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WAIVER: A COMPREHENSIVE ANALYSIS OF A CONSEQUENCE OF INADVERTENTLY PRODUCING DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

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The inadvertent\(^1\) production of documents protected by the attorney-

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Professor Harding would like to thank the Honorable Pascoe Bowman of the United States Court of Appeals for the Eighth Circuit, Anita Allen, and the members of the Northeast Corridor Collective of African-American Female Law Professors for their suggestions and comments. Professor Harding also thanks her student research assistants, Chadwick A. Davis and Sylvia Cosby, for their invaluable assistance and input. Many thanks go to Joyce Saylor, her administrative assistant, for her tremendous assistance, extraordinary patience and endurance. This Article is dedicated to Edward W. Deitz, a close friend, journalist, three-time Pulitzer Prize nominee, and musician who recently met an untimely death. Mr. Deitz provided continual words of encouragement in order to make this Article a reality.

1. The term “inadvertent” is formally defined as that which is “[u]njintentional: accidental.” WEBSTER’S II: NEW RIVERSIDE UNIVERSITY DICTIONARY 352 (1984) (emphasis added). The definition focuses upon whether whatever occurred did so without the intent that it occur. Attempts by case law to define and clarify the term incorporate this perspective. One example of this is found in International Digital Systems Corp. v. Digital Equip. Corp., 120 F.R.D. 445 (D. Mass. 1988), where the court declares that “[t]here is also no dispute that the disclosure was ‘inadvertent,’ at least in the sense that it was not an intentional or purposeful disclosure.” Id. at 446 (emphasis added). Consequently, the definition of inadvertency embodies the view that the disclosure was “not a deliberate act, or even the result of a conscious but erroneous decision.” Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1985) (emphasis added); see also Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1990) (noting that the disclosure of the privileged document “was truly inadvertent and not the product of some conscious but erroneous decision”); Note, Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege, 82 Mich. L. Rev. 598, 598 n.5 (1983) [hereinafter Note, Inadvertent Disclosure] (stating that “[i]n inadvertent disclosure is the unintentional revelation of the contents of a document otherwise subject to the attorney-client privilege”).

In determining whether the disclosure of documents was inadvertent, courts usually rely upon a host of factors. This approach essentially collapses the definition and proof of inadvertency into one inquiry. An attempt to determine whether the definition is met requires delving
client privilege frequently occurs in contemporary litigation. This phenomena becomes more prevalent as the number of cases involving inadvertent document production grows. Unfortunately, given the present modes into an examination of factors that either tend to support the definition or refute its application. See Golden Valley, 132 F.R.D. at 207. For example, in order for the Golden Valley court to determine whether or not the requisite inadvertency existed, it had to conduct an examination of an array of factors. Id. The factors perused by the court included: the length and complexity of discovery; the breadth or narrowness of discovery (local, regional, national or international); the number of documents produced; the number of documents examined, the number of documents designated as protected by the attorney-client privilege; and the existence of any protective orders. Id. Considering all of these factors enables a court to engage in a more comprehensive determination of the existence of inadvertence. Notwithstanding these approaches, however, the definition of inadvertency remains imprecise.


The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication 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 strangers (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.


While the protection of the attorney-client privilege extends to all forms of communication, the scope of this Article is limited to the examination of the inadvertent production of privileged documents, or written communications. See Upjohn Co. v. United States, 449 U.S. 383, 394 (1981) (stating that privileged confidences include those memorialized in documents). It warrants noting that no distinction is made between the degree of protection the attorney-client privilege affords to oral and written communications. See United Shoe, 89 F. Supp. at 358-59 (stating the requirements for assertion of the attorney-client privilege). This emphasis was selected for this Article because it reflects a situation that is prevalent in today's legal practice, as evidenced by the substantial body of case law on the topic of this Article. See, e.g., United States v. Pepper's Steel & Alloys, Inc., 742 F. Supp. 641, 645 (S.D. Fla. 1990) (finding privileged documents inadvertently disclosed); Golden Valley, 132 F.R.D. at 207 (same); see also Robert J. Franco & Michael E. Prangle, The Inadvertent Waiver of Privilege, 26 TORT & INS. L.J. 637, 639 n.8 (1991); Note, Inadvertent Disclosure, supra note 1, at 598, 599 & n.8, 600 (1982); James P. Ulwick, Producing By Mistake, LITIGATION, Spring, 1992, at 20-21; infra note 3 (discussing the nature and prevalence of cases involving the inadvertent production of privileged documents).

Inadvertently produced documents frequently are afforded dual protection under the work product doctrine and the attorney-client privilege doctrine. FED. R. CIV. P. 26(b)(3); see Hickman v. Taylor, 329 U.S. 495, 510-12 (1947), superseded by statute as stated in Hawkins v. District Court of Fourth Judicial Dist., 633 P.2d 1372 (Colo. 1982). This Article's analysis also is limited to an analysis of documents protected by the attorney-client privilege. Therefore, any protection afforded to documents by the work product doctrine, Rule 26(b)(3) of the Federal Rules of Civil Procedure, will not be addressed.
for resolving the waiver issue that stems from this occurrence, this occur-

However, it should be noted that under the federal discovery rules, the work product rule is divided into two categories. The first is tantamount to absolute protection, while the second provides conditional protection. Fed. R. Civ. P. 26(b)(3). The type of protection provided in the first category—"the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"—is similar to that afforded under the attorney-client privilege. Id. (emphasis added). Materials protected under this aspect of the work product rule raise issues similar to those encountered in the context of the attorney-client privilege. As a result, courts generally opt to examine the waiver consequences of inadvertently produced documents protected by the work product doctrine in a manner identical to that used to examine inadvertently produced documents protected by the attorney-client privilege. See Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 328-32 (N.D. Cal. 1985) (finding that inadvertent production test factors applied to documents protected by the work product doctrine); see also Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (applying inadvertent production test to documents protected by work product doctrine and attorney-client privilege); Ulwick, supra note 2, at 23.

3. In Pepper’s Steel & Alloys, the court acknowledged that with large document productions “[m]istakes of this type [inadvertent document production] are likely to occur . . . .” Pepper’s Steel & Alloys, 742 F. Supp. at 645 (emphasis added); FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991) (concluding that, despite the parties dispute as to the number of documents produced, “[w]hether the documents numbered 15,000 or 50,000, it cannot be doubted that this was a large document production carrying with it a substantial risk that privileged documents might be inadvertently disclosed” (emphasis added)). To illustrate the frequency with which these mistakes occur, the following is a sample of cases raising the issue with which these mistakes occur, the following is a sample of cases arising out of the waiver consequence of inadvertently produced privileged documents: In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (finding mistake with one privileged memorandum produced out of many documents); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 937 (S.D. Fla. 1991) (finding mistake where the attorneys and paralegal prepared thousands of pages of documents for inspection and inadvertently included “Exhibit #272 . . . a transcript of an attorney-client privileged conversation”), aff’d in part, question certified, 991 F.2d 1533 (11th Cir. 1993); Ray v. Cutter Lab., Inc., 746 F. Supp. 86, 88 (M.D. Fla. 1990) (finding mistake with one privileged document produced out of 900 pages of produced materials); Pepper’s Steel & Alloys, 742 F. Supp. at 643 (noting that more than 100,000 pages were produced during a document production and four pages contained privileged information); Bud Antle, Inc. v. Grow-Tech Inc., 131 F.R.D. 179, 181 (N.D. Cal. 1990) (noting that plaintiff’s counsel reviewed approximately 6000 documents in preparation for defendant’s inspection of the documents and between 2500 and 3000 pages of non-privileged documents were made available for review while one privileged document was produced); Golden Valley, 132 F.R.D. at 207 (finding that from the 90,000 documents examined, 14,000 documents were produced and one privileged letter was produced); Monarch Cement Co. v. Lone Star Indus., 132 F.R.D. 558, 560 (D. Kan. 1990) (stating that “[t]he scope of discovery undertaken in this case also leads us to conclude that a finding of waiver would be inappropriate. More than 9,000 pages of documents were produced, and the documents in question were only eight pages contained in one of 118 personnel files [produced].”), sum. judgment granted, No. 88-2431-V, 1991 U.S. Dist. LEXIS 18669 (D. Kan. Dec. 19, 1991), aff’d, 982 F.2d 1448 (10th Cir. 1992); Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989) (noting that three privileged documents were produced in a total production of 500,000 pages); Fidelity Bank, N.A. v. Bass, No. CIV.A.88-5257, 1989 WL 9354 (E.D. Pa. Feb. 8, 1989) (finding 11 privileged documents produced in a document request involving numerous documents); International Digital Sys., 120 F.R.D. at 446 (noting that of the 500,000 documents perused in response to the document request, 20 privileged documents were included in the production); In re Consolidated Litig. Concerning Int’l Harvester’s Disposition
rence could threaten to become the rule rather than the exception. The increased frequency of inadvertent document production is due primarily to more disputes arising out of production of documents demands by the opposing party that emerge as parties request the production of an increasing number of responsive documents. As a result, the sheer quantity of documents being produced facilitates the inadvertent production of materials protected by the attorney-client privilege.

When privileged documents are inadvertently produced, a multitude of problems and issues emerge. One of the most critical issues is whether the inadvertent production of protected documents requires a waiver of the attorney-client privilege.

See supra note 3.
5. See FED. R. CIV. P. 34.
6. See supra note 3.
7. See infra and notes 81-84 and accompanying text.
8. Once a court decides that the inadvertent production of privileged materials waives the attorney-client privilege, it still must determine the scope of the waiver. See generally Franco & Prangle, supra note 2, at 637; Note, Inadvertent Disclosure, supra note 1, at 603-04 n.26. Most courts select one of four approaches to resolve the scope of the waiver issue: 1) specific documents in issue; 2) documents on the same subject matter; 3) documents relating to the same subject matter; and 4) documents on the same general subject matter.

Under the first approach, some courts hold that “in a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.” Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 52 (M.D. N.C. 1987) (emphasis added), aff’d, 878 F.2d. 801 (4th Cir. 1989); see also Prudential Ins. Co. v. Turner & Newall, 137 F.R.D. 178, 182 (D. Mass. 1991); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208 (N.D. Ind. 1990); International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988). Thus, the waiver of the privilege is limited to the documents actually produced. This approach benefits the producing party, because while the non-producing party is granted access to some privileged matter documents, the
documents' attorney-client privilege. Presently, federal courts apply three

producing party does not run the risk of being required to produce additional privileged matter
that could have disastrous results.

Other courts have held that the waiver covers only materials on the same specific subject-

matter as the produced document(s). See, e.g., Prudential, 137 F.R.D. at 183 (refusing to find
a subject matter waiver despite the attorney-client privilege being waived); Perrignon v. Bergen
Brunswig Corp., 77 F.R.D. 455, 461 (N.D. Cal. 1978); Goldman, Sachs & Co. v. Blondis, 412
F. Supp. 286, 289 (N.D. Ill. 1976); see also FDIC v. Marine Midland Realty Credit Corp., 138
F.R.D. 479, 484 (E.D. Va. 1991); Standard Chartered Bank PLC v. Ayala Int'l Holdings
(U.S.), Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986) (noting that "[i]t is true that the voluntary
production of a privileged document effects a waiver of the privilege as to all other privileged
communications concerning the same subject matter") (emphasis added); 4 JAMES W. MOORE
ET AL., MOORE'S FEDERAL PRACTICE, ¶ 26.60[2], at 26-174 to 26-176 (1993); Note, Inadver-
tent Disclosure, supra note 1, at 603 n.26. Under this scenario, the party is at risk of producing
some privileged documents, but perhaps not enough that would prove fatal to the case. Thus,
the approach seems to strive to balance the policies of preventing strategic partial disclosure
and encouraging attorney-client communication. It also attempts to overcome the dangers
inherent in the more encompassing "relating to the same subject matter" test.

In In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), the court considered the scope of the
waiver test based upon a broader "same subject matter" standard. Id. at 980-81 (quoting In
re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)). Under this standard the scope of the
waiver of the attorney-client privilege encompasses "all other communications relating to the
same subject matter." Id. at 981 (quoting Sealed Case, 676 F.2d at 809) (emphasis added).
This approach, however, possesses the obvious inherent difficulty in defining what constitutes
"relating to the same subject matter." See id. (stating that "the subject matter of the waiver
could . . . be defined in a number of different ways").

Difficulties associated with defining and applying the standard in order to identify the addi-
tional documents required to be produced also places the producing party in a precarious
position. The producing party's potentially dangerous position is largely attributed to the un-
certainty in accurately determining what constitutes "relating to the same subject matter,"
which places the producing party in the position of possibly providing more privileged docu-
ments than is actually necessary. This, in turn, could impact the pre-trial and trial strategies of
the producing party and reduce its bargaining-power in any attempt to settle the case. It could
also trigger the production of documents that are properly protected by the attorney-client
privilege and then another waiver battle would ensue.

Lastly, at least one court suggests that the scope of the waiver may result in a waiver that
complements all documents on the same general subject-matter. See Sealed Case, 877 F.2d at
980-981. While such a broad scope was not deemed mandatory by this particular court, id., a
producing party still runs the theoretical risk of being subject to this waiver standard. The
obvious danger with this standard, from the producing party's position, is the risk that critical
elements of its case could be revealed to the opposition. Thus, a potential consequence could
be that the producing party might be "coerced" into settling the case on unfavorable terms, or
going to trial and risk an unfavorable outcome. Another adverse consequence of this outcome
is that it exceeds the goals of discovery and defeats the basic purpose of the adversarial process.
See infra note 83 and accompanying text. Nonetheless, at least one court did find full subject
matter waiver, following the suggestion in Sealed Case. See United States v. Western Elec.
Co., 132 F.R.D. 1, 2 (D.D.C. 1990). It should be noted that one important rationale preferred
by the court for this result was the party's refusal to cooperate in the discovery process. Id.
This suggests that the decision to apply a broad scope of the waiver standard might be influ-
enced by an interest in penalizing a recalcitrant party.
diverse tests—the lenient test, the strict test, and the middle test\textsuperscript{9}—to determine whether a waiver results from inadvertent production. In response to this situation, this Article favors the development and implementation of an alternative test that draws from the strengths of the existing tests and minimizes their inherent weaknesses.

This Article first examines the three tests federal courts currently apply to the issue of attorney-client privilege in connection with inadvertent document production. This Article also considers the problems caused by the courts' use of three different rules, including the increased uncertainty in the litigation process resulting from the lack of uniformity\textsuperscript{10} among the federal district and circuit courts in deciding this issue; the increased risk of forum shopping;\textsuperscript{11} the unnecessary expenditure of personal and judicial resources;\textsuperscript{12} the uncertainty as to the scope of the waiver if the privilege is deemed waived;\textsuperscript{13} and the ensuing frustrations in using this waiver as a tool to "police" attorneys' activities.\textsuperscript{14}

This Article goes on to examine the two major legal principles in conflict in this issue. An alternative test is proposed that is intended to be applied uniformly to the issue of inadvertent document production and waiver of privilege. The alternative test's strengths and weaknesses are also critiqued. Lastly, this Article compares the alternative test to each of the existing three tests and concludes that the new test draws upon the strengths of each of the three existing tests, while minimizing the existing doctrinal tension between discovery policy and attorney-client privilege.


\textsuperscript{10} See \textit{Transamerica Computer Co. v. IBM}, 573 F.2d 646, 650-52 (9th Cir. 1978) (noting a decisive split among courts deciding which test to apply to situations involving inadvertently produced privileged documents); \textit{International Digital}, 120 F.R.D. at 448 (commenting on the fact that the law on inadvertent waiver lacks uniformity); \textit{see also} Georgetown Manor, 753 F. Supp. at 937-9 n.4; Ray v. Cutter Lab., Inc., 746 F. Supp. 86, 87 (M.D. Fla. 1990); Golden Valley, 132 F.R.D. at 208-9; Ulwick, \textit{supra} note 3, at 23; Appendices, Table 1. \textit{See generally} Appendices, Chart B.

\textsuperscript{11} \textit{See infra} notes 70-82 and accompanying text; \textit{see also} Appendices, Chart B.

\textsuperscript{12} \textit{See United States v. Pepper's Steel & Alloys, Inc.}, 742 F. Supp. 641, 645 (S.D. Fla. 1990); \textit{infra} note 171 and accompanying text.

\textsuperscript{13} \textit{See supra} note 8; \textit{infra} notes 170-71 and accompanying text.

\textsuperscript{14} \textit{See infra} notes 151-52 and accompanying text.
I. THE CURRENT APPROACHES

Federal circuit courts of appeal and district courts currently employ three tests for deciding whether the inadvertent production of a privileged document waives the attorney-client privilege. This section discusses the three tests and considers the problems that arise from having three different approaches. The conflict between the liberal discovery policy and the attorney-client privilege also is presented in this section.

A. The Three Tests

1. The "Lenient Test"

The lenient test, at its most basic level, states that "mere inadvertent production [of privileged documents] does not waive the [attorney-client] privilege." The rationale for this test rests on the belief that "because the disclosure was inadvertent, there was no intention to waive the privilege, and one cannot waive the privilege without intending to do so." While the lenient standard has been adopted by several courts, it is not the majority test. The test has essentially one criterion: were documents protected by the attorney-client privilege produced to the opponent? This criterion does not require any investigation into the circumstances of the production of the

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16. Golden Valley, 132 F.R.D. at 208 (citations omitted) (emphasis added); see, e.g., Georgetown Manor, 753 F. Supp. at 938; Mendenhall, 531 F. Supp. at 955; Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1985); see also Fidelity Bank, 1989 WL 9354, at *1; Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955) (holding that there must be evidence that the client intended to waive the privilege); Wigmore, supra note 2, § 2291, at 545 (stating that "[t]he policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations. ... [H]ence the law must prohibit such disclosure except on the client's consent. Such is the modern theory." (emphasis added)); infra notes 87-89 and accompanying text.

17. See Appendices, Table 1.

18. See Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 329, 332 (N.D. Cal. 1985) (explaining that the rule in Mendenhall, 531 F. Supp. at 951 [the lenient test], is a minority rule); see also Franco & Prango, supra note 2, at 649 (discussing the majority rule that inadvertent disclosure may constitute a waiver); infra note 25 and accompanying text.

19. Kansas-Nebraska Natural Gas, 109 F.R.D. at 20-21; see, e.g., Helman, 728 F. Supp. at 1104; Fidelity Bank, 1989 WL 9354; Mendenhall, 531 F. Supp. at 954; see also Connecticut Mutual, 18 F.R.D. at 451 (holding that there must be intent to waive the privilege). In addi-
documents at issue. Therefore, technically, the outcome is not influenced by whether the production occurred accidentally or intentionally. Consequently, if the disclosed documents are deemed protected by the attorney-client privilege, then the privilege is not waived by inadvertently producing the documents.

2. The “Strict Test”

Under the strict test, the “disclosure of documents protected by the attorney-client privilege in the course of pre-trial discovery in which documents are being produced pursuant to Federal Rule of Civil Procedure 34, operates as a waiver of the attorney-client privilege [even] as to any documents disclosed by ‘inadvertence.’” Like the lenient test, the strict test does not require an inquiry into whether or not the privileged document was inadvertently produced. As a result, “inadvertnce,” a critical component of the
alternative test as embodied in its rebuttable presumption component,\textsuperscript{23} has no role in the strict test. The central inquiry of the strict test, therefore, is whether or not documents produced to the opposing party were protected by the attorney-client privilege.\textsuperscript{24}

3. The "Middle Test"

Under the middle test, inadvertent disclosure of privileged documents \textit{may} give rise to a waiver.\textsuperscript{25} Unlike the lenient and strict tests, the middle test requires a multi-prong analysis. The analysis used in applying the middle test is composed of three factors: (i) the existence of privileged documents; (ii) whether the privileged documents were inadvertently produced; and (iii) whether the inadvertent production results in non-waiver of the privilege.\textsuperscript{26} Furthermore, under the middle test, the producing party has the burden of proving all three factors.\textsuperscript{27} This

\begin{itemize}
\item \textsuperscript{23} See infra Part II.A. and accompanying notes.
\item \textsuperscript{24} In \textit{International Digital Systems}, the court, in applying the strict test, focused on two key components: whether the documents were protected by the attorney-client privilege and whether the documents were actually produced. \textit{International Digital Sys.}, 120 F.R.D. at 446; see, e.g., \textit{Thomas}, 672 F. Supp. at 243 (stating that the strict test applies to those documents that are protected by the attorney-client privilege); \textit{In re Standard Fin.}, 77 B.R. at 330 (stating that the strict test would have applied except that the documents were not protected by the attorney-client privilege); see also \textit{Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.}, 91 F.R.D. 254, 256-57 (N.D. Ill. 1988) (finding that documents were not protected by the attorney-client privilege because they were found in a trash bin located outside the building); \textit{Rockland Indus.}, 470 F. Supp. at 1181 (stating that the initial inquiry in the application of the strict test is whether or not the attorney-client privilege is applicable, while the second is whether "the document[s] [were] included with others submitted ... during ... discovery of this action"); Ulwick, \textit{supra} note 3, at 20-22 (discussing an example referring to documents that were not protected by the attorney-client privilege).
\item \textsuperscript{27} \textit{See Golden Valley}, 132 F.R.D. at 207 (holding that "[w]hen the producing party claims inadvertent disclosure \textit{it has the burden} of proving that the disclosure was truly inadvertent, and that the privilege has not been waived" (citation omitted) (emphasis added)); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 50 (M.D.N.C. 1987) (holding that when privileged documents are produced, the producing party "bears the burden on [proving] the inadvertency and waiver issues") \textit{aff'd}, 878 F.2d 801 (4th Cir. 1989); \textit{Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.}, 109 F.R.D. 12, 20
test is presently used by a majority of the courts that have ruled on the issue.28

The middle test is probably more problematic as it also recognizes the increased possibility that privileged documents might be produced simultaneously with non-privileged documents.29 Given this reality, the middle test scrutinizes the circumstances surrounding the document production process and makes a determination as to whether or not the privilege has been waived. The middle test, as set forth in the seminal Bud Antle, Inc. v. Grow-Tech, Inc.30 case, includes five factors that should be considered in order to assess the waiver consequences of inadvertent production:

1) the reasonableness of the precautions taken during document production;
2) the time taken to fix the error;
3) the scope of the document request;
4) the extent of the document request; and
5) fairness.31

If, after these factors are examined and it is determined that an attorney was not negligent in producing the documents, then the producing party will not have waived the privilege. On the other hand, if the circumstances indicate that an attorney "threw all caution to the wind," then the privilege might be deemed to have been waived. Theoretically, this flexibility in the application of the test should result in more equitable results.

B. The Problems of Nonuniform Rules

The use of three tests, instead of a uniform approach, has created a difficult and confusing situation, plagued by problems.32 One critical problem is that district courts have been provided with essentially no guidance by

28. Ray v. Cutter Lab., Inc., 746 F. Supp. 86, 87 (M.D. Fla. 1990) (noting that current cases tend to favor the multi-factor middle test); Kansas City Power, 133 F.R.D. at 174 (stating that the middle test is the current trend) see Appendices, Table 1.
31. Bud Antle, 131 F.R.D. at 183. The alternative test proposed in this Article excludes the time factor. See infra notes 97-105 and accompanying text (discussing the exclusion of the time factor in the alternative test).
32. See Marine Midland, 138 F.R.D. at 480 (stating that the issue of the inadvertent disclosure of privileged documents is a "knotty question"); Appendices, Chart B and Table 1.
circuit courts of appeal. This lack of guidance leads to a situation whereby litigants are unsure as to how document production should be conducted in order to avoid the pitfall of waiving the privilege.

For example, the United States Court of Appeals for the District of Columbia is the only federal court of appeals that has expressly selected one of the three existing tests to resolve the situation. While it has adopted the strict test, other circuits have not been so clear in their rulings.\textsuperscript{33}

An examination of the case law supports the conclusion that the United States Court of Appeals for the Ninth Circuit would probably reject both the strict and lenient tests in favor of the middle test.\textsuperscript{34} In \textit{Weil v. Investment/Indicators, Research \\& Management},\textsuperscript{35} the appellant objected to the lower court's finding that, due to the existence of the attorney-client privilege, the appellee was not required to respond to certain questions asked by the appellant during discovery.\textsuperscript{36} Though the appellee arguably did not intend to waive the privilege, he had previously disclosed the contested information.\textsuperscript{37} In reversing the lower court's decision, the \textit{Weil} court noted that "the subjective intent of the party asserting the privilege is only one factor to be considered in determining whether waiver should be implied."\textsuperscript{38} In addition, the court found that "inadvertence of disclosure does not as a matter of law prevent the occurrence of waiver."\textsuperscript{39} The Ninth Circuit's \textit{Weil} decision supports the view that it would likely adopt the middle test, since the decision's language is consistent with how the middle test is defined.\textsuperscript{40} This conclusion is bolstered by the fact that the middle test has been adopted by several district courts in the Ninth Circuit.\textsuperscript{41} It warrants noting, however, that those district courts have not cited \textit{Weil} as precedent for their adoption of the middle test.\textsuperscript{42}

\textsuperscript{33} \textit{In re Sealed Case}, 877 F.2d 976 (D.C. 1989); see Appendices, Chart A and Table 1. It can be argued, however, that the United States Courts of Appeals for the Ninth and Fourth Circuits have implicitly adopted the middle and strict tests respectively.
\textsuperscript{34} 647 F.2d 18, 24 (9th Cir. 1981).
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.} at 23.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 24 (emphasis added) (citation omitted). The subjective intent of the disclosing party is one of the criteria examined in the application of the middle test. See infra part III.C. and accompanying notes.
\textsuperscript{39} \textit{Weil}, 647 F.2d at 24 (citations omitted). This excerpt describes the rationale behind middle test. See infra part III.C. and accompanying notes.
\textsuperscript{40} See infra part III.C. and accompanying notes.
\textsuperscript{41} Eureka Fin. Corp. v. Hartford Accident \\& Indem. Co., 136 F.R.D. 179 (E.D. Cal 1991); see Bud Antle, Inc. v. Grow-Tech, Inc., 131 F.R.D. 179 (N.D. Cal. 1990); see also Appendices, Table 1.
\textsuperscript{42} See, e.g., \textit{Bud Antle}, 131 F.R.D. at 179 (applying the middle test but not citing \textit{Weil}, 647 F.2d at 18, as precedent for the adoption of this test).
An example of the Ninth Circuit's district courts' adoption of the middle test is the United States District Court for the Northern District of California decision in *Bud Antle*. This case is considered the seminal district court case articulating the middle test. The United States District Court for the Eastern District of California also adopted the middle test in *Eureka Fin. Corp. v. Hartford Accident & Indemnity Co.* The circumstances in which it adopted the test, however, are significantly different from those upon which this Article focuses. The court's opinion in *Eureka* noted that it "believes that an analysis of whether a waiver of important privileges has been effected should be analyzed under the inadvertent waiver standard on a case-by-case basis." The *Eureka* court went on to note that "even the inadvertent disclosure of a privileged communication does not prevent the occurrence of a waiver." These two references by the *Eureka* court are alternative ways of describing the middle test. In deciding that the privilege was waived, the *Eureka* court also relied upon the factors cited in *Bud Antle*. Thus, although the *Eureka* holding was made in a different context, it provides additional support for the contention that the Ninth Circuit would opt for the middle test.

The situation in the United States Court of Appeals for the Fourth Circuit is more complex. One district court in the Fourth Circuit has held that the Fourth Circuit adopted the middle test to resolve the inadvertency issue. In that case, the United States District Court for the Eastern District of Virginia noted that the middle test is "a rule that the Fourth Circuit appar-

43. *Id.* at 179. Hartford Fire Insurance Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985), is frequently cited as the pivotal case in the development of the middle test. While *Hartford* does discuss and scrutinize the pros and cons of the lenient and strict tests, the case was decided in the context of the inadvertent production of documents subject to work product immunity protection and not attorney-client privilege protection. *Id.* at 328-29. The *Bud Antle* decision, however, relies upon the *Hartford* rationale. *Bud Antle*, 131 F.R.D. at 183. As previously noted, many courts do not use the work product doctrine or the attorney-client privilege as a means for determining how to resolve the dilemma. See *supra* note 2; *supra* note 42 and accompanying text.


45. *Id.*

46. In *Eureka*, the non-producing party (Hartford) based its "blanket objection" to a request for documents upon the exercise of the attorney-client privilege. *Id.* at 182. Hartford agreed to produce the requested documents with the exception of those protected by the attorney-client privilege. The case did not involve the production of responsive documents that inadvertently included privileged materials. *Id.*

47. *Id.* at 183 (footnote omitted).

48. *Id.* at 184 (citation omitted).

49. See *supra* notes 25-31 and accompanying text.


ently has adopted." The district court, in *FDIC v. Marine Midland Realty Credit Corp.*, noted that "[w]hile it appears that the Fourth Circuit eschews the extremes and follows the middle road on the inadvertent disclosure-waiver issue, no circuit opinion includes extensive guidance on what types of inadvertent disclosures amount to waiver." The court cited *In re Grand Jury Proceedings* in support of its opinion.

A close reading of *In re Grand Jury Proceedings*, however, reveals that the *Marine Midland* court may have been premature in proclaiming that the Fourth Circuit adopted the middle test. While the *In re Grand Jury Proceedings* court discusses the strict and the middle tests, it notes that, as the documents at issue were not protected by the attorney-client privilege, it was unnecessary to address the issue of inadvertent disclosure. Thus, any guidance that *In re Grand Jury Proceedings* might provide in determining which of the three tests the Fourth Circuit endorses, is dicta.

Perhaps more revealing is that the language used by the court in *In re Grand Jury Proceedings* suggests that the Fourth Circuit favors adopting the strict test. An example is found in the same paragraph that *Marine Midland* relies upon for concluding that the Fourth Circuit "apparently" adopts the middle test. In that paragraph the court notes that "[i]n fact, so strong is this requirement of confidentiality that it has been held that the privilege may be lost 'even if the disclosure is inadvertent.'" This statement reflects the generally accepted definition of the strict test and, as such, suggests that the Fourth Circuit prefers the strict test. Furthermore, the *In re Grand Jury Proceedings* court relies upon *United States v. Jones* for its conclusion that the documents at issue were not protected by the attorney-client privilege. In *Jones*, the Fourth Circuit noted that "[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." Again we see a Fourth Circuit opinion containing language indicative of the strict test. Given these considera-

52. *Id.* at 482.
54. *Id.* at 482 (emphasis added).
55. 727 F.2d 1352, 1356 (4th Cir. 1984).
57. *Id.* at 1356.
58. *Id.* at 1358.
60. See supra notes 21-24 and accompanying text.
61. 696 F.2d 1069 (4th Cir. 1982).
63. *Jones*, 696 F.2d at 1072 (emphasis added).
64. See supra notes 21-24 and accompanying text.
tions, the Marine Midland court may have incorrectly concluded that the Fourth Circuit embraces the middle test.

The confusion surrounding the waiver consequence problem is compounded by the absence of any Supreme Court guidance on the issue. The Court denied review of In re Grand Jury Investigation of Ocean Transport, a case which would have given it the opportunity to clarify which test should be used and thereby determine if waiver is a consequence. At the court of appeals level, the United States Circuit Court for the District of Columbia Circuit affirmed the district court's decision that the attorney-client privilege was waived as to the inadvertently produced documents. In finding the privilege to have been waived, the District of Columbia Circuit appeared to apply the middle test, as it noted that objective factors and subjective intent must be examined. Thus, the court necessarily examined the circumstances surrounding the production of the privileged documents. This inquiry is a central feature of the middle test.

The federal courts' different approaches to the inadvertent disclosure waiver consequence issue is also of critical importance because it necessarily influences parties' selection of venue, thereby increasing the potential for forum shopping to occur. Ever since Erie Railroad v. Tompkins was decided over fifty years ago, it has been emphatically impressed upon all litigants that forum shopping is severely frowned upon. The situation in the New York district courts illustrates that abusive forum shopping can result from the existence of diverse tests to resolve the inadvertent disclosure issue.

66. Id. at 675.
67. Id. at 674-75; see also supra notes 25-31 and accompanying text.
68. Approximately ten years later, in In re Sealed, 877 F.2d 976 (D.C. Cir. 1989), the United States Court of Appeals for the District of Columbia Circuit rejected the middle test that it had previously adopted in Ocean Transport, 604 F.2d at 674-75, and instead applied the strict test. See Sealed, 877 F.2d at 980 (stating the court's agreement "with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent' " (quoting In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984) (citations omitted)). These actions by the appeals court only add to the district courts' frustration in seeking guidance on the issue. See Appendices, Table 1; supra notes 15-31.
69. See supra notes 29-31 and accompanying text.
70. Venue is "the district in which the suit is brought." BLACK'S LAW DICTIONARY 1557 (6th ed. 1990). Within each circuit there are several different districts and places of venue. See Fed. R. Civ. P. 34; see also Note, Inadvertent Disclosure, supra note 1, at 598-99 & nn. 8-11.
71. 304 U.S. 64 (1938).
72. See Appendices, Chart B. These district courts are within the United States Court of Appeals for the Second Circuit. 28 U.S.C. § 41 (1988). The pictorial depiction of the situation illustrates the practical implications of this disparity. See Appendices, Chart B.
Before analyzing this illustrative example, it must be recognized that ordinarily an attorney can readily determine, upon his or her first encounter with a case, whether or not the case will be "document intensive." Attorneys also are aware of the real possibility that one or more privileged documents may "slip through the cracks" and be inadvertently disclosed to the opponent. This reality can potentially affect the case from the outset by influencing the decision where to file the action.

The United States Court of Appeals for the Second Circuit has not adopted a single test to be uniformly applied by all the district courts, including those located in New York, within the circuit. While New York is divided into four districts, only the Eastern and Southern Districts of New York have adopted tests to resolve controversies regarding the inadvertent production of privileged documents. The Eastern District has selected the middle test, while the Southern District has adopted the middle and lenient tests. Therefore, since it is possible that the Southern District might apply the lenient test, the better trial strategy in a "document intensive" case would be, if possible, to bring the action in the Southern District. This view is bolstered by the great possibility of inadvertently producing privileged documents. Thus, it is better to be safe at the outset than sorry on the way back from the courthouse.

Of course, opposing counsel may also possess some degree of foresight, and may not object to venue in the Southern District because his or her client also may be in a situation where they would want to benefit from the lenient test. On the other hand, opposing counsel may attempt to transfer venue to the Eastern District where it is certain that the middle test would be applied. This way, if the opposing side inadvertently produces privileged

73. Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1985); see also FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991) ("[I]t cannot be doubted that this was a large document production carrying with it a substantial risk that privileged documents might be inadvertently disclosed . . . ." (emphasis added)).
74. See Appendices, Chart B and Table 1.
75. 28 U.S.C. § 112 (1988); see Chart B.
78. See supra note 3. See generally FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991) (stating that there was a "substantial risk that privileged documents might be inadvertently disclosed").
79. See infra note 159.
documents, this attorney increases his or her odds of successfully arguing that waiver has occurred. 81

Lastly, in preparation for a motion to transfer venue, an attorney may oppose such a transfer of venue. The ensuing series of motions to determine venue will be partially due to the impact the various inadvertent production tests have on litigation strategy. In the absence of any one test applied in all four districts, this scenario could be played out to the extent that excessive judicial and personal resources are spent. 82 Forum shopping and the unnecessary waste of resources are, therefore, inevitable problems resulting from the unresolved issue of inadvertent disclosure-waiver.

C. The Conflict Between Discovery Policy and Attorney-Client Privilege

There are two conflicting legal doctrines underlying the issue of inadvertent document production: the discovery policy 83 of the Federal Rules of

81. See infra notes 123-25 and accompanying text.
82. See United States v. Pepper’s Steel & Alloys, Inc., 742 F. Supp. 641, 645 (S.D. Fla. 1990) (stating that “[i]t is unfortunate that . . . the Court was forced to expend a great deal of time on . . . this matter”). See generally Ulwick, supra note 3, at 20.
83. Discovery is a critical aspect of the American judicial system. Its function is to obtain information on issues and facts pertaining to a legal controversy. See Fed. R. Civ. P. 26(a). Discovery essentially has three main purposes: (i) preserving relevant information that may be unavailable at the time of trial; (ii) ascertaining and refining the actual disputed issues; and (iii) enabling parties to obtain information that will lead to evidence admissible at trial. See, e.g., Fed. R. Civ. P. 26(b)(1); Jack H. Friedenthal et al., Civil Procedure § 7.1 (1985). Thus, the overall objective of discovery is to facilitate the truth-finding function of the judicial system. Nutt v. Black Hills Stage Lines, Inc., 452 F.2d 480, 483 (8th Cir. 1971) (commenting that “[t]he federal discovery rules were designed to provide each party with the fullest pre-trial knowledge of the facts and to clarify and narrow the issues to be tried”); FDIC v. Cherry, Bekker & Holland, 131 F.R.D. 202, 204 (M.D. Fla. 1990) (stating that “[t]he aim of the liberal discovery rules is to make trial ‘less a game of blind man’s bluff and more a fair contest’” (quoting Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978))); Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos., 99 F.R.D. 309, 312 (N.D. Ga. 1983) (stating that “[t]he purposes of discovery under the Federal Rules of Civil Procedure are to disclose the real points of dispute between the parties and to afford an adequate factual basis in preparation for trial” (citation omitted)); Grimmell Corp. v. Hackett, 70 F.R.D. 326, 332 (D.R.I. 1976) (noting that “[t]he purpose of these rules [Fed. R. Civ. P. 26-37] is to provide a way, consistent with recognized privileges, ‘for the parties to obtain the fullest possible knowledge of the issues and facts before trial’” (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947), superseded by statute on other grounds as stated in Hawkins v. Dist. Court of Fourth Judicial Dist., 638 P.2d 1372 (Colo. 1982))); Carlson Cos. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1100 (D. Minn. 1974) (stating that “[i]t is undeniable that the Federal Rules of Civil Procedure governing discovery should serve to clarify and confine the issues to be litigated and to reveal to the parties the Court the existence or whereabouts of facts relative to those issues” (citations omitted)); Woldum v. Roverud Construction, Inc., 43 F.R.D. 420, 420 (N.D. Iowa 1968) (stating that “[t]he overriding purpose of the federal discovery rules is to promote full disclosure of all facts to aid in the fair, prompt and inexpensive disposition of lawsuits”); Wood v. Todd Shipyards, 45 F.R.D. 363, 364 (S.D. Tex. 1968) (specifying that “[t]he purpose [sic] of discovery procedures are (1) to narrow the issues; (2) to obtain evidence for use at trial; and (3)
to secure information as to the existence of evidence that may be used at trial" (citation omitted); Metropolis Bending Co. v. Brandwen, 8 F.R.D. 296, 297 (D. Pa. 1948) ("To the pleadings is assigned the task of general notice giving, whereas narrowing and clarifying the basic issues between the parties, [and] ascertaining the facts or information as to the existence or whereabouts of facts relative to those issues is the role of the deposition-discovery process aided by the pre-trial hearing." (citation omitted)). See generally Fed. R. Civ. P. 26.

Furthermore, discovery is a necessary corollary to an adjudication system, like our federal system, premised upon the notice pleading system. Thus, the adoption of the notice pleading system is one of the main reasons for the liberal construction of the federal discovery rules. See generally Schlagenhauf v. Holder, 379 U.S. 104 (1964); Hickman, 329 U.S. at 495 (finding that discovery rules are to be liberally construed); Patten v. Dennis, 134 F.2d 137 (9th Cir. 1943); Alimenta, 99 F.R.D. at 309; In re Boland, 79 F.R.D. 665 (D.D.C. 1978); Harrel v. Directors of Bureau of Narcotics & Dangerous Drugs, 70 F.R.D. 444 (E.D. Tenn. 1975); Klausen v. Sidney Printing & Publishing Co., 271 F. Supp. 783 (D. Kan. 1967); Simmons Co. v. Cantor, 3 F.R.D. 281 (D. Pa. 1943) (noting that the Federal Rules of Civil Procedure "are quite lenient"); Wright & Miller, supra note 2, § 7.2. There are several reasons for this posture of the notice pleading system. First, the evolution of discovery has resulted in the adoption of a liberal policy. From a historical point of view, the modern liberal discovery policy is a natural result of the switch from the previous complex common law pleading system to today's simpler notice pleading system. For example, under Rule 8(a) of the Federal Rules of Civil Procedure, a complaint "shall contain" a short and plain statement of the grounds for relief. The complaint is requesting. Fed. R. Civ. P. 8(a).

Under the common law pleading system, litigants were required to include the entire case in the pleadings. See, e.g. Hickman, 329 U.S. at 500 (noting that "[u]nder the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings" (footnote omitted)); Floe v. Plowden, 10 F.R.D. 514, 515 (D.S.C. 1950) (noting that "our procedural forms came from the old common law practice wherein much legal learning and expenditure of time was used up in determining whether a suit should be brought on the theory of ex contractu or ex delicto"); Battin Amusement Co. v. Cocalis Amusement Co., 1 F.R.D. 769, 770 (D.N.J. 1941) (finding that "[t]o ascertain the facts the broad rules of discovery supersede the practice of framing issues by the pleadings" (footnote omitted)); see also F.W. Maitland, EQUITY (1909), reprinted in THE FORMS OF ACTION AT COMMON LAW (A.H. Chaytor & W.J. Whittaker eds., 1962). See generally William W. Blume, The Scope of a Civil Action, 42 Mich. L. Rev. 257 (1943). Because the entire case was set forth in the pleadings, under the common law system, the pleadings were the pivotal component of any action. Id. at 257. In the mid-1800s, a movement began advocating a shift from the common law pleading system to another type of pleading system due to inadequacies observed in the operation of the common law pleading system.

The notice pleading system, which emphasizes giving general notice to the parties vis-a-vis the initial pleadings, was selected to be the substitute for the common law pleading system. See Fed. R. Civ. P. 8(a). The notice pleading system was touted as a superior pleading mechanism because it was less technical and much simpler. Fed. R. Civ. P. 8(e)(1). Thus, pursuant to the mandate of Rule 8 of the Federal Rules of Civil Procedure, a party is only required to set forth a bare-bones complaint. In general, the notice pleading test requires that the essential, material facts be disclosed in a general statement such that the responding party can fashion a response to the allegations contained in the complaint. Fed. R. Civ. P. 8; Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

Given that the notice pleading system, unlike the common law pleading system, does not require full and detailed disclosure of the basis for the facts and legal theories when the case originates, it was necessary to find a means of augmenting this component of the defunct common law pleading system. The device selected to fill this new vacuum was discovery. Discov-
Civil Procedure and the attorney-client privilege. These two important

cery under the previous common law pleading system was virtually unknown because there was no role for it to play in the litigation process.

While the adoption of the notice pleading system was an impetus for the creation of the modern liberal discovery system, one must not lose sight of the fact that a critical concern was developing a means of obtaining the truth. See Fed. R. Civ. P. 1 (stating that a "just . . . determination of every action" is one of the goals of the Federal Rules of Civil Procedure); see also infra notes 124-25 and accompanying text. While the modern discovery system can certainly accomplish this goal, there are still dangers accompanying the benefit of a liberal discovery policy. The most obvious problems in our liberal truth-finding scheme include: the creation of a situation in which the cry of "fishing expedition" may no longer warrant the court's attention or concern and the great expense inherent in utilizing the discovery tools. See Pepper's Steel & Alloys, 742 F. Supp. at 641 (noting the judicial resources used in enabling discovery tools to be used by litigants). For better or worse, the liberal discovery system continues to be a vital component of the modern pleading and adjudication process.

84. The attorney-client privilege is only one of several privileges that exist. See Fed. R. Evid. 501; Cal. Evid. Code §§ 950-954 (Deering 1986); N.Y. Civ. Prac. L. & R. 4503 (McKinney 1992); Ky. R. Evid. 503; see also Cal. Evid. Code § 980 (Deering 1986) (marital privilege); id. § 994 (physician-patient privilege); id. § 1014 (1986 & Supp. 1992) (psychotherapist-patient privilege); id. §§ 1030-1034 (1986) (priest-penitent privilege); N.Y. Civ. Prac. L. & R. 4502 (McKinney 1992) (marital privilege); id. 4504 (physician-patient privilege); id. 4505 (priest-penitent privilege); Ky. R. Evid. 504 (marital privilege); id. 506 (counselor-client privilege); id. 507 (psychotherapist-patient privilege). As previously mentioned, the attorney-client privilege is a privilege designed to protect confidential communications between attorneys and clients. Upjohn Co. v. United States, 449 U.S. 383 (1981); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); see also Wright & Miller, supra note 2, § 2017 at 133-34.

The attorney-client privilege has traditionally been viewed as a sacred and inviolable legal doctrine. Upjohn, 449 U.S. at 383; Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.), Inc., 111 F.R.D. 76, 79 (S.D.N.Y. 1986) (holding that "[t]he attorney-client privilege is the 'oldest of the privileges for confidential communications known to the common law.' " (quoting Upjohn, 449 U.S. at 389)); Wright & Miller, supra note 2, § 2017. It is a dominant feature of the discovery process and of the judicial system. See supra note 2; see also In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (noting that the attorney-client privilege "is of ancient lineage and continuing importance"); Parkway Gallery Furniture, Inc. v. Kittinger/ Pennsylvania House Group, Inc., 116 F.R.D. 46, 49 (M.D.N.C. 1987) (commenting that the attorney-client privilege has "ancient roots and modern necessity"), aff'd, 878 F.2d 801 (4th Cir. 1989). The attorney-client privilege arose from a rich historical tradition and is central to the effective representation by counsel. Wright & Miller, supra note 2, § 2017 at 134 (stating that privileged communications are to be "zealously protected"); David A. Nelson, Comment, Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?, 86 Nw. U. L. Rev. 368, 377 n.80 (remarking that the attorney-client privilege "promotes free and open communications between attorney and client"); see also Wigmore, supra note 2, § 2290 (stating that the attorney-client privilege is "the oldest of the privileges for confidential communications"). Furthermore, the importance of the attorney-client privilege is bolstered by Canon 4 of the American Bar Association Model Code of Professional Responsibility. Model Code of Professional Responsibility Canon 4 (1980).

The attorney-client privilege serves several purposes. Perhaps foremost is that it encourages candor between clients and attorneys. Upjohn, 449 U.S. at 389; In re Subpoenas Duces Tecum, 738 F.2d. 1367, 1371 (D.C. Cir. 1984); Baker's Aid v. Hussmann Foodservice Co., No. DV 87-0937, 1988 WL 138254, at *3 (E.D.N.Y. Dec. 19, 1988) ("The attorney-client privilege is based upon a policy of encouraging openness and full disclosure between a client and his or
legal principles play a pivotal role in the formulation of a single, uniform test


The rationale supporting the objective of achieving increased candor between attorneys and their clients is related to the corollary goal that this candor will ultimately result in "just" determinations of controversies through the revelation of the "truth." See Fed. R. Civ. P. 1; Upjohn, 449 U.S. at 389 (stating that the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.") (emphasis added). See generally Nelson, supra, at 383 & 384 n.124 (citing Upjohn, 449 U.S. at 389). If a client is aware that he or she can in confidence be candid with his or her attorney, this candor, with the added insurance of confidentiality, should encourage clients to reveal all aspects of the case, including "unfavorable" or "sensitive" facts. Id. at 383. In turn, the client's candor enables the attorney to obtain all the facts that will assist in making important litigation decisions such as the type of discovery plan that should be developed and implemented, refining the case issues, refining and clarifying the trial strategy and considering the possibility of entering into a mutually-beneficial settlement. See id. at 383-84. In addition, a client's candor plays a tremendous role in deriving the truth. Much of the information necessary for handling the dispute comes from the client. Therefore, increased candor will assist in improving the truth-finding function of the adjudication process. From this perspective the attorney-client privilege aids the discovery of the "truth" of a particular matter rather than impeding the process.

The attorney-client privilege in its present manifestation is pro client, in that the client is the holder of the privilege. Wigmore, supra note 2, § 2321 (stating that "under the modern theory, [the privilege] is plainly the client's, not the attorney's"); Wright & Miller, supra note 2, § 2017; see also Nelson, supra, at 385 (noting that "the privilege belongs to the client and not the attorney" (footnote omitted)).

Arriving at this position constituted a significant alteration through the evolutionary process. At this point, it is fruitful to examine briefly the historical development of the attorney-client privilege. The attorney-client privilege has its roots in Roman Law. John W. McCormick, Evidence § 87, at 204 (Edward W. Cleary ed., 3d ed. 1984); Max Radin, Comment, The Privilege of Confidential Communication Between Lawyer and Client, 16 Cal. L. Rev. 487, 488 (1928). Under the Roman configuration of the attorney-client privilege, the privilege was held by the client. Id. at 487-88. While this stance is identical to the present manifestation of the privilege, the historical rationale is significantly different from the present scheme's position. Under Roman law, the attorney was considered a slave of his master (or client); a slave was essentially part of the master's family and the confidential relationship between family members was grounded in mutual fidelity. Id. at 488. Consequently, the attorney was deemed a "slave" of the client and only the client could hold and waive the privilege, as the attorney had no real authority. Id. This stance was significantly altered in the 1500s with the advent of the Elizabethan era in England. Id. at 489; Wigmore, supra note 2, § 2290; Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061, 1070-71 (1978); Nelson, supra, at 383; see also Union Carbide, 619 F. Supp. at 1046. Instead of being viewed as a "slave" of the client, the attorney assumed the position of the "master" of the situation, who like the "master" in the Roman times became the holder of the attorney-client privilege. Wigmore, supra note 2, § 2290. Consequently, the attorney, and not the client, as the holder of the privilege was the only individual permitted to exercise a waiver of the privilege. Id. This view of the privilege was based upon a perception that attorneys were individuals of great honor. Id.; see also McCormick, supra, § 92, at 221.

The erosion of this view of the attorney-client privilege started to occur around the 1700s. Wigmore, supra note 2, § 2290. Slowly, there was a shift from a focus on the attorney's honor to the recognition that clients needed to be assured that, unless the client otherwise
involving the waiver consequence of the inadvertent production of privileged documents.

The goal of preserving the attorney-client privilege is evident in the lenient test, as it forbids the waiver of the attorney-client privilege under any circumstance. On the other hand, the strict test endorses the liberal discovery policy as it automatically waives the privilege and thus, allows for the discovery of a greater amount of information. It warrants noting that Wigmore is frequently cited for endorsing the strict test because the lenient test interferes with the truth-finding function. Wigmore's commentaries, however, contain statements suggesting that while he might prefer a stricter test, he also might endorse a test more in line with the middle test. Such an example is found in Wigmore's statement that "the law must prohibit such disclosure except on the client's consent. Such is the modern theory." The policy concern inherent in this statement is closely aligned with the structure of the middle test whereby the examination of the client's consent is conducted under the auspices of whether or not the production was inadvertent. In another section, however, Wigmore notes, without expressly endorsing the view, that "all disclosures (oral or written) voluntarily made to the opposing party . . . are receivable as being made under an implied waiver of privilege." This statement would be more in line with the standard used in the strict test. It appears, therefore, that Wigmore can be used to support several of the present approaches. While the two principles appear to conflict in this context, the alternative proposed in this Article attempts to harmonize the two doctrines and to incorporate both of the policies.

requested, confidential communications would remain between the client and his or her attorney. Hazard, supra, at 1066-67; see also WIGMORE, supra note 2, § 2290. However, it was not until the late-1800s that the alteration in the perspective and application of the attorney-client privilege was completed. See id.

The final resting point of the evolution of the attorney-client privilege is as it operates today. As previously explained, the client holds the privilege and therefore, is the only one permitted to waive the privilege. See supra notes 21-24; see also WIGMORE, supra note 2, § 2321 (noting that under the modern theory only the client can waive the attorney-client privilege). 85. See supra notes 15-20 and accompanying text (describing the lenient test and its implications for the attorney-client privilege).

86. See supra notes 21-24 (discussing the strict test).
87. See 8 WIGMORE, supra note 2, § 2291.
88. 8 id. § 2291, at 545 (emphasis added).
89. 8 id. § 2325, at 633.
90. See supra notes 21-24 and accompanying text.
II. THE PROPOSED APPROACH: THE “ALTERNATIVE TEST”

A. Formulating the Alternative Test

1. Components of the Test

The following test should be applied by all courts as the means of resolving the waiver consequence issue: Once the parties are aware\(^9\) that privileged documents have been inadvertently produced, a rebuttable presumption is created whereby it is deemed that the producing party’s inadvertent production \textit{has not} waived the attorney-client privilege. This presumption is indicative of the alternative test’s endorsement of attempting to secure the attorney-client privilege. Subsequently, the producing party should then request the return of the documents. Under this test, two key factors are initially presumed in the producing party’s favor: 1) that the privileged documents were inadvertently produced; and 2) that the attorney-client privilege remains unscathed by the production of the documents. However, the producing party has the initial burden of proving that the documents are privileged.\(^9\)2 This burden is identical to that in the three currently existing tests.\(^9\)3

Once it is shown that the documents are protected by the attorney-client privilege, it is automatically presumed that the producing party did not waive the privilege and that the production was inadvertent. If the non-producing party does not contest this scenario, then the non-producing party must return the documents and is prohibited from using or relying upon them in any manner during the course of the litigation.\(^9\)4

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91. The required awareness, or notice, of the production of privileged documents could require that the producing party notify the non-producing party or vice-versa. See Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989) (producing party notified non-producing party when it discovered it had inadvertently produced privileged documents); see also Thomas v. Pansy Ellen Prods., Inc., 672 F. Supp. 237, 242-43 (W.D.N.C. 1987) (same); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 952 (N.D. Ill. 1982) (same). In addition the idea of requiring the non-producing party to return the privileged document to the producing party was recently addressed in an ethical opinion issued by the American Bar Association. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992) (reprinted in \textit{LAWS MAN. OF PROF. CONDUCT} (ABA/BNA) 1001:155.

92. See supra notes 2, 27.

93. Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1990) (stating that “[t]he burden is on the party asserting the attorney-client privilege to establish its existence”); Parkway Gallery Furniture, 116 F.R.D. at 50 (holding that “[t]he proponent of the attorney-client privilege has the burden of proving its applicability” (citation omitted)); Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 20 (D. Neb. 1985) (stating that “[t]he burden is upon the party claiming a privilege to demonstrate that it applies in the particular circumstances of the case”); see also \textit{WRIGHT & MILLER}, supra note 2, § 2016 (burden of proof is on the person attempting to show the existence of the attorney-client privilege); \textit{infra} part III.

94. \textit{See infra} notes 96-97 and accompanying text.
However, if the non-producing party contests the producing party's assessment of the situation, then the non-producing party has the right to attempt to rebut the nonwaiver presumption.95 The non-producing party might first opt to refute the producing party's contention that the documents are privileged. If this fails, the non-producing party must then overcome the rebuttable presumption. Thus, the non-producing party, in order to rebut the presumption and successfully establish that a waiver of the privilege has occurred, must prove two factors: 1) the privileged documents were not inadvertently produced; and 2) as a result, the attorney-client privilege is waived.

In order to prove the necessary elements, the non-producing party can gather information96 establishing that the management of the production fell below the level of care required for ensuring the exclusion of privileged materials. To rebut the non-waiver presumption, the non-producing party must examine and present proof on the following factors:

1. the reasonableness of the precautions to prevent inadvertent disclosure;
2. the scope of discovery;
3. the extent of disclosure; and
4. the overriding issue of fairness.

Several of these factors are identical to those examined in the middle test.97 The middle test, however, also includes an additional factor, the "time factor," that considers the length of time that has passed before the producing party became aware of the inadvertently produced privileged document(s). In other words, the middle test takes into account the length of time that the document has been in the possession of the non-producing party.98 This "time factor" is the only middle test element excluded from determining whether the non-producing party has rebutted the nonwaiver presumption.

Several considerations led to the decision to exclude the time factor from the alternative test. First, the Federal Rules of Evidence allow for the exclusion of evidence when the prejudicial value exceeds the probative value.99

95. See Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.), Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986) (noting that "the burden is particularly heavy on one seeking to pierce the attorney-client privilege" (citation omitted)).
96. The non-producing party may make discovery requests to obtain information regarding how the producing party managed and conducted the document production during which the privileged documents were produced. The non-producing party can also obtain discovery pertaining to the alleged privileged nature of the documents if this remains a point of contention between the parties. See generally FED. R. CIV. P. 26(b)(1).
97. See supra notes 30-31 and accompanying text.
98. Baxter Travenol Lab., Inc. v. Abbott Lab., 117 F.R.D. 119, 121 (N.D. Ill. 1987) (noting that "delay in claiming the privilege can result in waiver" (emphasis added)).
99. FED. R. EVID. 403.
Objections based upon this provision occur during trial, after the parties have had pre-trial access to and notice of all information and evidence. Substantively, this is no different from a party having pre-trial access to an inadvertently-produced privileged document which the court orders returned to the producing party and of which the court prohibits any use of during the remainder of the trial. Therefore, this analogy supports any importance attached to the time factor and adds support for its elimination from the alternative test. Thus, in rebutting the presumption it is immaterial whether an attorney possessed a document for five days instead of five months.

The use of motions in limine is another basis supporting the exclusion of the time factor. Motions in limine are typically filed immediately before trial in order to request the exclusion of particular evidence from trial. Typically, both sides have been aware for quite some time of the existence and contents of the information that is the subject of the motion in limine. If the motion in limine is granted, then the length of time that a party possesses a document becomes irrelevant since the party is precluded from using that information at trial.

100. See Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991) (stating that "a court can repair much of the damage done by disclosure by preventing or restricting the use of the document at trial" (citation omitted)), aff'd in part, question certified, 991 F.2d 1533 (11th Cir. 1993).


102. In a recent Michigan case, for example, the defendant had solicited legal advice from another inmate known throughout the prison as “counselor.” United States v. Tyler, 745 F. Supp. 423, 424 (W.D. Mich. 1990). Counselor had a facsimile of a law school diploma on the wall of his cell and routinely gave legal advice to the inmates. Id. The defendant filed a motion in limine to exclude his communication with Counselor, claiming that they were protected by the attorney-client privilege. Id. The court found they were so protected and granted defendant’s motion. Id. at 425-26. The court gave no consideration to the fact that prosecutors had had access to the documents for some time and planned to use them in the upcoming case. Id. at 423. Contra Bud Antle, Inc. v. Grow-Tech, Inc., 131 F.R.D 179, 183 (N.D. Cal. 1990) (noting that where it took the plaintiffs six weeks to realize that they had inadvertently produced privileged documents, “[b]y that time, the letter had been thoroughly analyzed by defendants’ attorney, and the client had been informed of its contents”); Baxter Travenol, 117 F.R.D. at 121 (“Where prior to the assertion of the privilege, the documents have been examined and used by the opposing party, it may be unfair and unrealistic to uphold the privilege.” (citation omitted)).

103. In addition, several courts opt for other means of handling the inadvertent production of documents when the privilege is not waived. See, e.g., Georgetown Manor, 753 F. Supp. at
Furthermore, if a court orders the return of the privileged documents to the producing party, then the non-producing party has, in all likelihood, already viewed the document and is aware of its contents, which is the focus of the time factor's concern. Thus, even though the non-producing party has had access to the documents, might have read them, and may be familiar with their contents, the court can still issue an order prohibiting the use of the documents and their contents at trial.\footnote{See Georgetown Manor, 753 F. Supp. at 938; \textit{supra} note 100.}

Lastly, the length of time that the privileged document has been in the domain of the opposing party has no relation to the goal of improving lawyering skills or of furthering the policing function found in strict and middle waiver tests.\footnote{See infra part II.B.1 (discussing the benefits of the alternative test).} If the non-waiver presumption can be rebutted, it is because of an inadequacy in the manner in which the attorney produced the document(s) in the first place and not for how long the document(s) remained in the non-producing party's possession.

Under the alternative test, once the non-producing party feels secure\footnote{The local rules of many federal courts have mandatory "meet and confer" rules requiring the parties to discuss the discovery dispute before any motions related to the dispute can be filed. \textit{See generally} \textit{Pepper's Steel \\& Alloys}, 742 F. Supp. at 645 (noting that the inadvertent disclosure of privileged documents should be resolved between the parties, thus avoiding substantial court involvement).} that it can rebut the nonwaiver presumption, it can approach the producing party to confer\footnote{See generally \textit{FED. R. Civ. P.} 11.} about the issue. If the producing party continues to adhere to its inadvertency and non-waiver position, then the non-producing party can move to retain the documents and, if possible, to compel the pro-

\footnote{938 (noting that if non-waiver is the consequence then the "court can repair much of the damage done by disclosure by preventing or restricting use of the document at trial" (emphasis added) (citation omitted)); Fidelity Bank, N.A. v. Bass, No. CIV.A. 88-5257, 1989 WL 9354 (E.D. Pa. Feb. 8, 1989) (finding that the privilege had not been waived and ordering the defendant to return the inadvertently produced documents to the plaintiff). Additionally, the producing party can be ordered "not [to] be directed to respond to the line of questioning about the document." Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1985). Similarly, a Florida district court held that, given that the attorney-client privilege remained intact, the appropriate remedy was to render the inadvertently-produced documents inadmissible. United States v. Pepper's Steel \\& Alloys, Inc., 742 F. Supp. 641, 645 (S.D. Fla. 1990); see also Kansas City Power \\& Light Co. v. Pittsburg \\& Midway Coal Mining Co., 133 F.R.D. 171, 175 (D. Kan. 1989) (ordering the non-producing party to return privileged documents to the producing party); Baker's Aid v. Hussman Foodservice Co., No. CV 87-0937, 1988 WL 138254, at *7 (E.D.N.Y. Dec. 19, 1983) (ordering privileged documents returned to producing party, and forbidding the non-producing party from "mak[ing] ... use of th[e] document or its contents during the course of th[e] litigation").}
duction of additional privileged documents. The producing party can oppose this motion and/or bring a motion seeking the return of the documents.

Once judicial involvement is requested, the court must determine whether the presumption has been successfully rebutted. If the court holds that the non-producing party has failed to rebut the presumption, several options are then available to the producing party. The producing party can request that the non-producing party return the privileged documents.109 The court may also order the non-producing party to refrain from questioning witnesses about the contents or the subject of the privileged matter.110 Furthermore, the court may preclude the non-producing party from introducing the privileged documents into evidence and prevent all subsequent use of the documents.111

2. Balancing Policy and Privilege

The alternative test reinforces the sanctity of the attorney-client privilege—the importance of ensuring candor between attorney and client.112 However, it is important that the alternative approach acknowledge and incorporate some of the critical concerns embodied in the strict and middle tests.113

Candor, or the attorney-client privilege, and truth-finding, or discovery, have generally been viewed as being at loggerheads, evidenced by the existence of three tests representing diverse endorsements of different legal principles.114 Nonetheless, they are inextricably linked, just as candor on the part

108. One of the most prevalent dangers of waiver being deemed the consequence of inadvertent production of privileged documents is that it opens the door to access to other privileged documents. See supra note 86 and accompanying text; supra note 8.


110. Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1985); see also Note, Inadvertent Disclosure, supra note 1, at 609 n.45 (noting that "[f]ew courts discuss what procedure to use in permitting assertion of the privilege despite inadvertent disclosure").

111. See infra notes 121, 123, 153-76 and accompanying text.

112. See supra notes 83-90 and accompanying text.
of the client, achieved through the preservation of the attorney-client privilege, and truth-finding in the judicial process achieved through the discovery system, are intertwined. It is difficult to "discover" the truth if the client does not feel free to be "candid." The new test's rebuttable presumption furthers the principles of the attorney-client privilege and the liberal discovery system by ensuring that the truth-finding objectives, as necessarily modified by privileged communications, are carried out.\textsuperscript{115}

The alternative test also incorporates and addresses the strict test's emphasis on both "negligent" or sloppy lawyering and encouraging good lawyering skills.\textsuperscript{116} Attorneys whose document production activities fall below an acceptable level will be singled out and penalized by the non-producing attorney's ability to successfully rebut the presumption. This acts as a "policing function" for an attorney's actions. Thus, the test reconciles the conflicts that exist between the attorney-client privilege and the discovery policy.

\textbf{B. Critiquing the Alternative Test}

1. \textit{Strengths}

A key strength of the alternative test is that it is fairly simple to administer. The simple process of the test,\textsuperscript{117} with its use of the rebuttable presumption, should create a situation in which the parties must initially attempt to resolve. In addition, the parties will simultaneously be made aware of the increased certainty in how the test will be applied and the likelihood of the outcome given a particular set of facts. Furthermore, the alternative test's predetermined consequence of non-waiver is designed to reduce the undesirable amount of uncertainty that presently exists when the middle test is applied, while retaining the middle test's advantageous flexibility.

The alternative test discards the inflexible positions taken by the lenient and strict tests\textsuperscript{118} by including a rebuttable presumption that enables courts to entertain cases that might require equitable considerations, or where there is a need to penalize\textsuperscript{119} attorneys for below-standard lawyering habits. If the

\begin{footnotes}
\textsuperscript{115} See infra note 123 and accompanying text.
\textsuperscript{116} See infra notes 117-25 and accompanying text (discussing the various benefits of the alternative test, including the promotion of good lawyering skills); infra note 152.
\textsuperscript{117} See supra notes 91-111 and accompanying text.
\textsuperscript{118} See supra notes 15-24; infra notes 148-56 and accompanying text; see also Appendices, Chart B.
\textsuperscript{119} See Monarch Cement Co. v. Lone Star Indus., Inc., 132 F.R.D. 558, 560 (D. Kan. 1990) (stating that "[f]airness in this case constrains a holding that the client should not suffer because of the actions of counsel"), sum. judgment granted, No. 88-2431-V, 1991 U.S. Dist. LEXIS 18669 (D. Kan. Dec. 19, 1991), aff'd, 982 F.2d 1448 (10th Cir. 1992). The possible penalty is that the non-producing party can retain the documents, and although this "penalty"
non-producing party contends that the presumption is inequitable or unfair, then the non-producing party has an opportunity to have the situation reviewed, similar to the process available under the middle test. Thus, the alternative test's inclusion of the rebuttable presumption reduces the potential for unfair outcomes.

The alternative test assists in accomplishing the "truth-finding" goal that is central to the strict test. It encourages client candor, which ultimately helps in discovering the "truth" and leads to the rendering of a just determination, comporting with the interests of justice for all parties involved. The test also seeks to reduce judicial intervention in resolving the matter, a reduction that will result in a positive impact on the litigation process. The subsequent reduction in litigation is primarily derived from the reduced uncertainty created by the adoption of the alternative test, and the test's use of the rebuttable presumption. Because a party deciding to rebut the presumption must have sufficient evidence, the issue must be investigated and the cost of pursuing judicial relief and expending resources must be weighed against the benefits, given the existence of the non-favorable rebuttable presumption. In other words, a reduction in litigation will result from the non-producing party's determination of whether it is cost efficient to try to rebut the presumption which will, in turn, reduce the expenditure of both judicial and personal resources.

A final benefit of the alternative test is that it encourages good lawyering skills. The test's "built in" penalty—that the opponent may succeed in rebutting the presumption and attaining the release of privileged documents—functions as an incentive for attorneys not to stray far from conducting their legal duties in an appropriate manner. In order to avoid this "penalty," attorneys will be forced to be more conscientious during document production.

is meted out for the attorney's actions, the client is the actual recipient of the repercussions from the penalty. In other words, it is the client who is penalized. See infra note 152.

120. The non-producing party's actions to attempt to rebut the presumption are, of course, subject to the mandates of the Federal Rules of Civil Procedure Rule 11. FED. R. CIV. P 11; see infra note 139.

121. See infra notes 157-70 and accompanying text.

122. See generally FED. R. CIV. P. 1 (providing that the goal of the adjudicatory process is to have "just, speedy, and inexpensive determination" of every action).

123. See infra notes 121, 152.

124. See FED. R. CIV. P. 1 (mandating that speedy and efficient adjudications are to be obtained in "every action").

125. See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3-17 (3d ed. 1986) (applying cost-benefit analysis to legal decisionmaking).
2. Weaknesses

The alternative test is a marked improvement over the strict, lenient, and middle tests. However, a possible shortcoming of the alternative approach is that, because of the rebuttable presumption, there may be a risk that the overall success of the truth-finding aspect of discovery will be comprised, particularly when compared with the emphasis given to this concern under the strict test. Therefore, critics might claim that one weakness of the alternative test, like the lenient test, is that it impedes the truth-finding function. However, given the alternative test's position of promoting the attorney-client privilege as the legal doctrine to be protected, this perceived shortcoming may more aptly be deemed a consequence of the institution of the alternative test, rather than a weakness.

This perceived weakness is also present in several evidentiary rules. Courts adhering to the strict test seem to make an inviolable connection between the truth-finding function and the "absence" of any remedy. In International Digital Sys. Corp. v. Digital Equip. Corp., the United States District Court for the District of Massachusetts held that a waiver occurred, took a strong stance, and stated that "[t]here is no order which can remedy what has occurred [the inadvertent production of privileged documents]." A similar position was taken in Baxter Travenol Lab., Inc. v. Abbott Lab., where the United States District Court for the Northern District of Illinois noted that "[w]hen the documents have been examined and used by the opposing party, it may be unfair and unrealistic to uphold the privilege." Such tough positions forget or omit an important aspect of the interaction between the truth-finding and remedial functions of the judicial system, as there are numerous instances where relevant evidence, which would enhance the "truth-finding" function, is excluded. In the context of the inadvertent production of privileged documents, for example, one court noted that the fact that a document had been inadvertently pro-

126. See infra notes 164-76 and accompanying text.
127. The truth-finding function of the judicial process is frequently cited by strict test adherents as a reason for the test's duration in this area. See supra notes 123-24 and accompanying text; infra notes 158-60 and accompanying text.
129. Id. at 449 (emphasis added).
131. Id. at 121.
132. See also In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.) (stating that "it would be unfair and unrealistic now to permit the privilege's assertion as to these documents which have been thoroughly examined and used by the Government for several years" (citations omitted)), cert. denied, 444 U.S. 415 (1979).
133. See supra notes 123-24 and accompanying text; supra note 103.
134. See, e.g., supra notes 99, 103.
duced and the opponent may have seen it does not preclude "a court [from] repair[ing] much of the damage done by disclosure by preventing or restricting use of the document at trial." In a similar vein, other courts have specifically noted that the non-waiver of the attorney-client privilege can be enforced by ordering that "such documents shall not be used by defendant at trial except upon further order of the court." Another court resolved the issue by prohibiting deposition responses to "the line of questioning about the document, or about the meeting." Thus, much of the criticism based upon the alleged hinderance of the truth-finding function that would result by instituting a less absolutist and automatic exclusionary rule can be dismissed by examining how courts regularly follow what is common trial practice—excluding evidence that is inadmissible for one reason or another. Thus, any perceived impediment to the truth-finding process that the alternative test may possess is weakened.

Another possible disadvantage to the alternative test is that it may not fully achieve its goal of reducing litigation through the institution of a uniform test. This possible consequence manifests itself in two ways. First, if the non-producing party has conducted discovery and, in accordance with Rule 11 of the Federal Rules of Civil Procedure, attempts to rebut the

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138. See supra note 113 and accompanying text.
139. Rule 11 of the Federal Rules of Civil Procedure provides:

   Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include
presumption, the case load of the courts could be increased. Additionally, some amount of discovery\textsuperscript{140} will need to be conducted by the non-producing party to assess the likelihood of successfully rebutting the presumption. However, in litigation, the possibility always exists that a discovery battle may ensue and that judicial action will be required to resolve such battles.

Finally, while a critical objective of the alternative test is to improve certainty for litigants confronted with this situation, the test, because it does not endorse an absolutist view, certainly will not achieve the same degree of certainty that is inherent in the strict and lenient tests.\textsuperscript{141} This should not be viewed, however, as an obstacle sufficient to disregard the potential benefits from the adoption and implementation of the alternative test. Part of the alternative test's uncertainty stems from the fact that, while attempting to reduce or minimize uncertainty, the test has incorporated numerous features and accommodated various doctrinal conflicts to prevent inequitable results and to promulgate the continuance of the two legal principles in conflict.\textsuperscript{142}

III. THE ALTERNATIVE TEST COMPARED TO THE THREE EXISTING TESTS

A. Versus the Lenient Test

Both the lenient and the alternative tests focus on inadvertence. The alternative test,\textsuperscript{143} however, has additional similarities and dissimilarities to the lenient test that warrant discussion. The most dominant feature shared by both tests is an endorsement of the attorney-client privilege as the primary legal doctrine to be protected. As mentioned above, the lenient test's endorsement is contained in its statement of the test: Waiver of the attorney-client privileged document cannot occur absent the party's intent to waive. The alternative test contains the same general principle, but approaches it from a slightly different stance. The alternative test automatically presumes that the attorney-client privilege continues to protect an inadvertently produced privileged document, even after disclosure. Thus, the privilege is not waived, thereby placing the burden for proving otherwise on the non-pro-

\begin{itemize}
  \item FED. R. CIV. P. 11.
  \item 140. See generally FED. R. CIV. P. 26 (governing discovery).
  \item 141. See supra notes 85-140 and accompanying text; infra notes 142-56 and accompanying text.
  \item 142. See supra notes 83-105, 112-25, 134-40 and accompanying text; infra notes 143-70 and accompanying text.
  \item 143. See supra notes 85-105 and accompanying text.
\end{itemize}
dancing party. Both tests also place the burden of proving the existence of the attorney-client privilege on the producing party.

The manner in which the lenient test operates technically lends itself to greater certainty in the outcome of privilege disputes. If the protected document is inadvertently produced, then the document is automatically returned to the producing party. Any disparity in the certainty of the outcome presented by the two tests, however, is tempered by the alternative test’s rebuttable presumption, as the presumption creates an environment that lends a heightened degree of certainty to the outcome—non-waiver—and places the burden of proving intent to the contrary on the non-producing party.

Several differences also exist between the two tests. The most obvious difference is that the lenient test lacks the alternative test’s flexibility, as it precludes examination of specific unique circumstances that might arise to permit waiver of the privilege, particularly in document intensive and cumbersome litigation. On the other hand, the new test’s rebuttable presumption allows for this type of inquiry and, if necessary, permits detouring from the lenient test’s position. Additionally, the alternative test, unlike the lenient test, is not as absolute. The lenient test’s absolutist manner can be viewed from a perspective similar to the ideology and principles of strict tort liability.

Another significant difference is that, although the alternative test does not advocate or encourage shoddy work product or a disregard for profes-

144. See supra notes 92-111 and accompanying text.
145. See supra notes 92-93 and accompanying text.
146. See supra notes 115-20 and accompanying text.
147. See supra note 95 and accompanying text.
149. See Appendices, Chart B.
150. See DAN B. DOBBS ET AL., PROSSER AND KEETON ON TORTS § 75, at 534-38 (5th ed. 1984) (discussing the elements and nature of strict liability); Appendices, Chart B.
sional duties and obligations, the lenient test's absolutist stance precludes all inquiry into such behavior and thus precludes its ability to function as a policing element. In contrast, the alternative test assumes that an attorney has been performing his or her professional duties in an appropriate manner, and allows for the rebuttable presumption to be continually waved as a "carrot" in front of attorneys as a policing function, which acts as an incentive for attorneys to execute their duties in accordance with high professional standards. Since unfortunately this is not always the case, the alternative test, like the lenient test, functions to minimize the client's suffering for the attorney's foibles.

This sought-after heightened degree of certainty also introduces another attribute of the alternative test that is absent from the lenient test. The alternative test's rebuttable presumption may deter litigants from immediately resorting to tribunals for the resolution of waiver issues. A positive consequence of this is that there could be a reduction in judicial and personal resource expenditures.

In conclusion, the lenient test and the alternative test share common ground in some areas and differ in others. However, both maintain a mutual respect for and an endorsement of the sanctity of the attorney-client privilege.

B. Versus the Strict Test

The alternative test and the strict test diverge on one important and critical point—waiver. Under the alternative test, waiver is not presumed, while under the strict test, waiver of the protection is an automatic consequence. However, both tests require an initial review to determine whether the documents are actually privileged. In addition, both tests place the burden of proving the existence of privilege upon the producing party.


152. This should be compared with the situation under the application of the strict test. Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del.); sum. judgment granted in part, dismissed in part, 742 F. Supp 860 (D. Del. 1990), superseded by statute as stated in Young v. West Coast Indus. Relations Ass'n, 144 F.R.D. 206 (D. Del. 1992); Monarch Cement Co. v. Lone Star Indus., 132 F.R.D. 558, 560 (D. Kan. 1990) (providing that "the client should not suffer because of the actions of counsel"), sum. judgment granted, No. 88-2431-V, 1991 U.S. Dist. LEXIS 18669 (D. Kan. Dec. 19, 1991), aff'd, 982 F.2d 1448 (10th Cir. 1992); Mendenhall, 531 F. Supp. at 955 (stating 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" (emphasis in original)); see also infra note 153 and accompanying text.

153. See supra notes 91-93 and accompanying text.

154. See supra notes 24, 92 and accompanying text.

155. See supra notes 92-93 and accompanying text.
Both tests find that it is unnecessary to inquire whether the production was inadvertent or not. Under the strict test, this inquiry is entirely irrelevant, and coincides with the mechanics of the strict test where the only question posed is whether the produced document is protected by the attorney-client privilege. The alternative test, however, approaches this feature differently, assuming that there is no need to make such an inquiry because of the automatic rebuttable presumption. Although the two tests superficially appear to operate similarly, the alternative test’s approach is entirely different from that of the strict test. The alternative test automatically endorses the attorney-client privilege, while the strict test’s position reflects an overriding concern with the truth-finding function and the discovery policy. The alternative test eventually does allow, however, for an inquiry into the circumstances of the production through the use of the rebuttable presumption.

Both tests seek to maintain a high degree of professional excellence in the legal profession. The strict test accomplishes this task by imposing an automatic penalty—waiver—upon every attorney who allows a document protected by the attorney-client privilege to come into an opponent’s possession. This mode of operation does have its virtues, as it sends a strong signal to attorneys that the best is required and expected from them. The alternative test also addresses this concern by starting with the assumption that the attorney’s actions were in accordance with professional expectations. The existence of the rebuttable presumption, however, provides the opponent with the opportunity, if warranted, to establish that the producing party’s attorney’s actions fell below an acceptable standard. Thus, the alternative and strict tests each provide an incentive for encouraging excellent and conscientious lawyering skills. Yet there exists an important difference in how these two tests attempt to accomplish this goal. The alternative test does not impose a blanket penalty upon all lawyers whose opponents have their privileged documents in their possession. Under the strict test, the client ultimately pays for the foibles of the attorney. The alternative test, however,

156. See supra notes 21-24 and accompanying text.
157. See supra notes 95-105 and accompanying text.
158. See supra notes 116-42 and accompanying text.
159. The strict test’s placement of the penalty on the client seems to be partially based on the belief that the client has an option—to seek recourse against the attorney. Where the strict test is applied, case law suggests that this should be the manner in which inadvertent production problems are handled. In In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), where after applying the strict test and thereby allowing the non-producing party to retain the privileged documents, the court noted that the actions of the producing party’s attorney were tantamount to negligence. Id. at 980. The court declared:

Even assuming Company’s disclosure was due to “bureaucratic error”, which we take to be a euphemism that necessarily implies human error, that unfortunate lapse
simply reveals that someone in the company and thereby Company itself... was careless with the confidentiality of its privileged communications.

_This same approach is suggested in In re Standard Fin. Management Corp., 77 B.R. 324 (Bankr. D. Mass. 1987) where the court, again applying the strict test, noted that inadvertent disclosure is “after all, merely a euphemism for negligence and, certainly... one is expected to pay a price for one's negligent actions.”_ Id. at 330.

The elements of a legal malpractice action mirror those in a negligence action:

Under New York law [and that of most other states], the elements of a claim for legal malpractice are (1) existence of an attorney-client relationship; (2) negligence on the part of the attorney; (3) proximate cause; and (4) proof that, but for the alleged acts of malpractice, plaintiff would have been able to recover or proceed in a manner other than that which actually occurred.

Sacco v. Burke, 764 F. Supp. 918, 920-21 (S.D.N.Y. 1991) (citations omitted). The existence of the attorney-client relationship gives rise to a duty and negligence on the part of the attorney is a breach of that duty. The third and fourth elements require the traditional forms of causation in a negligence action, while the fourth, in addition, implies that an actual injury must have occurred.

While this action is available for the producing party but not for the non-producing party, it appears that this theoretical alternative for redress has several critical flaws. One flaw is that if such an action is brought, then the attorney-client privilege is completely waived. This further undermines the goals of the attorney-client privilege that have already been attacked under the application of the strict test. The difficulties in bringing such an action present the second flaw of this theoretical alternative. When the alleged act of negligence consists of the inadvertent production of privileged documents, the client or claimant is likely to have difficulty establishing three of the malpractice elements. Primarily, it will be difficult for the client to show that the attorney breached the duty to use reasonable care, which has been summarized as follows:

His duty to his client requires an attorney to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated. He is not bound to exercise extraordinary diligence, but only a reasonable degree of care and skill, having reference to the character of the business he undertakes to do. Within this standard, he will be protected so long as he acts honestly and in good faith.

7 AM. JUR. 2D Attorneys at Law § 199 (1993) (footnotes omitted). Under such a definition, an attorney/defendant may be able to convince a jury that the duty was not breached despite the production of privileged documents. If the original case involved thousands of documents, and the attorney established an elaborate method of review before production, a jury would probably find that reasonable care had been used. To ask for more would be seen as improper, requiring the attorney to “exercise extraordinary diligence.” _Id._

Secondly, even if a breach of duty can be shown, the client must shoulder an extremely large burden to establish “but for” causation. Hickox v. Holleman, 502 So. 2d 626 (Miss. 1987), exemplifies the degree of the problem. In Hickox, the attorney/defendant was retained to bring an action for medical malpractice and failed to file the papers within the time frame required by the statute of limitations. _Id._ at 629-30. The court found this to be negligence, or failure to use reasonable care, as a matter of law, _id._ at 634, stating:

[T]he plaintiff must show that but for their attorney's negligence, they would have been successful in the prosecution or defense of the underlying action. . . .

. . . [T]he plaintiff/client carries this burden by trying the underlying medical malpractice claim as a part of this legal malpractice case. . . .”

_Id._ (citations omitted).

The burden of this showing would be greater where the alleged negligent act is the production of privileged materials. The client will essentially have to re-litigate the underlying action as though production had never taken place, and then prove that the outcome would have been
more favorable to him or her. Unless the inadvertently produced document was a true "smoking gun," which proved, by a preponderance of the evidence, that a more favorable settlement or different verdict would have occurred without the inadvertent production, such a determination would likely require intricate twists of logic.

Third, proximate cause would be difficult to establish. Many factors influence a jury's verdict or encourage the parties to reach a settlement, thus the attorney/defendant could argue that any number of these factors caused the client's loss. The opponent's investigation, the skill of the opponent's attorney, or the client's own failures on the witness stand could be cited as more direct causes of the client's disappointment than the privilege waiver.

Aside from the difficulty inherent establishing the requisite elements, a third flaw of the theoretical alternative is that the client/claimant will find himself before the jury in an unenviable position, essentially saying, "I was trying to keep this information secret but my attorney erred, the court forced me to reveal my secrets, and I lost." While such "sneakiness" is permissible in the American court system, it will be unattractive to the jury. The jury may find in favor of the attorney/defendant on the rationale that the client/claimant was culpable for not voluntarily disclosing the information in the first place.

Therefore, the strict test's implied avenue of legal malpractice is more attractive theoretically than realistically. Case law does not indicate that malpractice actions are appropriate for the inadvertent production of privileged documents. Thus, courts apply the strict test in part because of a theoretical option which in reality is not a viable option. This point is illustrated in Coleman v. Thompson, 111 S. Ct. 2546 (1991). While Coleman concerned capital punishment appeals, it illustrates the illusory "option" often relied upon in creating and applying legal tests. In Coleman, the petitioner's attorneys failed to file an appeal with the Virginia Supreme Court from the dismissal of his petition for writ of habeus corpus within the thirty day period proscribed by statute. Id. at 2553. When Coleman tried to bring his writ in federal court to argue the same issues on which he was denied a hearing by the Virginia court, the United States Court of Appeals for the Fourth Circuit refused to hear him, holding that the issues had been resolved in the Virginia court on "independent and adequate state grounds," namely the procedural default rules. Id.

In considering the appeal of this refusal, the Supreme Court reiterated several case rules in a single statement:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Id. at 2565. Anticipating this ruling, Coleman argued that his attorneys' negligence caused his default. Id. at 2566.

The Supreme Court did not respond favorably to this position, stating that "'[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Id. at 2566 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). This rule, however, applies only when the default occurs in a discretionary appellate hearing. In a criminal trial or appeal as of right, the Sixth Amendment precludes actions that force the accused to bear the risk of attorney negligence.

In contrast, since Coleman's writ of habeus corpus was a discretionary appeal, Coleman was forced to bear the burden of his attorney's negligence. As a result of this and his failure to show that a "fundamental miscarriage of justice" would occur, Coleman literally died under the weight of this burden. See Robert L. Jackson & David G. Savage, Final Appeals Rejected, Killer is Executed, L.A. TIMES, May 21, 1992 at A16.

Civil litigants are forced to bear a similar burden when the courts apply the strict test to inadvertent document production. Such litigants lose the potential benefit that may have re-
prevents this from happening by providing other forms of recourse.160

The alternative test’s presumption also reduces the undesirable absolutism
of the strict test. This absolutism is similar to the tort law concept of strict
liability.161 This presents another important difference between the tests
from a client’s perspective. By the alternative test moving along the contin-
uum away from the strict test’s absolutist stance it reduces the likelihood of
a non-producing party being the recipient of a “windfall.” This result com-
ports with the general goals and objectives pronounced in Rule 1 of the Fed-
eral Rules of Civil Procedure.162

C. Versus the Middle Test

The middle test was developed primarily in response to the inflexibility,
limited breadth and extreme consequences that result from the application of
the lenient and strict tests.163 The middle test also acknowledges and at-
ttempts to reconcile the doctrinal battle that exists between the attorney-cli-
ent privilege (under the lenient test) and a liberal discovery policy (under the
strict test).164 Similarly, the alternative test acknowledges the conflict be-
sulted from non-disclosure of these documents, as well as others that the waiver may require to
be produced. These losses are incurred as a result of the carelessness of another. Ordinarily,
when an individual is injured, a cause of action in negligence accrues. In comparison, courts
applying the strict test seem to imply that a legal malpractice action is an appropriate remedy
for the client’s injuries. This provides an impractical remedy for clients whose attorneys inad-
virtently waive the attorney-client privilege.

The impracticality for the privilege holder to seek redress is implicit in the lenient test.
Cases applying the lenient test recognize that negligence on the part of the attorney may exist
when privileged documents are inadvertently produced. See Helman v. Murray Steaks, Inc.,
728 F. Supp. 1099, 1104 (D. Del.), sum. judgment granted in part, dismissed in part, 742 F.
Supp. 860 (D. Del. 1990), superseded by statute as stated in Young v. West Coast Indus. Rela-
951, 951 (N.D. Ill. 1982). Courts applying the lenient test—while recognizing that negligence
may exist—are nonetheless reluctant to use the strict “theoretical right of redress” to excuse
the privilege holder for the possible negligence by counsel.

160. See supra text accompanying note 103.
161. See Appendices, Chart B; supra note 118.
as the pivotal case in the development of the middle test. While Hartford does discuss and
examine the pros and cons of the lenient and strict tests, id. at 328-29, the case was decided in
the context of the inadvertent production of documents subject to work product immunity
protection and not attorney-client privilege protection. Id. at 333; see also FDIC v. Marine
Midland Realty Credit Corp., 138 F.R.D. 479, 480-82 (E.D. Va. 1991); Kansas City Power &
Light Co. v. Pittsburgh & Midway Coal Mining Co., 133 F.R.D. 171, 174 (D. Kan. 1989); Ray
164. Baker’s Aid v. Hussman Food Service Co., No. CV87-0937, 1988 WL 138254, at *3-4
(E.D.N.Y. Dec. 19, 1988); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House
Group, Inc., 116 F.R.D. 46, 49 (M.D.N.C. 1987) (acknowledging that the document produc-
tion was "massive," as it required copying 12,000 pages, but that the producing party was
tween these two key legal principles that surfaces whenever the issue is confronted by the parties to the litigation and by the court rendering a decision on the point of contention. The middle and alternative tests also recognize that, depending upon the circumstances, one doctrine may necessarily take precedence over the other. Therefore, both tests recognize that situations

under no time constraints and could have reviewed the documents after they were copied and before producing them; privilege waived), **aff'd**, 878 F.2d 801 (4th Cir. 1989); **Eigenheim Bank v. Halpern**, 598 F. Supp. 988, 990 (S.D.N.Y. 1984); **Suburban Sew 'N Sweep, Inc. v. Swiss-Berina, Inc.**, 91 F.R.D. 254, 257 (N.D. Ill. 1981) ("A court must balance the possibility that the privilege indirectly promotes free and honest communication with the policy of liberal discovery to enhance the search for truth.").

165. See **Marine Midland**, 138 F.R.D. at 483 (noting that two people devoted only one day to prepare a production involving anywhere from 15,000 to 50,000 documents and that the attorney did not review the documents after producing them to check for privileged documents that may have been inadvertently produced; privilege waived); **Ray**, 746 F. Supp. at 88 (stating that although a total of 900 pages of documents were eventually produced, the privileged memorandum was turned over in a small batch of documents consisting of 157 pages; privilege waived); United States v. Pepper's Steel & Alloy, Inc., 742 F. Supp. 641, 643 (S.D. Fla. 1990) (noting that 100,000 pages were produced in a rushed production; privilege not waived); **Liggitt Group, Inc. v. Brown & Williamson Tobacco Corp.**, 116 F.R.D. 205, 208 (M.D.N.C. 1986) (noting that the document discovery was extensive but the producing party had "ample" time to screen the documents; privilege waived); **Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.**, 109 F.R.D. 12, 21 (D. Neb. 1985) (providing no explanation for how one privileged document was inadvertently produced out of over 75,000 documents provided; privilege not waived).

Even in strict cases where an analysis of the "precautions" taken during the document production is unnecessary because of the absolute outcome of the test, courts, in dicta, note the importance of taking such precautions. See, e.g., **International Digital Sys. Corp. v. Digital Equip. Corp.**, 120 F.R.D. 445, 447 (D. Mass. 1988) (noting that counsel failed to segregate the privileged documents until after they were copied). Courts view identification and segregation of privileged documents after copying as increasing the likelihood that privileged documents might be inadvertently produced. See **Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.**, 132 F.R.D. 204, 209 (N.D. Ind. 1990) (analyzing the question presented under the strict and the middle tests and noting that under the middle test no procedure was instituted regarding privileged materials; privilege waived); **Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.**, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (stating that the precautions taken by the attorney barely protected the privileged documents, as he had no previous practice designating confidential documents and there was no statement as to how a search for privileged materials was undertaken; privilege not waived); In re Consolidated Litig. Concerning Int'l Harvester's Disposition of Wisc. Steel, 666 F. Supp. 1148, 1154 (N.D. Ill. 1987) (finding that "[e]xcept for five boxes of new material [counsel] did not screen the files for privileged documents"; privileged waived); **Eigenheim Bank**, 598 F. Supp. at 991 (stating that the defendants' attorneys had kept the document segregated but provided no explanation as to how it was inadvertently produced a second time; privilege waived); Ranney-Brown Distrib., Inc. v. E.T. Barwick Indus., 75 F.R.D. 3, 5 (S.D. Ohio 1977) (noting there was no indication that any special effort was made to keep a separate file for privileged materials; privilege waived); see also **Georgetown Manor, Inc.**, v. Ethan Allen, Inc., 753 F. Supp. 936, 937 (S.D. Fla. 1991) (one privileged document out of thousands of pages of documents; privilege not waived), **aff'd in part, question certified**, 991 F.2d 1533 (11th Cir. 1993); **Kansas City Power**, 133 F.R.D. at 172 (concerning three privileged documents produced out of 500,000 pages of documents produced; privilege not waived); **Fidelity Bank, N.A. v. Bass**, No. CIV.A.88-5257, 1989 WL 9354, at *1
involving the inadvertent production of privileged documents are not clear cut, but require flexibility and scrutiny of the circumstances surrounding the production of the privileged materials. Thus, the middle and alternative tests both attempt to address directly the tension that exists between two important doctrinal principles: a liberal discovery policy and the sanctity of the attorney-client privilege.

Although the "time factor"\textsuperscript{166} is excluded from the alternative test, the alternative test, like the middle test, should still increase the number of equitable outcomes. Thus, the flexibility and the totality-of-the-circumstances position taken by the middle and alternative tests help preserve the sanctity of the attorney-client privilege.

The middle test, like the alternative test, however, is not solely focused on preserving the attorney-client privilege. The breadth of the test and the resulting inquiry also include the strict test's preoccupation with the truth-finding function.\textsuperscript{167} After applying the middle test and determining that waiver of the privilege is the consequence, the middle test then manifests its truth-finding objective.\textsuperscript{168} The application of the alternative test can produce the same result. The uncertainty of the outcome under the middle test can, like the alternative test, help keep lawyers on "their toes," because the uncertainty acts as a deterrent to the improper management of document production. While the uncertainty of the alternative test is less than that of the middle test, it still performs a policing function.\textsuperscript{169}

On the downside of the middle test is the existence of such a great array of factors as are included in the test\textsuperscript{170} which one must consider to complete the "total picture." This can create a situation riddled with uncertainty and unpredictability as to the outcome of the controversy. This consequence can, to some degree, generate litigation that may have been avoided if the

\textsuperscript{166} Baker's Aid, 1988 WL 138254, at *4 (noting that one factor in determining whether the privilege had been waived was "whether a substantial amount of time was taken to correct the error").

\textsuperscript{167} See supra notes 25-31 and accompanying text.

\textsuperscript{168} Id.

\textsuperscript{169} See supra notes 121-42 and accompanying text.

\textsuperscript{170} See supra text accompanying note 31.
lenient or strict tests were utilized because of their greater degree of definiteness171 in outcome.

The middle test, on the other hand, presents an entirely different picture in terms of the calculation of which option should be pursued. Given the variety of factors172 and the resulting greater degree of uncertainty as to the outcome of the matter if it is judicially pursued, a party may be more willing to expend the resources to pursue the matter. This aspect of the middle test is aggravated because the frequent inclusion of privileged documents with non-privileged documents173 increases the likelihood that a court will face this issue.174 Obviously, this raises the concern that additional judicial and personal resources will be expended and possibly wasted.175 Furthermore, the inherent uncertainty in the outcome when the middle test is applied could be viewed as contravening Rule 1's "speedy and efficient"176 objective, as the uncertainty may spur additional litigation pertaining to the issue that would inevitably delay the litigation. Again, the rebuttable presumption of the alternative test is one way to lessen these practical concerns.

IV. CONCLUSION

The present tests addressing the waiver consequences of the inadvertent production of privileged documents are deficient in resolving a recurring practical problem, prohibit uniformity among the courts, and reduce the possibility of establishing a greater degree of certainty in resolving the issue. Each of the three tests possesses various strengths and weaknesses.177 The lenient test upholds the important long-standing attorney-client privilege, encourages candidness on the part of clients which aids in the truth-finding goal of discovery, facilitates the efficient and just determination178 of legal

171. See supra notes 15, 21 and accompanying text.
172. See supra text accompanying note 31.
173. See supra note 3; see also FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991) (involving the production of 15,000 to 50,000 documents).
175. See United States v. Pepper's Steel & Alloys, Inc., 742 F. Supp 641, 645 (S.D. Fla. 1990) (commenting that the dispute over document production required a large amount of the court's time and attention); see also FED. R. CIV. P. 1 (providing that one goal is for the "inexpensive determination of every action") (emphasis added).
176. FED. R. CIV. P. 1 ("These rules . . . . [S]hall be construed to secure the just, speedy, and inexpensive determination of every action.").
177. See supra Part III.
178. See FED. R. CIV. P. 1.
controversies, and recognizes that the client, not the attorney, is the proper holder of the privilege.\textsuperscript{179}

The strict test reflects the liberal discovery policy that is a critical component of the present litigation process as its penal-like consequence reflects the system's commitment to discovering the "truth" and encourages attorneys to adopt good lawyering skills.\textsuperscript{180} The middle test acknowledges the tensions that exist between the key doctrines confronted when addressing the issue at hand, recognizes that the "absolutist" positions of the other two tests may be contrary to the goals cited in Rule 1 of the Federal Rules of Civil Procedure, and realizes that the integrity of the judicial system may be undermined if the "absolutist" stances taken in the first two tests result in inequitable decisions.\textsuperscript{181}

There is a blatant need for a new, alternative test that can improve the equitable application, and ultimately the outcome, of a legal rule while reducing the tension between the critical conflicting doctrines in the context of the inadvertent production of privileged documents. This Article proposes the alternative test as an improvement upon each of the three current tests. While the alternative test is not a cure-all for the waiver aspect of the inadvertency issue, it is a superior method of resolving the issue and should be adopted by the federal district courts and courts of appeal. In addition, the new test will better reconcile the conflict that exists between the two primary legal doctrines—attorney-client privilege and a liberal discovery policy—that are integral to this subject.

In conclusion, the new test compensates for the deficient aspects inherent in the three tests, incorporates the attributes of each of the three tests, and minimizes the existing doctrinal tension between the liberal discovery policy and the attorney-client privilege.

\textsuperscript{179} See supra notes 84 and 152 and accompanying text.
\textsuperscript{180} See supra part IIIB.
\textsuperscript{181} See supra part IIIC.
APPENDIX

CHART A

The Thirteen Federal Judicial Circuits

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The distribution of the federal judicial circuits are provided for in 28 U.S.C. § 41 (1982); see supra notes 33-83 and accompanying text (discussing treatment of inadvertently produced documents protected by the attorney-client privilege by the United States Courts of Appeals for the Fourth and Ninth Circuits).

b. See In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (strict test); supra note 34 and accompanying text.
CHART B

The Three Tests and Their Interaction with Tort Law Principles

"Lenient Test"

"Strict Liability" Principles

"Middle Test"

"Negligence" Principles

"Strict Test"
## Table 1

**UNITED STATES DISTRICT COURTS**

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