136 F.R.D. 341, 347 (D. Conn. 1991) (“[I]t goes without saying that plaintiff’s counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy”); see supra text and notes 47-48, 66-68. California courts have, however, held that transmission of misappropriated, privileged materials by the lawyer’s client does not constitute improper conduct warranting the lawyer’s disqualification. Neal v. Health Net, Inc. 123 Cal. Rptr.2d 202 (Cal. App. 2002).

84 For example, in Jasmine Networks, discussed supra text and notes 42-49, 12 Cal. Rptr.3d at 128, the court read California authority as requiring that the waiver be by the privilege holder not the lawyer, at least in cases of inadvertent waiver:

Marvell argues that no waiver occurred in this case, because the inadvertent disclosure was by its counsel, Gloss, and because Marvell did not intend to disclose the information, Gloss’s inadvertent disclosure was not sufficient to constitute waiver. Marvell is correct that an attorney’s inadvertent disclosure does not waive the privilege absent the privilege holder’s intent to waive. (See State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 654, 82 Cal. Rptr.2d 799 (State Comp.) [court concluded, “‘waiver’ does not include accidental, inadvertent disclosure of privilege information by the attorney”].)
the holder of the privileged information took suitable precautions to protect the confidentiality of the information, but that factor does not, on its face, distinguish between inadvertent or unauthorized disclosure.

The second dissimilarity the Standing Committee noted was the greater likelihood in the unauthorized disclosure cases that the information at issue evidenced improper or unjust conduct. Again this position was asserted, not established. There is some anecdotal evidence that unauthorized disclosure cases arise in whistleblower type actions and this may feed the belief that inadvertent and unauthorized disclosures separate on this point. There is, however, nothing about inadvertent disclosure as opposed to unauthorized disclosure that suggests that the content of the disclosure may or may not more likely suggest wrongdoing. One can find cases in both disclosure categories that do, and do not, evidence wrongdoing.\footnote{85} Evidence of wrongdoing may affect the ability to use the information, but that is a function of the extent to which the crime-fraud exception (lawyer’s advice sought to assist or further the perpetration of crime or fraud) may defeat the information’s protected status,\footnote{86} and the crime-fraud exception applies, if at all,\footnote{87} independent of the means of disclosure.

Regardless of the form of disclosure, (Inadvertent or Unauthorized), the best resolution of the issue, whether fixed as one of professional responsibility or evidentiary use, is to use a single approach when evaluating the consequences for both forms of disclosure. The recipient of the disclosure is unlikely to have a firm, factual basis for distinguishing between the two forms of disclosure until the recipient has reviewed the

\footnote{Id. at 128 (brackets in original). \textit{Jasmine}, however, expresses a minority position. Grace M. Giesel, \textit{Client Responsibility For Lawyer Conduct}, supra note 46, 86 Neb. L. Rev. at 393.\footnote{85} For example, \textit{Jasmine Networks} is an inadvertent disclosure case that suggests fraud was afoot. See supra text and notes 41-49 (discussing \textit{Jasmine Networks}).\footnote{86} Restatement (Third) Law Governing Lawyers (2000), at §82 (application of crime-fraud exception to attorney-client privilege), at §83 (application of crime-fraud exception to attorney’s work product).\footnote{87} Rico v. Mitsubishi Motors, 171 P.3d 1092, 1101 (Cal. 2007) (refusing to apply crime-fraud exception to attorney’s work product).}
materials to some extent. For example, assume the recipient lawyer receives an email message or a package from the client or from the lawyer for the adversary. Is the lawyer in a position to determine her professional obligations before examining the disclosure sufficiently to determine if it is inadvertent or unauthorized or neither? In either case the lawyer may seek more information before reviewing or may elect to review first until the status of the disclosure comes clearer into focus. In most cases the lawyer simply reviews the materials without any preconception as to the material's possible protected status.

What happens when some clarity is achieved either by prior notice, prereview checking, or by actually reviewing the information? If the lawyer correctly determines that the disclosure is consensual, e.g., not inadvertent or not unauthorized, the lawyer is entitled to use the information. If the lawyer correctly determines that disclosure is sufficiently likely to be privileged to warrant preliminary protection, the lawyer must act in a professionally proper manner under the rules of her jurisdiction. This will require, as to both inadvertent and unauthorized disclosures, in most jurisdictions that the lawyer notify opposing counsel of the disclosure. The lawyer may return the disclosed information if the lawyer is satisfied that the information is protected and was


[T]he purpose of confidentiality is to promote full and open discussions between attorney and client. [I]t would be ironic to protect confidentiality by effectively barring from such discussions an adversary's confidences known to the client. A law client should not be expected to make such distinctions in what can and cannot be told to the attorney at the risk of losing the attorney's services.

Id. at 742 (citation and footnotes omitted) [brackets added].

transmitted unintendedly\textsuperscript{90} or seek judicial clarification whether the information may be used if the issue cannot be resolved informally and privately. If the court finds that disclosure caused the information’s protected status to be lost or if the court finds that the information is not privileged, as, for example, due to the crime-fraud exception, the lawyer may use the information and doing so raises no professional objection. If the court finds that the disclosed materials retain their protected status, the lawyer cannot use the information in direct violation of a court finding that the information is privileged; doing so would constitute a violation of professional obligations. If the court determines that the information is privileged, the court will then have to consider whether the lawyer’s review of the disclosed materials required further action, such as disqualification because of the lawyer’s exposure to the adversary’s privileged information.\textsuperscript{91} In no case, however, do these determinations turn on the bare

\textsuperscript{90} Cf. Model Rule 4.4(b), cmt.3 (regarding inadvertent disclosure); Jonathan Groner, Akin, Grump Returns ‘Hot’ Documents to Sender, Legal Times at 8 (Week of October 5, 1992) (reporting decision and action of law firm to return documents apparently leaked from federal agency; the documents were relevant to a matter the firm was handling on behalf of a client). Whether the client must be informed of the lawyer’s decision turns on whether the receipt of the information constitutes a significant development in the representation. ABA Model Rule 1.4. Under new Rule 502 (discussed supra at text and notes 7-9) and 63-65, does the inadvertent disclosure of privileged documents, which the lawyer believes retain their protected status notwithstanding the disclosure, and, therefore cannot be used, constitute a significant development? If the lawyer discloses the situation to the client must the lawyer abide by the client’s instruction to seek judicial resolution rather than return the materials without further review to the privilege holder? See ABA Model Rule 1.2(a). Comments 1 and 2 to Rule 1.2 effectively concede that when the lawyer and the client disagree over the means to be used to accomplish the representation, the rule provides no clear standard for allocating authority to decide. Comment 1 to Rule 1.3 does suggest that the “lawyer is not bound to press for every advantage that might be realized for a client”; however, that admonition is found in the context of a lawyer’s duty of diligence and promptness, not as to the lawyer’s general duties owed to the client.

\textsuperscript{91} Rico v. Mitsubishi Motors Corp., 171 P.3d 1092 (Cal. 2007):

The State Fund court held that [m]ere exposure to an adversary’s confidences is insufficient standing alone, to warrant an attorney’s disqualification. The court counseled against a draconian rule that [could] nullify a party’s right to representation by chosen counsel any time inadvertence or devious design put
characterization of the disclosure as inadvertent or unauthorized. There is no separate
test for each type of disclosure. In each context, courts today assess whether the
privilege holder exercised reasonable precautions to prevent disclosure;\textsuperscript{92} whether the
disclosure was inadvertent or unauthorized simply describes how the disclosure
occurred.

The real problem, however, is the failure of courts and ethics committees to
recognize the precarious, uncertain position of the lawyer who receives, or is offered,
information that may be privileged. A court can make factual determinations or an
ethics committee can make hypothetical assumptions, which it presents as facts; the
lawyer, however, is often presented with a nebulous, uncertain situation, which she
must attempt to resolve. It is in this context that the inadvertent/unauthorized dichotomy
has little salience. The California Supreme Court in Rico v. Mitsubishi Motors Corp.,
held that a lawyer must notify the opposing party that the lawyer possesses information
that may be confidential or privileged when is the information “obviously” and “clearly”
appears to be privileged. When does the basis for believing that the information is
protected attach? Are there magic words that trigger this duty, for example, the
presence of the terms “privileged” or “confidential on the document or materials?” What
document from a lawyer or law office today does not assert a pretextual claims to
protected status. Must a lawyer cease reading when she encounters those magic

\begin{quote}
863, 869 (D. Minn. 1979) (using reasonable precautions test to determine if stolen
privileged information had lost its protected status); DC Bar Ethics Opinion 318 (using
balancing test to determine if materials that were misappropriated have lost their
privileged status).
\end{quote}

\textsuperscript{Id. at 1100 (citations and quotation marks omitted) (brackets in original), but see Neal v.
Health Net, Inc., discussed supra note 83 (holding that when lawyer’s exposure to
adversary’s privileged materials is caused by client’s efforts to secure legal
representation and advice, exposure alone does not require disqualification).}
words? Instructing lawyers to do so is an exercise in futility. A lawyer necessarily will read a disclosure to determine whether it is protected and will reread the disclosure to confirm the conclusion the lawyer initially reached. Notification then becomes but the beginning of the journey – a journey whose path is not meaningfully affected, except in instances of blatant theft and misappropriation, by the means by which the lawyer received the disclosure. One can concoct difficult hypotheticals that test this assumption, e.g., the client who brings lawyer documents the client admits he pilfered from opposing counsel’s briefcase during a deposition break. When faced with these unambiguous facts the lawyer’s task is clear. The problem, however, is that the lawyer’s world is not always so clear and unambiguous as to facts and their interpretation.

One way inadvertent disclosures may be perceived to differ from unauthorized disclosure is in the lawyer’s complicity in effecting the disclosure. Complicity may raise collateral issues of dishonesty and deception. Here I address what may be perceived as a structural distinction: the receiving lawyer usually has some forewarning in the unauthorized disclosure case whereas disclosure is usually a surprise in the inadvertent disclosure case. This distinction may be, however, more constructed than real. What do we mean by “surprise?” The words “unauthorized” and “inadvertent” carry a different meaning, but does either word really capture the real world experience of the lawyer who encounters a situation primed for disclosure? The client says, “I have documents from my workplace that evidence my employer is engaging in illegal conduct which caused my termination when I refused to participate in the wrongdoing.” Alternatively, the lawyer is representing that same client in that same dispute and receives the same information in a (1) brown paper package left with the lawyer’s secretary, (2) an email, or (3) a voicemail. In what ways are the two scenarios meaningful different for the lawyer?

The only meaningful different is the point in time when the lawyer reasonably appreciates that the material is protected. Using the test expounded in Rico v.

93 See supra note 54 (lawyer disqualified and disciplined for knowingly accepting stolen privileged information taken from opposing counsel’s briefcase); but cf. United States v. Gangi, supra note 90 (holding that document with legend that it was “Grand Jury” material did not preclude inspection of the document by the receiving lawyer).
Mitsubishi Motors, this would be when the material’s protected status “obviously” and “clearly” appear to a reasonably prudent lawyer. When is that?

Does the lawyer have a duty to explore with the provider of the unauthorized information whether the information is protected before reviewing the information? Such an approach may appear on the surface to be prudent, but when should the provider’s perceptions be preferred over the information’s actual status? What if the provider’s perceptions are inaccurate? The best evidence of the information’s status is the information itself. Whether the information is privileged is determined initially by the character and nature of the information. How the information was obtained by the provider and produced for the lawyer goes to the issue whether the information’s protected status has been lost due to waiver. Questioning the provider of the information, may do little to illuminate whether the provider had authority to disclose the information because that issue will often depend on the innate character of the

94 The provider may not be in a position to opine accurately as to the legal status of the materials and may be confused as to the legality of the means by which the information was obtained. O’Brien v. O’Brien, 899 So.2d 1133 (Fla. App. 2005) (wife installed spyware program on household computer that simultaneously copied husband’s email messages; court excluded evidenced as illegally obtained). For example, if the provider says she copied emails sent to her is her conduct illegal? What if the client wife knows the husband’s computer password and uses it to access his email account? Illegal? What happens if the client says her husband gave her his password or knows she has it and has accessed his email in the past? Must the lawyer disbelieve the client? What type of a dialogue is the lawyer supposed to have before he may review the information, at least preliminarily to ascertain if it is privileged? See generally Patricia L. Bellia, Spyware and the Limits of Surveillance Law, 20 Berkeley Tech. L.J. 1283 (2007); In re Complex Asbestos Litigation, supra note 88 (noting general inability of lay clients to make nuanced legal distinctions regarding what may and may not be disclosed to the lawyer).

95 Many of these unintended disclosure cases turn on the issue of “waiver.” Did the disclosure reflect a failure to maintain the confidentiality of the information and, thus, amount to waiver of the privilege? The relationship between disclosure and waiver is, however, muddled. Does waiver allow the recipient to use the information freely? Does improper conduct in connection with the disclosure on the recipient’s part prevent or compromise a finding of waiver? Which is primary – the “disclosure” or the “waiver”? See Kanter v. Superior Court, 253 Cal. Rptr. 810 (Cal. App. 1988) (holding that lawyer and client’s inadvertent inclusion of privileged documents in discovery response raised triable issue whether they had waived the privilege).
information, which cannot be determined in many cases until the information is reviewed by the lawyer. The dominance of the balancing, case-by-case approach to the determination whether disclosure (inadvertent or unauthorized) has resulted in a waiver of the materials privileged status evidences the substantial uncertainty that exists in this area. This puts the lawyer in a precarious position. If she reads too little she may be unable to accurately determine whether the information is privileged and may end up not using information that would be helpful to the client’s cause. If she reads too much, she risks being disqualified for improperly accessing the adversary’s privileged information. This is not an idle risk.96

Separating the issue of how the lawyer obtained the materials from the status of the materials does not mean that the lawyer always has a free hand to examine the materials to determine if they are protected. For example, if the provider of the materials admits to facts that put the lawyer on notice that the materials were stolen, the lawyer has to address how he will deal with “stolen” property. Courts and ethics committees have agreed that a lawyer should not read materials that the lawyer knows were stolen when that knowledge exists prior to the time the lawyer would review the materials. The courts and ethics committees have not been as clear when the situation is ambiguous, for example, what does “stolen” mean. Obtaining documents by rifling

96 See, e.g., Richards v. Jain, 168 F. Supp.2d 1195, 1205 (W.D. Wash. 2001) (holding that whether a lawyer should be disqualified when the lawyer receives privileged information outside the normal course depends on an evaluation of the following six factors:

1. whether the lawyer knew or should have known the information was privileged;
2. the promptness with which the lawyer informed the opposing side that he had received privileged information;
3. the extent which the lawyer reviewed and digested the privileged information;
4. the significance of the privileged information;
5. the extent to which the disclosure was the fault of the privilege holder;
6. the extent to which the disqualification will harm the lawyer’s client.
through opposing counsel’s briefcase during a deposition break is one thing; obtaining documents by downloading them from computer files to which the person has lawful access may be another. The lines are fine and courts often elide the issue. It is, however, in this situation that the Rico trigger of “obviously” and “clearly” privileged lends some instructional assistance. Once that trigger is met, the lawyer must notify. The Rico trigger provides something of a safe harbor for the lawyer who is confronted with an ambiguous situation not of his making. In such situations, that lawyer should be given reasonable protection from after-the-fact second guessing.
WHAT MAY THE LAWYER DO ON RECEIPT OF INFORMATION THAT IS UNINTENTIONALLY DISCLOSED

There is a professional consensus that the lawyer should notify opposing counsel when the lawyer receives material that is apparently privileged.\textsuperscript{97} I do not question that point as it does not impose a significant burden on lawyers. If notification is required, what else must the recipient do after receiving the disclosure and ascertaining its apparent protected status of the materials in the recipient's possession? Four options are possible: (A) a return obligation; (B) a use opportunity; (C) a review option; or (D) clarification.

A. Return

Many of the early decisions and ethics opinions that addressed the inadvertent disclosure issue opted to impose a return obligation on the recipient.\textsuperscript{98} The few cases that addressed unauthorized disclosure did not impose a similar obligation,\textsuperscript{99} likely due to the then influence of the view that theft or misappropriation defeated the information's protected status, as long as the lawyer did not encourage the theft or misappropriation. The modern trend is to reject a \textit{per se} waiver in favor of a case-by-case balancing

\textsuperscript{97} Monroe Freedman has argued that lawyers should not be obligated to provide notice. \textit{See supra} text and note 38. The bench and bar have, however, consistently over the past several decades opted for a notification duty, which is currently set forth in Model Rule 4.4(b).

\textsuperscript{98} ABA Formal Opinion 92-368.

\textsuperscript{99} Cooke v. Superior Court, 147 Cal. Rapt. 915 (Cal. App. 1978) (involving butler who overheard conversation between client Husband and his attorney and communicated same to Wife and her attorney; butler also provided copies of relevant privilege documents; court refused to disqualify Wife’s attorney because confidential information was not obtained from client-lawyer relationship between Husband and his Attorney by Wife’s attorney and no prohibition exists against third party independent communication of confidential information).
approach.\textsuperscript{100} As a corollary to this, the modern cases and ethics committee opinions, along with the ABA, have not included a “return” obligation as part of the receiving lawyer’s duties.\textsuperscript{101}

As a practical matter, the issue of a return obligation is unlikely to generate much modern debate. The modern trend is to seek clarification from the court as to whether the disclosed materials are privileged. When clarification is obtained, resolution of any return obligation will also be achieved. The same is true if the parties privately resolve the issue without the need of judicial intervention.

\section*{B. Use}

Whether a lawyer can use unintentionally disclosed information presents a difficult issue because “use” is a significantly ambiguous term here. Use of information can range from review of the information to ascertain whether it is protected (knowledge use) to exploitation of that information strategically against the adversary (evidentiary use). Exploitation of the disclosed information may involve only knowledge use (e.g., trial or negotiation strategy) or it may involve evidentiary use (e.g., admissions, trial exhibits). Use of the information may predate notification or occur after notice of the disclosure is given.

The modern trend suggests that a lawyer who \textit{ex ante} uses apparently privileged information against an adversary acts at his peril both in terms of professional responsibility\textsuperscript{102} and in terms of disqualification,\textsuperscript{103} if it is determined \textit{ex post} that the

\textsuperscript{100} See supra text and notes 59-60.

\textsuperscript{101} Rico v. Mitsubishi Motors Corp. 171 P.3d 1092, 1099 (Cal. 2007); Model Rule 4.4(b) cmt.2.

\textsuperscript{102} DC Bar Ethics Opinion 318 (2002) (suggesting that lawyer who uses material that lawyer knows is privileged may be violating Rule (8.4(c)) that prohibits a lawyer from engaging in conduct that is deceptive or dishonest); Florida Bar Professional Ethics Committee, Opinion 07-01 (September 2007) (opining that lawyer properly segregated and did not use information client wife had improperly obtained from adverse party (husband); Connecticut Bar Association Ethics Opinion 96-4 (March 1996) (opining that lawyer can retain and not turn over to client privileged information client caused to be sent to lawyer by deception practiced on public authority holding the information).
information was protected and the lawyer over-reviewed the information, i.e., reviewed beyond the point the information’s protected status became “obvious” to the reasonably prudent lawyer. The cases do not, however, carefully distinguish between the different ways the information can be used. This results because judicial consideration of the issue here tends to be case-by-case oriented rather than rule oriented.

C. Review

The critical issue here is whether the lawyer should be allowed to review materials that are “apparently” privileged or which are claimed to be privileged or should cease reading once the “apparently” threshold is met or a claim of privilege is tendered. There has been significant disagreement on this point. One camp argues that the lawyer’s obligations to the client mandate that the lawyer read on to fully inform himself so as to better represent the client’s interests.104 This “zealous advocacy” argument has not, however, found much modern acceptance in this context. On the other hand, numerous courts and commentators have argued that once the threshold or claim is made, the lawyer should cease reading (“read no further”).105

The difficulty with the “read no further” rule is that it is unworkable as an ex ante rule and overly draconian as an ex post rule. As an ex ante rule, “read no further” fails because when the privileged status of information becomes “apparent” is not tethered to any principled standard that can be applied consistently. The very fact that courts have generally opted for a case-by-case approach to the question whether unintended disclosure constitutes a waiver demonstrates the difficulty of identifying pre-set points that identify whether information is privileged in fact.

The uncertainty surrounding an ex ante rule leads to the draconian consequences of an ex post rule. Ex post the information either was privileged, which means the lawyer should not have read further, or it was not, which means the lawyer


104 Freedman, Erroneous Disclosure, supra note 38.

105 Perlman, Untangling Ethics, supra note 4.
could have read further. In the first situation the lawyer is sanctioned for violating a professional norm; in the second situation the client suffers because the lawyer exercised restraint. Neither option is reasonable or efficient.

The problem is compounded when we realized that the professionalism concern fails to distinguish between use of the information in the sense of exploitation and use of the information in the sense of knowledge as discussed in Part 4B. Gaining knowledge in order to effectively represent the client is not unprofessional in the same sense as exploitative use of the possibly privileged information against the privilege claimant. The knowledge the lawyer gains from reading further allows the lawyer to counsel and advise the client, including arguing to a court that the information should be usable because the claim of privilege is erroneous. Unlike exploitative use, there is no deception practiced on the privilege claimant; instead, allowing the lawyer to read further encourages the lawyer to seek judicial clarification so that the information could be “used” in the full sense of the term.106

Instructing lawyers that they should “read no further” imposes on lawyers an obligation that is uncertain in scope and dimension because the obligation’s trigger (“apparancy”) is undefined. While that deficiency does not apply to a claim that the information is privileged, there is no reason why the recipient lawyer should be required to restrain his duty to the client of professional independence to benefit opposing counsel, particularly when opposing counsel is under no correlative duty of restraint in making the claim of privilege.


There are a number of California decisions that have discussed the issue of whether an attorney should be disqualified after being exposed to an adverse party’s confidential information. These cases, which articulate controlling neutral principles of law, are directly pertinent to the disqualification motion at issue. The cases have consistently concluded that mere exposure to confidential information of the opposing party does not require disqualification.

Id. at 210 (citations omitted).
Rather than allowing either side unconstrained freedom to use (recipient) or to claim (privilege claimant), a fairer resolution is to place the matter before the court and require the parties to abide by the court’s resolution of the claim. Because the critical issue is the alleged privileged status of the information, fundamental fairness would dictate that the lawyer recipient be allowed to review the material alleged to be privileged so that the lawyer could argue to the court that the material is not privileged or has lost its privilege.\footnote{Cf. Restatement (Third) Law Governing Lawyers §80(1)(a) (2000):}

Given that the recipient lawyer should be able to review the material to be able to argue to the court, nothing is lost if the lawyer is allowed to “read further” at an earlier point in time, as long as the privilege claimant is apprised that the lawyer is “reading further.”

D. Clarify

The dangers associated with using possibly protected information incentivizes the recipient of the disclosure to obtain judicial clarification before doing so. A judicial decision resolves the open question of the information’s status that puts the receiving lawyer in peril. Abiding by judicial instruction protects the lawyer from the threat of sanction arising from a court’s subsequent disagreement with the lawyer’s unilateral resolution of the issue.

Clarification prevents the lawyer from surreptitiously exploiting the information to the adversary’s disadvantage. Seeking clarification will necessarily serve to notice that disclosure has occurred. Refraining from using the information until the court acts

\footnote{Cf. Restatement (Third) Law Governing Lawyers §80(1)(a) (2000):}

(1) The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that:

(a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client’s conduct; . . . .

Moreover, by voluntarily introducing the privileged communications into the proceedings, the privilege holder waives the protection of the privilege. See Restatement (Third), Law Governing Lawyers §79 and illustration 3 (2000).
to clarify the status of the information will have little effect beyond that imparted by the disclosure. If the disclosed information is knowledge-based only, notice discounts the information’s strategic value because the owner of the information knows the information is not confidential. Knowledge use may be contained if the lawyer is disqualified and ordered not to divulge the information to successor counsel;\(^{108}\) however, knowledge cannot be unlearned. Even if the court declares the information protected, the court can do little to allay the harm disclosure has caused other than disqualifying counsel. All the knowledge harm that the owner-adversary will sustain was sustained as a result of the disclosure; all rectification of the benefit disclosure could provide the recipient is obtained by requiring the recipient to give notice.

Once the adversary realizes that its information has been shared with the recipient, the adversary will take what action it can to mitigate damage associated with disclosure. If the information has evidentiary use value, obtaining clarification before use has no meaningful impact on the parties’ rights. A ruling on the right to use the evidence will occur at some point prior to use. For example, if the recipient seeks to use the information obtained as an evidentiary trial or deposition exhibit, the owner-adversary may object and force consideration of the right to use the information in the proceedings. Clarification simply moves that point up earlier in the litigation process.

While restraining oneself from using the information until clarification is obtained does not impose meaningful costs on the recipient, notification does. Notification deprives the recipient of the element of surprise – the ability to know what the adversary knows without the adversary knowing that the recipient knows. It is a significant benefit to know the adversary’s position when the adversary is unaware of that fact. Notification, however, puts the recipient at risk of disqualification, which is the only effective remedy a court has when a lawyer has been exposed to protected information that has informational value (e.g., trial strategy) but no evidentiary use value (e.g., establishes or helps establish part of litigant’s case). This reality entices a lawyer not to

\(^{108}\) Cf. San Diego County Bar Ass’n Ethics Committee, Opinion 2008 -01 (stating that discharged in-house lawyer who wishes to sue hr former employer may share client confidential information of employer with her lawyer, but lawyer may not reveal the information in the litigation unless disclosure is authorized by court order or professional rule exception).
notify, albeit at the cost of losing evidentiary use of the information, but retaining
knowledge use.

The desirability of a notification duty suggests, however, that courts and bars
should not create rules that discourage notification. Imposing disqualification whenever
a lawyer was exposed to protected, unintentionally disclosed information would
discourage lawyers from notifying. This might also result in lawyers not fully advancing
client interests if the lawyer failed to use information for evidentiary purposes that a
court would allow them to use because the lawyer erroneously believed the court would
rule otherwise (i.e., the information was protected), and disqualify the lawyer because
she had been exposed to the information. To avoid that problem, a lawyer might elect
to not notify and not use the information as evidence, but not notify the adversary what
the lawyer knew.

This course of conduct would itself be precarious. For example, the adversary
might become suspicious and ask the lawyer questions as to how the lawyer gained the
knowledge she had. Silence on the lawyer’s part would raise suspicions; lying on the
lawyer’s part would involve the lawyer in dishonesty and potential sanction independent
of the status of the information.109

If courts and professional bars want lawyers to notify, they should create
incentives to notify. Hanging a Damoclean sword over the lawyer who notifies will
discourage conduct courts and bars want to encourage. Creating safe harbors for
lawyers who notify and seek clarification before using the information by relegating
sanctions (disqualification) to situations in which the lawyer did more, such as sought to
use the information surreptitiously, would encourage notification and private or public
resolution of the claim of protected status of the information.110

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use the information surreptitiously, would encourage notification and private or public
resolution of the claim of protected status of the information.110

A strict notification rule following by efforts to clarify would avoid the problem
created by the suggestion that a lawyer can read too much when reviewing a disclosure

109 Formal Opinion 01-422 (2001); see Mississippi Bar v. Attorney ST, 621 So.2d
229, 232-33 (Miss. 1993) (holding that attorney who falsely denied that conversation
was being recorded would be subject to discipline even though secret recording was not
itself illegal).

110 See supra note 51.
to determine if it is protected and was disclosed unwontedly. Attempts to limit how much a lawyer should read are not only difficult to enforce they are unwise to implement. When a lawyer receives information that may be protected, the lawyer needs the leeway to ascertain the validity of that claim. Moreover a lawyer should not be subject to second guessing whether she read too much of a protected document. The notification trigger (“obviously” and “clearly” protected and “apparently” misdelivered) is not precise. Reasonable minds may disagree when the threshold was reached. While the receiving lawyer may be situationally incentivized to read more than she should, a post-review determination whether the lawyer read too much might be unfairly influenced by hindsight bias. While there are costs to allowing lawyers leeway in reading materials that may be privileged, those costs are, in my opinion, outweighed by the benefits a read, notify and clarify, but do not use for evidentiary purposes approach would bring to this area of the law.

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111 This incentive may be created by the law of privilege waiver. See In re United Mine Workers of America Employee Benefit Plans Litigation, 156 F.R.D. 507, 513 (D.D.C. 1994) (noting that a privileged document is deemed “disclosed” when the recipient reads enough to get the “gist” of the document’s contents; thus, if the lawyer ceases reading before that point, no disclosure, and hence, no waiver, has occurred).

112 “Hindsight bias” is a cognitive heuristic that encourages individuals to overestimate one’s ability “ex post” to have anticipated or predicted future events “ex ante.” Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, In Behavioral Law & Economics (Case R. Sunstein ed., 2000) at 95-115 (discussing hindsight bias).
Some lawyer no doubt wish that lawyers were more like the “gentleman who don’t read each other mail.” Our legal system remains, however, an adversarial process and it is unrealistic to expect lawyers to behave like angels rather than advocates. It is also unproductive to have balancing tests, based on open-ended criteria that subject lawyers to disqualification if they make a judgment error. Requiring lawyers to promptly notify when the lawyer comes into receipt of privileged materials, but allowing the lawyer to read the material, (unless the lawyer has aided or abetted a breach of a duty of confidentiality), to determine if the materials are privileged balances the competing interests. Whether information is privileged should be decided in court, not in a vacuum. The receiving lawyer needs to know what she has received in order to effectively advocate for the client. A “read no further” rule will not advance the goal of judicial resolution of privilege disputes. A “read no further” rule will discourage notification and encourage evasion, neither of which advances the goals of the legal system. Decisions in this area should be fully informed, which they cannot be if the lawyer, in possession of materials claimed to be privileged, cannot test the claim by reading and reviewing the materials.

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113 Quotations Book at http://quotationsbook.com/quote/44728 (visited, June 7, 2008) (attributing quote to United States Secretary of State Henry Stimson as his justification for closing down a State Department code-breaking operation in 1929); see Maryland State Bar Ass’n Committee on Ethics, Op. 2000-04 (acknowledging that no Rule of Professional Conduct created or specified a legal duty on the part of a lawyer who receives inadequately disclosed privileged information, but concluding that the Rules “imply a higher standard of conduct”).

114 Cf. In re Napster Inc. Copyright Litigation, 479 F.3d 1078 (9th Cir. 2007) (holding that party invoking crime-fraud exception to claim of privilege must establish claim by preponderance of the evidence and the party asserting the claim is entitled to a hearing – the court should not review the claim using only in camera procedures).