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THE ATTORNEY-CLIENT PRIVILEGE: AN ANALYSIS OF INVOLUNTARY WAIVER

SHAWN T. GAITHER¹

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I. INTRODUCTION

Clients not only place their trust, but also their livelihood, and many times their lives, in the hands of their attorneys. These clients can rest assured that the information they relay to and receive from their attorneys is protected by the well known “attorney-client” privilege and will remain secret. Or can they?

Certain cases can involve months of work and research, which can end in the accumulation of hundreds, even thousands of written documents. Many of these documents are communications between the attorney and client, which may fall within the parameters of the attorney-client privilege. These privileged documents could reflect trial strategies, personal issues of the client, and legal advice. These documents could mean the difference between the client’s being a free individual and going to jail, or the difference between the client’s earning or losing one million dollars.

The client’s limited knowledge of the attorney-client privilege may lead him or her to believe that since these documents are “privileged,” they may never be found out, or even if discovered, they may never be used by the opposing party unless the client expressly waives the privilege. However, the situation may be quite the contrary. For example, In a number of federal jurisdictions, if the attorney or client inadvertently loses possession of documents, or disposes of documents and the opposing party ends up with them, the privilege may be considered waived.

This paper will explore the different schools of thought on the inadvertent waiver of the attorney-client privilege, with an emphasis on the case of *McCafferty’s Inc. v.*

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Bank of Glen Burnie.² In *McCafferty's*, the client, who was the director of human resources at the Bank of Glen Burnie, tore up and discarded a memorandum that had been sent to her by the bank's attorney. The document ended up in a dumpster on the Bank of Glen Burnie's property, where a private investigator for the opposing party searched, finding the memo. The United States District Court for the District of Maryland stated that the attorney-client privilege can be waived involuntarily, but held that no waiver had occurred under the circumstances of the case.³

This paper will first define the attorney-client privilege, and explore the forms of waiving the attorney-client privilege: voluntary, implied, and inadvertent. Next the discussion will focus on the three schools of federal case law concerning inadvertent waiver, known as the "lenient approach," the "strict approach," and the "middle-ground approach," with an emphasis on the middle-ground approach as adopted by *McCafferty's*. The paper then will introduce the possibility of a new "hybrid" approach to inadvertent waiver of the privilege. The discussion will continue with analyzing agency law and its parallels to the attorney-client privilege. Finally this paper will conclude that the hybrid approach is the most appropriate test.

II. THE ATTORNEY-CLIENT PRIVILEGE

The United States Supreme Court has described the attorney-client privilege, now applied in the federal courts under Federal Rule of Evidence 501,⁴ as the "oldest of the privileges for confidential communications known to the common law."⁵ The purpose of the attorney-client privilege is to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."⁶ The privilege helps attorneys gain information from their clients to properly prepare for the case. The attorney-client privilege covers advice given by the attorney as well as information given to the attorney by the client so that the attorney may render advice.⁷

²179 F.R.D. 163 (D. Md. 1998).

³*Id.* at 169-70.

⁴FED. R. EVID. 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Therefore the common law of privileges as interpreted by courts governs the attorney-client privilege.

⁵*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁶*Id.*

⁷*Id.* at 390.

The privilege is “limited to communications expressly intended to be confidential, and some showing of an intention of secrecy must be made.”⁸ However, the privilege impedes full and frank discovery of the truth and therefore, like other privileges, is strictly construed by the courts.⁹ The party claiming the privilege has the burden of proving all of the essential elements of the privilege:¹⁰ (1) the asserted holder of the privilege is or sought to be a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication, the attorney is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of third parties not enjoying a privileged relationship (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹¹

The holder of the privilege is the client, and therefore, only the client or his or her representative, such as a guardian, trustee, personal representative, or attorney, may claim or waive the privilege.¹²

III. FORMS OF WAIVING THE ATTORNEY-CLIENT PRIVILEGE

As previously stated, the final element of the attorney-client privilege calls for the privilege to be claimed, and not waived.¹³ Waiver of the privilege may be either express or implied.¹⁴ Some courts hold that implied waiver may even be inadvertent.¹⁵

A. Voluntary Waiver

Waiver occurs when the client voluntarily discloses the privileged communications to a third party to either: intentionally waive the privilege; to abandon confidentiality; or for using the confidential communications for purposes other than seeking legal advice.¹⁶ When a client relays confidential, privileged information for any of these three reasons, a court may find voluntary waiver because the communication is not made in furtherance of the purpose of the

⁸Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975).

⁹E.g., *In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984).

¹⁰*In re* Int'l Harvester's Disposition of Wis. Steel, 666 F. Supp. 1148, 1150 (N.D. Ill. 1987).

¹¹*McCafferty's Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 166-67 (D. Md. 1998).

¹²See generally JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § Standard 503.20 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997) (defining the lawyer-client privilege and its exceptions).

¹³*McCafferty's Inc.*, 179 F.R.D. at 167.

¹⁴*Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985).

¹⁵*Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 636 (W.D.N.Y. 1993).

¹⁶*In re* Int'l Harvester's Disposition of Wis. Steel., 666 F. Supp. 1148, 1157 (N.D. Ill. 1987).

privilege. For example, a client may be questioned about conversations he had with his attorneys. If the client's attorneys do not object to his answering these questions, and the client answers them, the privilege is considered voluntarily waived.¹⁷

Voluntary waiver is not very controversial, because if it is found that the client intended for a third party to know of the "privileged" information, there is no need for the courts to recognize the information as privileged. If the client intentionally relinquishes his or her right, he is not able to reinstate the privilege at a later time.

B. Implied Waiver

The privilege can also be waived implicitly when a client injects the advice of counsel as an issue in the litigation.¹⁸ For example, a client may assert reliance on the advice of the attorney as an affirmative defense, or may sue the attorney for malpractice.

In one federal case, the plaintiff was an inmate who sued the State penitentiary for violating his due process rights, for confining him to the mental health unit without a hearing. The defense was based on discretionary decisions of public officials, who are immune from suits for damages if they acted in good faith. Plaintiff tried to counter the "good faith" aspect of the defense by requesting documents of legal advice which were given to the defendants by the state's Attorney General, and the defendants claimed attorney-client privilege. The court held that the defendant's claim of immunity placed the otherwise protected legal advice at issue, and asserting the privilege deprived the plaintiff of information necessary to counter the defense.¹⁹ Therefore, the defendants had impliedly waived the attorney client privilege with respect to the legal advice.²⁰

The idea of implied waiver should cause litigants to think about what claims and defenses that they will assert as they may impliedly waive their privileges. Like voluntary waiver, implied waiver is not controversial, due to the unfairness of raising particular claims or defenses, while not allowing the opposing party to properly refute that position.

C. Inadvertent Waiver

A third form of waiver of the attorney-client privilege is the inadvertent (or accidental) waiver. An attorney's inadvertent disclosure of an otherwise privileged document may waive the privilege.²¹ Courts have generally followed one of three distinct approaches to inadvertent waiver of the attorney-client privilege: (1) the strict approach, (2) the lenient approach and (3) the "middle-ground" approach, which is also called the "*Hydraflow*" approach.²²

¹⁷*Hollins*, 773 F.2d at 197.

¹⁸*Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995).

¹⁹*Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

²⁰*Id.* at 583.

²¹*Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 636 (W.D.N.Y. 1993).

²²*Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996).

1. Strict Approach

Under the strict approach, once privileged communication is inadvertently discovered by the opposing party, the attorney-client privilege is deemed waived. In a case decided by the United States Court of Appeals for the Circuit of the District of Columbia,²³ the Grand Jury subpoenaed records of a company regarding a criminal investigation for tax evasion, and the attorney-client privilege was raised. The company claimed the privilege because certain documents requested included notes taken during a meeting with company attorneys and memoranda containing legal advice. The government agreed that the documents had been privileged, but argued that the privilege was waived because the documents had been viewed by the Internal Revenue Service, a third party. The Internal Revenue Service viewed these documents through the submission of the company's taxes. The Court of Appeals held that it did not matter "whether the waiver is labeled 'voluntary' or 'inadvertent,'" in either case, waiver occurred.²⁴ The Court of Appeals stated that the client had the duty to keep the documents confidential:

Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.²⁵

The strict approach gives no mercy to the client. This approach provides strong incentives for attorneys and clients to be careful with documents, but warrants no protection to the clients for accidental disclosure. This approach has been rejected by most of the circuits due to its inflexible, harsh outcome.²⁶

2. Lenient Approach

The 9th and 11th Circuits follow the lenient approach, under which the privilege remains intact, unless it is knowingly waived.²⁷ The rationale for the lenient approach is that the client should not be punished for the negligence of the attorney.²⁸

For example, in a case before the United States District Court for the Northern District of Illinois, the defendant sought the production of four letters from the plaintiff, who claimed the attorney-client privilege.²⁹ The defendant argued that the privilege had been waived because the plaintiff's attorney had earlier, inadvertently, produced the letters to the defense attorney for a short time. The court rejected the defendant's argument and stated: "We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.'

²³*In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).

²⁴*Id.* at 980.

²⁵*Id.*

²⁶*Gray*, 86 F. 3d at 1483.

²⁷*Id.*

²⁸*Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 939 (S.D. Fla. 1991).

²⁹*Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982).

Inadvertent production is the antithesis of that concept.”³⁰ The court explained that, “if we are serious about the attorney-client privilege and its relation to the client’s welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege.”³¹

The lenient approach creates the opposite result of the strict approach. Under this test, there is little incentive for a lawyer to maintain tight control over privileged documents.³² This test does effectuate the principle behind the attorney-client privilege, protecting the client, who must waive the privilege. However, the approach ignores the confidentiality aspect of the privilege.³³

3. Middle-Ground Approach

The final approach that some courts have applied to inadvertent waiver is the “middle-ground” approach. This approach uses a five-part analysis to decide whether the inadvertent disclosure should be considered a waiver of the attorney-client privilege.³⁴ The court considers: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error.³⁵

In *McCafferty’s*, the United States District Court for the District of Maryland chose to follow the middle-ground approach, indicating that the Fourth Circuit “appears to have adopted” the middle ground approach.³⁶ The district court enumerated five situations in which courts have held the attorney-client privilege inadvertently waived:

inadvertent disclosure has been deemed to evidence an abandonment of the requisite intent to maintain confidentiality, and thereby waive the attorney-client privilege, where (1) conversations between attorneys and clients in a public place are over-heard by others; (2) there is indiscriminate mingling of attorney-client privileged documents with documents which will be subject to routine disclosure to third persons without having taken pre-cautions to protect the privileged documents

³⁰*Id.* at 955.

³¹*Id.*

³²*Gray*, 86 F.3d at 1483.

³³*Id.*

³⁴*Id.* at 1483-84.

³⁵*Id.* at 1484.

³⁶*See In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (The Fourth Circuit did not rule on the issue of waiver because the court found that there was no attorney-client privilege to begin with; however, the court did recognize that other courts recognize inadvertent waiver, and it hints to the middle-ground approach in its language, stating, “it has been held that privilege may be lost, ‘even if the disclosure is inadvertent’ such as in some circumstances ‘eavesdroppers,’ and again, where if the privileged communication consisted of ‘privileged documents,’ the party did not ‘take reasonable steps to insure and maintain [their] confidentiality.’”).

from disclosure; (3) privileged documents are stolen or taken because they were not adequately protected; (4) privileged documents are kept in file cabinets routinely used by others, and (5) privileged papers are left in places accessible to the public.³⁷

The court also listed examples of precautions that evidence an intent to maintain attorney-client privilege and confidentiality in documents, such as (1) labeling privileged documents as such at their origination; (2) segregating documents in their own separate files; (3) establishing policies to limit access to privileged materials; (4) shredding, not simply discarding, privileged materials; and (5) if unauthorized individuals do gain access to privileged materials, taking “immediate remedial steps” to obtain their return.³⁸

In *McCafferty’s*, the documents in question were discarded by the client. The paper was torn into sixteen pieces, placed in a plastic bag with other trash, and placed in a dumpster on the bank’s property. The dumpster had a sign on it stating that it was for the exclusive use of the Bank of Glen Burnie. An investigator for the opposing side went into the dumpster and located the torn pieces of the privileged document.

The court concluded that tearing the document into sixteen pieces evidenced the client’s intent to maintain confidentiality.³⁹ Although the client could have done more to protect confidentiality, “the issue is not whether every conceivable precaution which could have been taken was taken, but whether reasonable precautions were taken.”⁴⁰ Finally, the court concluded that under the five factor test, there was no waiver of the privilege as:

(1) [The client’s] actions to preserve the confidentiality of the memo were reasonable; (2) there was but a single disclosure; (3) the disclosure was limited in scope; (4) there was no delay in measures taken by BGB to rectify the disclosure once it was discovered; and (5) interests of justice militate against a finding of waiver given the facts of this case.⁴¹

Other lower courts have also adopted the middle-ground approach to inadvertent waiver. The United States District Court for the Western District of New York has rejected both the strict and lenient tests in favor of the middle-ground approach. The court stated that the strict approach has a deterrent effect but it “sacrifice[s] the value of protecting client [confidentiality] in the name of certainty of results.”⁴² The lenient approach, in focusing solely on the intent of the client to waive the privilege, is too lenient, because clients would always deny any intention to ever waive the privilege.⁴³

³⁷*McCafferty’s Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 168 (D. Md. 1998).

³⁸*Id.*

³⁹*Id.* at 169.

⁴⁰*Id.*

⁴¹*Id.* at 170.

⁴²*Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993).

⁴³*Id.*

The United States Court of Appeals for the Eighth Circuit has also accepted the middle-ground approach, stating:

An analysis which permits the court to consider the circumstances surrounding a disclosure on a case-by-case basis is preferable to a *per se* rule of waiver. This analysis serves the purpose of the attorney-client privilege, the protection of communications which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.”⁴⁴

This rationale by the Eighth Circuit shows the balance that the middle-ground approach facilitates. The middle-ground test is a thoughtful approach allowing the trial court broad discretion, providing flexibility, and is “best suited to achieving a fair result.”⁴⁵

IV. PROPOSAL: A HYBRID TEST

Each of the three tests presently used by the federal courts to determine whether the attorney-client privilege has been inadvertently waived has its strong points, but the middle-ground test is the fairest to all parties. This test, while it takes time to apply, ensures that the court will do a thorough review of the circumstances surrounding the discarded or disclosed documents.

The strict test does not produce fair results to a client whose attorney has shredded and discarded privileged documents which then somehow end up in the possession of the opposing party. The strict test, as a practical matter, calls for attorneys to either never discard privileged material by keeping them under lock and key forever, or to totally destroy the documents by some means such as burning the document. Neither of these results is rational.

The lenient test swings the pendulum too far in the opposite direction. Although waiver of a privilege calls for it to be waived knowingly, the lenient test does not give any incentive to the attorney to maintain documents in a confidential fashion. Additionally, the defense against waiver is too easy; a mere claim that the documents were “inadvertently produced” is enough for the privilege to be upheld.

The middle-ground test is the most desirable of the tests presently used. The five factors used to determine waiver allow the court to use its discretion in deciding whether a waiver was made, but also add guidance. This test is not a sure win for either party, as the strict test and lenient test prove to be. A balance is struck between the importance of the attorney-client privilege and the incentive to keep confidential documents safe. While the middle-ground test gives attorneys an incentive to properly maintain documents, it does not go to the extreme of strict test.

In *McCafferty's*, the inadvertent disclosure was due to the actions of the client who discarded the document. The hybrid-test proposed in this paper, however, separates inadvertent disclosures by the client from those made by the attorney. Most of the cases involving inadvertent disclosure are in reference to the actions of the attorney, who is usually in control of the documents. A majority of the cases

⁴⁴*Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993).

⁴⁵*Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996).

discussed dealt with the situation in which the attorney negligently disclosed the documents contrary to what the client or the attorney intended. In these situations, the middle-ground test's use of the five factors is sufficient to remedy the situation. However, if the attorney purposely discloses privileged material, contrary to the client's intention of maintaining confidentiality, will the middle-ground test help the client?

Because the attorney-client privilege is held by the client, and must be asserted by the client,⁴⁶ if the attorney purposely discloses information contrary to the desire of the client to maintain confidentiality, there should be no waiver. However, under the five-factor test used in the middle ground approach, waiver may be found. Under the first factor, the precautions taken were probably not reasonable if the attorney purposely hands over documents, and under the fourth factor, the delay in measures taken to rectify the situation may be very substantial as the client may not learn about the purposeful disclosure until a long time has passed. Additionally, the client may not realize that the documents were in fact privileged.

Therefore, when courts look to the disclosure of privileged documents by attorneys, their first inquiry may be whether the disclosure was negligent or purposeful. In the event that the disclosure was negligent, the court should move to the five-factor test used in the middle-ground approach. In the event that the disclosure by the attorney was purposeful, but the disclosure was inadvertent in the eyes of the client, (the client did not know of, or authorize the attorney's actions), the court should automatically rule that the privilege was not waived, as if following the lenient test. This outcome is warranted in the interest of justice, because the client's privilege was circumvented by the purposeful actions of the attorney.

A malpractice suit against the attorney for disclosing privileged information will be inadequate because the remedy will be too little, too late. The client will not receive an immediate remedy, but must wait until after the harm is done, the privileged material is not recovered, and the case is most likely lost. Finally, even if the client wins the malpractice suit against the attorney, it will not change the harm caused by losing the privileged information.

The agency relationship of the attorney to the client should not change this outcome.⁴⁷ Under the Restatement (Second) of Agency, there is a clause which parallels the essence of the attorney-client privilege.⁴⁸ The attorney, as an agent of the client, is liable to the client for conveying confidential information without permission of the client.⁴⁹ While the agent/client may have recourse for the attorney's actions, under agency law it may be too late, because negligent acts of the agent, and speech by the agent authorized or apparently authorized to speak on the

⁴⁶McCafferty's Inc. v. The Bank of Glen Burnie, 179 F.R.D. 163, 166-67 (D. Md. 1998).

⁴⁷Restatement (Second) of Agency § 1 (1958) (defining an agency relationship as a "manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding [of the parties] that the principal is to be in control of the undertaking").

⁴⁸See Restatement (Second) of Agency § 395 (1958) (stating that an agent is not to use or communicate confidential information given by the principal or discovered during the course of his or her agency).

⁴⁹See Restatement (Second) of Agency § 401 (1958) (stating that an agent is liable to the principal for damages caused by the agent's breach of duty).

principal's behalf, binds the principal.⁵⁰ Under this agency analysis, the negligent disclosure of privileged material by the attorney may bind the client, contrary to the lenient, middle-ground, and proposed hybrid test.

Lawyers have a greater responsibility to their clients than do other agents, because lawyers are officers of the court.⁵¹ A lawyer's responsibility even reaches beyond their established clients to prospective clients who relay privileged information.⁵² Since lawyers have a higher duty to their principals, more than mere agency law governs the lawyer's actions. While under a strict agency approach, the client may have little or no recourse, under the current law, particularly following the lenient and middle-ground approach, the client may have immediate recourse.

V. CONCLUSION

There needs to be unity throughout the federal circuits with regard to inadvertent waiver of the attorney-client privilege. There are several flaws with the strict and lenient test currently used. Although they provide definite, clear results, these results are made at the expense of one party. The middle-ground analysis used by some circuits is the best approach because it looks at several factors to determine whether waiver occurred.

However, even the middle-ground approach could use improvement, and consider more factors such as negligent(accidental) versus purposeful disclosure by the attorney, understanding that both forms of disclosure can be "inadvertent" in the eyes of the client who holds the privilege. Neither agency law nor malpractice claims completely and fairly address the issue of purposeful but unauthorized disclosure by the attorney. Therefore, courts should adopt the two-part, hybrid test which combines the lenient approach for purposeful disclosure by the attorney made contrary to the client's wishes, and the middle-ground test for negligent disclosures by the attorney.

⁵⁰Deborah A. DeMott, *The Lawyer As Agent*, 67 FDM. L. REV. 301 (1998).

⁵¹*Id.* at 311.

⁵²*Id.*