The Attorney-Client Privilege:

Some Practical Guidelines to Avoid Waiver

By:

Alimonti Law Offices, PC

200 Mamaroneck Avenue – Third Floor

White Plains, New York 10601

Although prepared with due care, this paper and accompanying presentation are presented for purposes of education and discussion. They should not be construed as legal advice, particularly with respect to highly fact-dependent issues such as privilege and waiver, which are ultimately subject to abundant judicial discretion and variation among different court systems.

I. Introduction. What Is The Attorney Client Privilege?

Privilege, as defined in Black's Law Dictionary, is "the right to prevent disclosure of certain information…especially when the information was originally communicated in a professional or confidential relationship."[1] Perhaps the most well-known relationship giving rise to such a privilege is the relationship between attorney and client, from which arises the attorney-client privilege.[2] Attorney-client is one of the oldest confidential privileges at common law, dating from the sixteenth century and, as the name suggests, covers confidential communications between attorney and client.[3] In accordance with this privilege, a lawyer is generally prohibited from revealing information relating to the representation of a client without first receiving authorization to do so, *i.e.*, informed consent, from the client;[4] "unauthorized" disclosure of privileged information is permissible if necessary to carry out representation.[5]

In order to assert the attorney-client privilege <u>each</u> of the following 4 factors must be present:

1. Client—the holder of the privilege is a client or, at the time of disclosure to the attorney, seeks to become a client;

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[1] BLACK'S LAW DICTIONARY 974 (Bryan A. Gardner, ed., 2000).

[2] *See id.*

[3] *See* 8 Wigmore on Evid. § 2290 (McNaughton Rev. 1961).

[4] *See* ABA Model Rules of Professional Conduct R. 1.6 (2004). *See also* ABA Model Code of Professional Responsibility Cannon 4 (2004).

[5] *See id.*

2. Legal Representation—the communication was made to an attorney in connection with legal representation;
3. In Confidence—the communication was made by the client (or prospective client), without the presence of strangers, for the purpose securing legal services or an opinion of the law; and,
4. Claimed—the privilege is claimed or asserted (not waived) by the client.[6]

II. Does It Apply in the Insurer/Insured Context?

It is important to note the distinction between privilege as it exists between attorneys and their clients versus that which exists between the insurers and the client-insureds. Though the attorney-client privilege does not per se apply, as the US Southern District court held in *In re Johns-Manville Corporation*, "the duty to defend its insured (including investigations made by the insurer in connection therewith) consists of a duty to defend *in confidence*, subject to all of the protections of privilege and confidentiality that the adversarial system affords all parties in litigation."[7] Therefore communications between the insurer and insured for *the purpose of discussing legal strategy, settlement initiatives, or to obtain or render legal advice*, are privileged.[8]

Though these communications are not protected by the attorney-client privilege directly, very similar motives are employed to establish both protections. The attorney-client privilege protects communications made to "essential" third parties, most commonly law clerks and

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[6] *See generally In re Grand Jury Subpoena,* 341 F.3d 331, 336 (4th Cir. 2003).

[7] *In re Johns-Manville Corporation* 2004 WL 1876046.

[8] *American Special Risk Insurance Company v. The Greyhound Dial Corp*., 1995 WL 442151 (S.D.N.Y. 1995). Emphasis added.

secretaries because they are hired to enable the attorney to properly perform their duties by working to the achieve the same legal objective as the attorney. However, courts will provide a similar protection for the communications between the insurer and insured, for the purpose of obtaining or rendering legal advice, and defending claims and litigation, as long as the legal interests of the 3rd party (the insurer) match the interests of the insured. In other words, the insurer and insured must have a common legal interest.[9]

However, the communications by an insured with their insurer for a purpose that has little or nothing to do with the pursuit of legal representation or the procurement of legal advice will not be protected. "…[A] statement betraying neither interest in, nor pursuit of legal counsel bears only the most attenuated nexus to the attorney-client relationship and thus does not come within the ambit of the privilege."[10] For example, if an insurer talks to an insured about the possibility of obtaining coverage, this communication would not be privileged. But if the insured were to call their insurer for the purpose of finding out if they are in fact protected under their existing policy, and in the course of doing so, were required to reveal facts to demonstrate any potential liability, this communication would clearly be "in the pursuit of legal representation".

Though it can seem that the insurer's and the insured's legal interests should often conflict, it is important to remember that the NY Court of Appeals held in 1991 that the "duty of an insurer to defend extends beyond the 'four corners of the complaint' and requires 'the insurer to provide a defense when it has actual knowledge of facts establishing a reasonable possibility

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[9] "The common interest privilege provides an exception to the rule that communications between an attorney and his client made in the presence of a third party who is not an agent or representative of the party lose their privilege." *Finkelman v. Klaus* Slip Copy 2007 WL 4303538 (N.Y.Sup.2007)

[10] *American Special Risk Insurance Company v. The Greyhound Dial Corp.*, 1995 WL 442151 (S.D.N.Y. 1995).

of coverage.'"[11] Any communications and discussions for the purpose of determining the possibility of coverage would therefore likely be confidential and protected.

However all documents created by the insurer for the insured are not necessarily privileged. This is because many such documents are made in the ordinary/routine course of business for an insurance company, and are not made *because of* the pending litigation. Insurance companies routinely investigate and evaluate claims, and therefore, the argument can be made that these documents should not be privileged but rather are discoverable as records made in the ordinary course of business.[12] But with respect to certain documents, such as accident reports prepared by the defendant-insured for the insurer, the courts may assign a "conditional privilege."[13] This means that the report, for example, "would be immune from discovery unless it can be established that a substantial equivalent of the material cannot be obtained by other means without undue hardship."[14] As you know, insurance policies and associated limits are typically disclosed early in litigation.

III. Waiver of the Privilege.

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[11] *Fitzpatrick v. American Honda Motor Co.* 571 N.Y.S.2d 672, 675 (Ct.App.1991).

[12] *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw* 2003 WL 22110281.

[13] *Recant v. Harwood*, 222 A.D.2d 372 (1st Dep't, 1995).

[14] *Id. at 373*

As with any privilege, the attorney-client privilege is not absolute. It is subject to several exceptions and the possibility of waiver,[15] by client, attorney or statute.[16] However, waiver is generally voluntary and may occur outside the course of litigation.[17] Even though the privilege is generally considered vested in the client and, therefore, technically may only be waived by the client,[18] in practice it usually is waived by either the attorney or the attorney's conduct.[19] For

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[15] *See generally* Thomas M. Geisler, Jr., *Proof of Waiver of Attorney-Client Privilege,* 32 Am. Jur. Pof. 3d 189 (2004). An attorney is authorized to disclose information in order to:

1. prevent reasonably certain death or substantial bodily harm;
2. prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is suing the lawyer's services;
3. prevent, mitigate or rectify substantial [financial or property] interest;
4. secure legal advice about the lawyer's compliance with these Rules;
5. establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;
6. comply with other law or a court order.

See ABA Model Rules of Professional Conduct R. 1.6 (2004); NY DR 4-101.

[16] *See* Geisler, *supra* note 7. In addition to being express or implied, waiver can also be provided for by statute. For example, in New York, CPLR § 4503(a) provides that communications between the attorney and client are confidential unless:

> [u]nless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

N.Y. Civ. Prac. L. & R. §4503(a) (McKinney's 2002).

[17] *See* ABA Model Rules, *supra* note 4.

[18] *See* Geisler, *supra* note 7. Indeed, the attorney can only waive privilege on a theory of agency. *See id.* at § 7.

[19] *See id.*

example, the attorney's failure to object to the disclosure of privileged material during the course of litigation can constitute such a waiver.[20]

A. Intentional Waiver

Generally, the attorney-client privilege is considered intentionally waived when the client expressly waives it. However, a seemingly unintended disclosure of the communication can be considered an intentional waiver. This is especially true if the holder of the privilege either takes an affirmative action or fails to take adequate precautions, and as a result, part of or all of the once confidential communication is placed in the public domain.[21] In such a scenario, no matter how inadvertent the inclusion of the confidential information was, the court will consider the privilege's protection of that information intentionally waived. Courts reason that the privilege is waived in such a situation, because there is no need to protect from disclosure information which is readily accessible from other sources.[22] If the information is readily accessible from a source other than the attorney or the client, it is considered in the public domain.

For an example of where a court found that the privilege was "intentionally" waived see *In re Kidder Peabody Securities Litigation.*[23] The court held in *Kidder* that the client completely waived any and all privilege attached to a report prepared by their attorney. In hopes of obtaining favorable treatment in litigation and arbitration, drafts and factual summaries of the

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[20] *See id. quoting Diematic Mfg. Corp. v. Packaging Industries, Inc.*, 412 F.Supp. 1367 (S.D.N.Y. 1976).

[21] *See id.*

[22] *See id.*

[23] *See In re Kidder Peabody Securities Lighting,* 168 F.D.R. 459, 468 (S.D.N.Y. 1996).

report were sent to the Securities and Exchange Commission.[24] By intentionally including portions of the report, the client "intentionally" waived the attorney-client privilege protection of that material, despite the fact that the client's actual intention was not to commit a waiver.

B. Common Pitfalls and Inadvertent Waiver.

Cases involving voluntary disclosure of privileged communications tend to be fairly straightforward as to waiver of the attorney-client privilege; jurisdictions differ most on how much of the communication is "voluntarily" waived. Court rulings are generally dependent on the type and nature of the disclosure.[25]

1. The Simple Form: Disclosures to Third Parties.

It is generally accepted that the attorney-client privilege does not attach to communications made in the presence of "strangers" or "outsiders" (third parties).[26] Essential third parties, such as law clerks and secretaries that are necessary to enable the attorney to properly perform their duties, will not defeat a finding of confidentiality. "The attorney-client privilege undeniably extends to communications with 'one employed to assist the lawyer in the

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[24] *See id.* at 470. *See also United States v. Jones,* 696 F.2d 1069 (4th Cir. 1982) (attorney-client privilege deemed waived when attorney's tax opinion published in promotional brochures). *C.f. Hudson v. General Dynamics*, 186 F.R.D. 271, 276 (D. Conn. 1999) (finding waiver of questionnaires when they were used to draft affidavits "opens too wide a door on this important privilege;" to qualify as waiver the questionnaires "would have had to been interjected into the litigation such as by using them to refresh their recollection or otherwise rely upon their questionnaire responses as an indicum of their credibility").

[25] *See* Geisler, *supra* note 7. Some jurisdictions hold that disclosure of privileged communications result in a waiver with respect to the entirety of the communication, while others hold that waiver applies to the entire subject matter of the disclosure even though the waiver was made within express limits. *C.f. Eastman Kodak Co. v. International Harvester Co.*, 14 FR Serv.2d 1272 (S.D.N.Y. 1970); *Duplan Corp. v. Deering Milliken, Inc.* 397 F.Supp. 1146 (D.C. 1974).

[26] *See United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975) (stating that communications divulged to strangers or outsiders can hardly be considered confidential communications between an attorney and client). *See also In re Bennett's Will*, 152 N.Y.S. 46 (4th Dep't 1915) (stating that communications between and attorney and client were not confidential when the client gave the attorney instructions for the completion of her will in the presence of her friend, and the will was then read aloud in the presence of the friend and client).

rendition of professional legal services.'"[27] As noted, an insurer can be, but is not always, considered an "essential party" protected by the attorney-client privilege.[28] The privilege will be held waived by the subsequent disclosure to a third party whose role has little to do with the pursuit of legal representation.[29] Generally the three common instances where privilege is lost in this manner involve: (a) careless disclosure by the client; (b) careless disclosure by the attorney; and, (c) careless disclosure by a third party.[30]

a. Careless or Inadvertent Disclosure by the Client.

When a client has disclosed protected information to a nonessential third party, courts have held that the attorney-client privilege is effectively waived.[31] For example, in *In re Sealed Case*,[32] a company inadvertently waived its privilege when it turned over documents to an IRS auditor that would ordinarily have been protected. The court stated that "if a client wishes to

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[27] *Linde Thompsan Langworthery Kohn & Van Dyke, P.C. v. Resolution Trust Corporation* 5 F.3d 1508 (D.C.Cir. 1993)

[28] *Id.at 1515*,

> "Certainly, where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege. However, a statement betraying neither interest in, nor pursuit of, legal counsel bears only the most attenuated nexus to the attorney-client relationship and thus does not come within the ambit of the privilege. To paraphrase the *Kovel* case, if what is sought is not legal advice, but insurance, no privilege can or should exist."

[29] *See In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672 (D.C. 1979).

[30] *See generally* Epstein, *supra* note 13.

[31] *See, e.g., In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989).

[32] *Id.*

preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels."[33]

b. Careless or Inadvertent Disclosure by the Attorney.

As with careless disclosure by the client, careless disclosure by the attorney can also effectively waive the attorney-client privilege. For example, in *In re Grand Jury Investigation of Ocean Transportation*, documents protected by the attorney-client privilege were inadvertently disclosed when included with a larger group of documents produced in compliance with a grand jury subpoena. Upon receipt, (producing) counsel was asked if the documents marked with a "P" were disclosed unintentionally. When counsel mistakenly replied in the negative, the "privileged" documents were subsequently copied, analyzed, and witnesses were questioned on their content. The court held that any previously existing attorney-client privilege in regard to the disclosed documents had been waived.[34]

In *In re Lernout & Hauspie Securities Litigation,* the court held that inadvertent disclosure of documents by the attorney resulted in the waiver of privilege for *all* other communications on the same subject.[35] In *Lernout*, the court's holding resulted in waiver for 15

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[33] *Id.* at 980. *See also State ex rel. Stovall v. Meneley,* 22 P.3d 124, 141 (Kan. 2001) (holding that attorney-client privilege was effectively waived when the client reveals communications made during confidential consultations with the attorney to a third party).

[34] *See id.* at 675. Specifically, "when … conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." *Id. quoting* 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961).

[35] *See In re Lernout & Hauspie Securities Litigation,* 222 F.R.D. 29, 35 (Mass. 2004). In addition to stating that the attorney-client privilege is waived as to all communications on the same subject with inadvertent disclosure, the court also stated that the same would result from a knowing disclosure. *Id.*

previously privileged e-mails when an attorney inadvertently provided printed copies of privileged e-mails to the opposition.[36]

c. Disclosure by a Third Party.

Another instance where the attorney-client privilege can be waived is through disclosure by a third party (*i.e*. disclosure by someone who is neither the attorney nor the client). This waiver scenario, of course, presupposes that privilege has not already been destroyed by the third party's knowledge and/or possession of the confidential communication.[37] However, privileged documents can generally be retrieved on motion.[38] For example, in *Fry v. McCall*, a former employee was called as a third party and produced documents, including handwritten notes of conversations with legal counsel. Upon motion, the documents were ordered returned.[39]

2. Disclosure in the Modern Age: Fax, Voicemail, and E-mail.

Technological developments have added obstacles in maintaining the attorney-client privilege. In addition to waiver through traditional means—either by the client, attorney, or third party—parties must now be mindful of the possibility of waiving privilege due to misdirected faxes, voicemail, and e-mail.

a. Disclosure by Fax.

[36] *See id* at 33. The e-mail between the attorney and client was initially inadvertently disclosed to the opposition because the attorney responsible for gathering documents was not the same attorney responsible for the communication and was unaware that the author of the e-mail was an attorney (no identification as such in e-mail). *Id.*

[37] *See* Epstein, *supra* note 13, at 311. For example, in the case of documents, the possession of those documents cannot constitute a waiver. *Id.*

[38] *See id.*

[39] *See id.; see also Fry v. McCall*, 1998 WL 770563 (S.D.N.Y. 1998).

Inadvertent revelation of confidential communications through fax does not always destroy the attorney-client privilege. For example, in *Sampson Fire Sales, Inc. v. Oaks,* the U.S. District Court held that privilege was not waived when an attorney's letter to his client was inadvertently faxed to the opposition.[40] In upholding privilege for the inadvertent disclosure, the court considered the following factors:

1. Reasonableness of precautions taken;
2. Number of inadvertent disclosures;
3. Extent of disclosure;
4. Timeliness of measures taken to rectify the disclosure; and,
5. Overriding interests of justice.[41]

The *Sampson Fire Sales* Court found that the attorney had met the above requirements and upheld the privilege.[42] First, reasonable precautions were taken when the fax was sent with a cover sheet stating that the contents were "confidential and privileged information, intended for the addressee" and, instructed improper recipients that "dissemination, distribution or copying … [was] strictly prohibited," and requested notification in the instance of faulty receipt.[43] Furthermore, the court found that the number and extent of the inadvertent disclosure was minimal because only one, one-page fax was misdirected.[44] The attorney's actions were timely

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[40] *See Sampson Fire Sales, Inc. v. Oaks,* 201 F.R.D. 351, 360 (M.D. Pa 2001).

[41] *See id.* For a detailed discussion of other waiver tests used in different jurisdictions, see below.

[42] *See id.*

[43] *See id.*

[44] *See id.* at 360-361.

when he addressed the issue to the court as soon as he became aware of the inadvertent disclosure.[45] Finally, the court found that the interest of justice dictated that privilege should be upheld because confidentiality is a fundamental aspect of the attorney-client privilege.[46]

It is noteworthy that, a determination of whether attorney-client privilege has been waived in the case of a misdirected fax often depends upon which waiver test a court applies.[47]

b. Disclosure through Voicemail.

A message left by the client on the voicemail of a third-party may result in a "disclosure" even if the message was intended for the attorney. Depending on the message's content, it may fail to qualify as an intended "communication."[48]

In *Joyner v. Southeastern Pennsylvania Transportation Authority*, a client mistakenly left a message on the opposing counsel's voicemail rather than that of his own counsel.[49] Applying a plain-language interpretation, the court found that the message was admissible in court.[50] The relevant statutory provision analyzed by the court provides the following:

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[45] *See id.* at 361. The attorney first became aware of the disclosure when it was included in the defendant's reply brief. *Id.* The attorney's response, motion, and brief were filed with the court within five days. *Id.*

[46] *See id.* at 362.

[47] For a detailed discussion on the three tests used in different jurisdictions, see Section C below.

[48] *See Joyner v. Southeastern Pennsylvania Transportation Authority,* 736 A.2d 35 (PA 1999).

[49] *See id.*

[50] *See id.* at 37.

> [i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon trial by the client.[51]

Since opposing counsel was not the client's attorney, it was found that no confidential communication was made between the attorney and client.[52] As such, the message was fully admissible in court proceedings.[53]

A possible means of creating a confidential communication on voicemail, even when the message is left on the machine of a third party, is through the demonstration that the client intended to direct the communication to his attorney.[54] To be successful, the party seeking privilege must demonstrate a (subjective) reasonable belief that he was talking to his attorney.[55]

c. Disclosure through E-mail.

E-mail communications between attorneys and clients are covered by the attorney-client privilege; it is the content of the document, not the type, which determines privilege.[56] Specifically, "[l]awyers have the same reasonable expectation of privacy when they use

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[51] *Id*.

[52] *See id.*

[53] *See id.*

[54] *See id.; see also Triffin v. DiSalvo,* 643 A.2d 118 (PA 1994) (law school graduate who had not passed the bar held himself out to be a licensed attorney was bound by the attorney-client privilege and thus prohibited from revealing information gathered in confidence from his clients).

[55] *See Joyner, supra* note 39, at 37-38.

[56] *See United States v. Advanced Disposal Service*, 885 F.Supp. 672 (M.D. Pa 1995).

computer e-mail to discuss confidential client matters as they would have conversing by phone."[57]

E-mail communications should be exchanged with caution. More than either phone or fax communications, e-mail may promote inadvertent waiver due to the ease and frequency with which messages can be forwarded (to non-privileged parties).[58] In certain circumstances, however, privilege will not be waived after an inadvertent disclosure if reasonable steps to protect e-mail privacy were taken.[59]

For example, in *United States v. Keystone Sanitation Company, Inc.*, reasonable steps were taken when attorneys sent e-mail messages to each other using the firm's LAN.[60] Likewise, expectations of privacy were appropriate when communications were made between users of American Online because such communications are more private than communications over the internet.[61]

C. In-House Counsel and Corporations.

Due to the multi-faceted nature of their employment, In-House Counsel face even greater risks with respect to attorney-client privilege; it is not always clear whether they are engaged in

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[57] Brian Cummings, *Lawyer-Client E-Mail Same as Phone Call: Ethics* Opinion, 487 PLI/Pat 141 (1997).

[58] *See* Wendy R. Leibowitz*, As I was Saying—E-Mail and Privilege, available at http://www.wendytech.com/ articlesemailandprivilege.htm (visited Mar.* 9, 2005) (*originally published in* ABA Law Practice Management, Mar. 2003).

[59] *See generally id.*; *see also United States v. Keystone Sanitation Company, Inc*, 855 F. Supp 672 (M.D. Pa. 1994); *United States v. Maxwell,* 42 M.J. 586 (A.F. Crim. App. 1995).

[60] *See Keystone*, *supra* note 50.

[61] *See* Leibowitz, *supra* note 49; *see also Maxwell*, *supra* note 50.

issuing legal advice or simply acting as a business advisor.[62] Moreover, advice from in-house counsel may have both business and legal elements.[63] Documents prepared for simultaneous review by legal counsel and non-legal personnel will not always be privileged.[64] For example, when protected information was shared with the employees of a trade support services company, such as outside accountants, such disclosure waived the privilege. In this example, the employees were found to be in the same position as an outside accountant.[65]

This tension faced by in-house counsel is further illustrated in the varied tests that courts apply in determining whether the privilege has been waived. The first "test" used by courts, the "control group test" and the second, the "subject matter test," consider, respectively, whether the parties to the communication are within or without the control group (*i.e.*, limited – or not- to persons within the corporation), and whether the subject matter of the communication is legal in nature. Several additional tests have been used when privilege is asserted in regard to a mixed business/legal communication from the in-house counsel.[66] One example is the "predominant purpose test," whereby courts analyze the predominant purpose of the communication in order to determine privilege.

1. **Steps to Avoid Waiver in the Corporate Context.**

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[62] See, *Georgia-Pacific Corp. v. GAF Roofing Manuf. Corp.*, 1996 WL 29392 (1996).; *United States v. Chevron Corp.*, 1996 WL 264769 (N.D. Cal. 1996).

[63] See *Georgia-Pacific, supra* note 53 at 4; *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588 (1989).

[64] *See Id.; see also United States v. Aluminum Co. of Am.,* 193 F. Supp. 251, 252-3, (N.D.N.Y. 1960).

[65] See *In re Currency Conversion Fee Antitrust Litigation,* 2003 U.S. Dist. LEXIS 18636, 7-8, (S.D.N.Y. 2003).

[66] *See Rossi,* 73 N.Y.2d 588*; c.f. Georgia-Pacific Corp.,* 1996 WL 29392.

Both the in-house counsel and the corporation should implement policies that protect communications intended to be privileged. First, corporations should label all written materials regarding legal communications between employees and corporate counsel as "confidential" or "privileged." These communications should be kept in separately labeled files.[67] Second, corporations should not assume the privilege will apply to mixed legal and business advice.[68] Third, corporations should avoid using in-house counsel as a conduit for information; it will not work.[69] Fourth, before the communication takes place, the conferring parties should discuss the anticipated topics in order to segregate privileged and non-privileged topics and, thus avoid "mixing apples and oranges" in such a way as to waive an intended privilege by communicating it unnecessarily to a larger audience.[70] Fifth, corporations should consider hiring outside counsel to conduct internal investigations when those investigations are intended to remain privileged.[71] Sixth, corporations must educate and train employees regarding privilege: its scope, its potential for waiver and, the ease with which it may be inadvertently waived.[72]

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[67] *See* Amber Stevens, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*. 23 HAMLINE L. REV. 289, 320 (1999), *citing* Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, ANN. SURV. AM. L. 629, 657 (1997).

[68] *See* Amber Stevens, *supra* note 57 at 321, *quoting National Employment Service Corp. v. Mut. Life Ins. Co.*, 3 Mass.L.Rptr. 221, (Mass. Super. 1994), *United States v. Chevron Corp.*, 1996 WL 264769 (N.D. Cal. 1996), *Griffith v. Davis*, 161 F.R.D. 687, 697 (C.D. Cal. 1995).

[69] *See* Amber Stevens, *supra* note 57 at 321.

[70] *See id., citing* Amy L. Weiss, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO J. LEGAL ETHICS 393, 408 (1998).

[71] *See id.* at 321.

[72] *Id.* at 321, *citing* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of The Participants*, 63 ST. JOHN'S L. REV. 191, 236 (1989).

D. Judicial Treatment of Inadvertent Waiver.

Judicial review of inadvertent waiver can be divided into three general categories: strict-waiver, no-waiver, and intermediate-waiver. However, the case law is far from consistent. There initially appeared to be a clearly demarcated split amongst the circuits[73] with respect to the issue of inadvertent waiver; today, however, any number of rules and factors are discussed, if not implemented, throughout the various U.S. jurisdictions.[74] Legal certainty of the applicable standard has faded; instead, practitioners and corporations alike are faced with uncertainty.

1. Strict Waiver: "Too Bad, So Sad; Waive Bye-Bye."

The strict waiver test is harshest. Under strict waiver, any inadvertent disclosure constitutes a waiver of the attorney-client privilege.[75] For example, any time the attorney-client privilege is waived by a client disclosing confidential information to a third party, regardless of who the third party is, that disclosure constitutes a permanent general waiver of the attorney-client privilege pertaining to that information.[76] This holds true for the intentional as well as unwitting disclosure of privileged information.[77] Strict waiver is best described by the court in *Permian Corp. v. United States*: "the attorney-client privilege should be available only at the

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[73] *See, e.g.*, Brian M. Smith, *Be Careful How You Use it or You May Lose it: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 72 U. DET. MERCY L. REV. 389, (1998).

[74] *See generally Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991); Berg Elecs. v. Molex, Inc., 875 F. Supp. 261, (D. Del. 1995); *Rotelli v. 7-Up Bottling Co.*, 1995 U.S. Dist. LEXIS 5277 (D. Pa. 1995).

[75] *See* Leibowitz, *supra* note 49.

[76] *See* Smith, *supra* note 63; Ross G. Greenberg, Jordan Klingsberg, & Diedre Mulligan, *Attorney-Client Privilege*, 30 AM. CRIM. L. REV. 1011, 1017 (1993), *citing Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991).

[77] *See* Smith, *supra* note 63, at 402-403.

traditional price; a litigant who wishes to assert confidentiality must maintain genuine confidentiality."[78]

2. No Waiver – "You Didn't Mean To? We Don't Mind."

No waiver is the opposite of strict waiver. Under this theory, "although there is a waiver of the attorney-client privilege by a disclosure of confidential communications to a third party, the waiver is only effective against the party to whom the communications were disclosed."[79] For example, in *Diversified Indus., Inc. v. Meredith*, the 8th Circuit held that privileged communications revealed to the SEC as part of an SEC investigation remained privileged as to all other parties.[80] But this test goes even further, as its title indicates; when the waiver of the privilege is inadvertent, the privilege may not be deemed waived.[81]

3. Intermediate / Totality of Circumstances – "Well, Let's think this over?"

The totality of circumstances approach, described as the "middle of the road" approach between strict waiver and limited waiver, was first adopted by the Southern District of New York *Teachers Ins. & Annuity Ass'n. v. Shamrock Broadcasting Co*.[82] Other jurisdictions have subsequently implemented this approach. In *Shamrock*¸ the Court decided that if the corporation took affirmative steps to preserve the privilege as to disclosed confidential information, then the

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[78] *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981).

[79] *See* Smith, *supra* note 63 at 408.

[80] *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), *and see,* Raymond E. Watts, Jr., *Reconciling Voluntary Disclosure with the Attorney-Corporate Client Privilege: A Move Toward a Comprehensive Limited Waiver Doctrine*, 39 MERCER L. REV. 1341, 1346 (1988) (*quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)*).

[81] *See Helman v. Murry's Steaks, Inc.,* 728 F.Supp. 1099, 1104 (D. Del. 1990) (superseded by statute on unrelated issue).

[82] *See Teachers Ins. & Annuity Ass'n. v. Shamrock Broadcasting Co.*, 521 F.Supp. 638 (S.D.N.Y. 1981).

privilege should not be deemed waived. However, if the corporation did nothing, privilege would be waived.[83] This decision planted the seed for the development of the five-part "intermediate" test:

1. the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;

2. the number of inadvertent disclosures;

3. the extent of the disclosure;

4. any delay and measures taken to rectify the disclosure; and,

5. whether the "overriding interests of justice would or would not be served by relieving a party of its error."[84]

Due to the uncertainty concerning which approach the courts of various jurisdictions will apply, attorneys (and in-house counsel alike) would be wise to take precautions suited to balancing the five factors of the intermediate test.

IV. Precautions to Protect Privilege.

With attorney-client privilege being one of the cornerstones of the attorney-client relationship, it is incumbent upon the attorney and client to take all necessary and possible precautions to protect this privilege.

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[83] *See id.*

[84] *Elkton Care Center Associates LP v. Quality Care Management, Inc.*, 145 Md. App. 532, 545 (Md. Ct. Spec. App. 2002), *citing Sampson Fire Sales v. Oaks*, 201 F.R.D. 351, 360 (M.D. Pa. 2001).

Perhaps foremost, the attorney should never produce documents that they have not reviewed, and never unlock their client's file room to an adversary in compliance with a notice of discovery and inspection; such conduct is simply asking for trouble (*i.e.*, waiver, disclosure, *et al*). Although timely and expensive, no document should be disclosed until first reviewed by counsel for the party from whom the documents are sought. One practical way to proceed is to begin a privilege log as a matter of course when you are preparing to disclose documents, and continually update it. This will better focus counsel on staff on the need to identify and corral privileged documents in the course of pre-disclosure document review.

The attorney can take several steps to protect privilege. These steps include the following:

i. To Prevent Waiver

A. Take as much time as necessary - or as much time as a court will allow - for the review of privilege in discovery. Be aware, however, that the greater the time taken, the less excusable any inadvertent production of privileged documents will be.

B. Carefully consider who on your "litigation team" will actually be considered "essential third parties" should it become an issue, so that you don't reveal too much inadvertently to the wrong employee or associate.

C. Give paralegals designated to review for privilege clear instructions as to what constitutes a privileged document.

D. Whenever possible, have an attorney review documents for privilege before the documents are made available to an adverse side for inspection.

E. Review for privilege after photocopying and before tender to parties outside the company and its "litigation team" i.e., in-house and outside counsel, officers, employees involved in discovery compliance efforts and litigation strategy development.

F. Take precautions that privileged documents are not erroneously or excessively photocopied, such as by labeling "Privileged and Confidential"

G. Even if a document is only arguably privileged, make all efforts to treat it as privileged.

H. All emails and faxes containing sensitive material should come with confidentiality notices to alert the wrongful receiver.

I. Always carefully consider whether the purpose of disclosure to a third party is for the purpose of, and for the unified objective of, the legal representation. Are you speaking to the accountant for legal advice or for financial advice? If both, consider separated communications.

J. Never assume that a communication with a member of a corporation's in-house counsel and an employee will be privileged, especially when business and legal advice are both discussed.

ii. In the Event of Inadvertent Waiver

A. If a privileged document slips through the discovery sieve, seek a voluntary return immediately. If return is not readily forthcoming, bring a motion seeking return, and a ruling that the privileged document be not admissible at trial.

B. In bringing the motion, submit detailed affidavits from those persons involved in the production process, detailing the precautions taken both in the storage and review process.

C. Always Act Quickly. The court will want to see that you attempted to timely rectify the situation.

D. Consider filing any arguably privileged documents under seal for court review prior to disclosure.[85]

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[85] Epstein, *supra* note 10, at 310.