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Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases

Privileged communication between client and attorney is considered a necessity in contemporary society.[1] The attorney-client privilege permits a client, whether or not a party to litigation, to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and the attorney.[2] If the client is assured that confidential communications will remain confidential, the client is more likely to advise the attorney of all facts relevant to the client's situation.[3] Full disclosure ensures adequate legal representation of litigants and encourages knowledge and compliance with the law by providing the attorney with all facts necessary to advise the client.[4] Therefore, the privilege benefits clients, attorneys, and society as a whole.[5]

Because disadvantages are associated with the attorney-client privilege, critics have argued for an abolition of the privilege.[6] One disadvantage in applying the privilege is that the trier of fact is precluded from viewing evidence relevant to the proceeding.[7] Another concern is that individuals who are liable or guilty may invoke the protection of the privilege to avoid penalty or punishment.[8] Instead of recommending abolition of the privilege, other commentators have argued for a narrow application of the privilege.[9] Because the attorney-

1. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).

2. *See* CAL. EVID. CODE § 954. The privilege is subject to several qualifications and limitations. *See infra* notes 33-101 and accompanying text.

3. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 87, at 205 (E. Cleary 3d ed. 1984).

4. *See* Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 640 (S.D.N.Y. 1981).

5. *See infra* notes 388-44 and accompanying text. The attorney-client privilege has prompted discussions between academicians as well. *See generally,* M. FRANKEL, PARTISAN JUSTICE (1980); Alschuler, *The Preservation of a Client's Confidence: One Value Among Many or a Categorical Imperative?,* 52 U. COLO. L. REV. 349 (1981); Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege,* 54 U. COLO. L. REV. 51 (1982); Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel,* 54 U. COLO. L. REV. 67 (1982).

6. *See, e.g.,* M. DUMONT, A TREATISE ON JUDICIAL EVIDENCE, EXTRACTED FROM THE MANUSCRIPTS OF JEREMY BENTHAM, 246-47 (London 1825).

7. *See* Article, *Developments in the Law of Privileged Communications,* 98 HARV. L. REV. 1450, 1507 (1985).

8. *See* M. DUMONT, *supra* note 6, at 246-47.

9. *See infra* note 316 and accompanying text.

client privilege has a strong foundation in our legal system, the privilege is unlikely to be abolished.[10] The privilege may, however, be limited. Liberal recognition of waiver is one means by which the privilege may be limited.[11] For example, if the client discloses a confidential communication to a third person,[12] the court may find that the attorney-client privilege has been waived.[13] Confidentiality would not be maintained since the client did not intend the communication to be confidential.[14]

One of the most troubling areas of conflict between proponents and opponents of the privilege has involved cases of inadvertent disclosure of confidential communications. Inadvertent disclosure issues arise most often when an attorney seeks to introduce into evidence a confidential communication between another attorney and client, the confidentiality of which has been accidentally breached.[15] After an inadvertent disclosure, any assertion of the attorney-client privilege may be met with the claim that the privilege was waived due to the disclosure.[16] The party opposing the privilege would argue that a waiver has occurred despite the lack of intent by the client to waive the privilege.[17]

Courts faced with the issue of whether intent is necessary to effectuate a waiver of the attorney-client privilege by inadvertent disclosure have approached the problem in one of three ways. Some courts have followed a "strict responsibility" approach, viewing the client's intent as irrelevant.[18] Other courts have used a balancing approach.[19]

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10. C. McCormick, *supra* note 3, § 87, at 206.
11. *See infra* notes 60-77 and accompanying text.
12. *See infra* note 48 and accompanying text.
13. *See* Cal. Evid. Code § 952 (definition of confidential communication); *see also*, Gonzales v. Municipal Court, 67 Cal. App. 3d 111, 118, 136 Cal. Rptr. 475, 480 (1977) ("[I]f the communication is made by the client in the open presence of a third party not present to further the interest of the client in the consultation, it is not privileged.") (footnote omitted).
14. *See* Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954); *see also infra* notes 182-99 and accompanying text.
15. *See, e.g.*, Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 23 (9th Cir. 1981) (plaintiff acquired communications during the deposition of the defendant and after being permitted to examine files that contained the communication); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 255-56 (N.D. Ill. 1981) (plaintiffs acquired documents by searching through trash dumpster of defendant for two years).
16. An alternative theory would be that nothing remains to be protected, since the documents are no longer confidential. *See Suburban Sew 'N Sweep*, 91 F.R.D. at 257.
17. *See, e.g., Weil*, 647 F.2d at 23; *Suburban Sew 'N Sweep*, 91 F.R.D. at 257.
18. *See, e.g., In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979) (privilege was waived when a defendant failed to mark documents as privileged, voluntarily turned them over, and explicitly advised plaintiff that other documents were intended to be disclosed and not regarded as privileged); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (former attorney of the plaintiff ordered to answer questions concerning a privileged letter).
19. *See infra* notes 163-224 and accompanying text.

Under the balancing approach, several objective factors may be considered in rendering a decision.[20] A third group of courts has focused specifically upon whether the client intended to waive the privilege.[21] Regardless of the approach used, the final determination of whether an assertion of the attorney-client privilege will be upheld in an inadvertent disclosure context depends upon whether the client either expressly or impliedly waived the privilege.[22] California courts have not confronted directly the issue of whether intent is required to find an implied waiver of the attorney-client privilege in inadvertent disclosure situations. Statutory law in California, however, may provide guidance in resolving the intent issue.[23]

The purpose of this comment is to demonstrate that a client's intent to waive the attorney-client privilege should be required to find an implied waiver of the privilege due to the inadvertent disclosure of privileged information.[24] The background of the attorney-client privilege in the context of California statutory law will be detailed.[25] This comment will analyze competing approaches to resolving inadvertent disclosure issues, and will discuss the undesirability of the approaches that do not focus upon the client's intent to waive the attorney-client privilege.[26] This comment will also examine California Evidence Code section 912(a), the statute governing waiver of the attorney-client privilege.[27] A review of the legislative history of Evidence

20. *See, e.g.*, Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (documents of defendant inspected by plaintiff during discovery were still privileged since precautions of defendant were barely sufficient); *Suburban Sew 'N Sweep*, 91 F.R.D. at 260-61 (privilege waived since defendant did not take sufficient precautions to protect confidentiality from plaintiffs).

21. *See, e.g.*, Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (no waiver occurred when plaintiff's attorney unintentionally provided privileged documents to defendant's attorney, but later refused to turn over copies of the documents); Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1954) (no waiver occurred when plaintiffs were allowed to inspect privileged documents belonging to defendant, absent evidence that defendant intended to waive the privilege).

22. *See* Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598, 598-600 (1983).

23. *See* CAL. EVID. CODE § 912(a). "[T]he right of any person to claim [the attorney-client privilege] . . . is waived . . . if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. . . ." *Id.* Section 912(a) also applies to the marital communications privilege, the physician-patient privilege, the psychotherapist-patient privilege, the penitent privilege, the clergyman privilege, and the sexual assault victim-counselor privilege. *See id.* This comment will deal solely with the attorney-client privilege, and other privileges will be discussed only by analogy. *See infra* notes 266-313 and accompanying text. Issues concerning the attorney's work product privilege are beyond the scope of this comment.

24. *See infra* notes 31-344 and accompanying text.

25. *See infra* notes 102-17 and accompanying text.

26. *See infra* notes 118-224 and accompanying text.

27. CAL. EVID. CODE § 912(a).

Code section 912(a) will indicate that section 912(a) contains an implied requirement of intent, a conclusion supported in studies by the California Law Revision Commission.[28] Finally, this comment will conclude that a requirement of corroborated subjective intent[29] promotes the purpose and benefits of the attorney-client privilege, without increasing the perceived disadvantages of the privilege.[30] First, however, an understanding of the general background of the attorney-client privilege, and statutory treatment in California of the privilege, is necessary before analyzing the difficult inadvertent disclosure issues.

THE ATTORNEY-CLIENT PRIVILEGE

A. Application of the Attorney-Client Privilege

The attorney-client privilege is the oldest of the confidential communication privileges.[31] The privilege is recognized in all United States jurisdictions.[32] While statutory formulations of the privilege vary from state to state, the basic requirements are similar. Generally, a client has a privilege to refuse to disclose, and to prevent other persons from disclosing, confidential communications between the client and attorney.[33] The communication must relate to legal advice rendered by the attorney as a legal advisor.[34] Finally, the privilege must not have been waived by the holder of the privilege.[35]

Originally, the privilege only protected confidential communications during the litigation in which they were made.[36] The privilege gradually

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28. *See infra* notes 254-65 and accompanying text.
29. *See infra* notes 227-41 and accompanying text.
30. *See infra* notes 314-44 and accompanying text.
31. H. MILSTEIN, ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE: CORPORATE APPLICATIONS, A-1 (1980); 8 J. WIGMORE, *supra* note 1, § 2290, at 542; Linklater, *Disclosure of Confidential Information Can Destroy the Attorney-Client Privilege,* 66 CHI. B. REC. 34, 36 (1984). The privilege appears generally to have been accepted as early as the 16th century. 8 J. WIGMORE, *supra* note 1, § 2290, at 542 n.1.
32. 3 B. JONES, EVIDENCE § 21:8 (Gard 6th ed. 1972).
33. In his treatise, Professor Wigmore formulated the following generally accepted definition of the privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 J. WIGMORE, *supra* note 1, § 2292, at 554; *see In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (using Wigmore's formulation of the attorney-client privilege). *But see* Clark v. State, 159 Tex. Crim. 187, 199, 261 S.W.2d 339, 342-43 (1953) (attorney-client privilege does not extend to testimony regarding telephone conversation between attorney and client which is overheard by a third party), *cert. denied,* 346 U.S. 855 (1953).
34. 8 J. WIGMORE, *supra* note 1, § 2292, at 554; *see Fischel,* 557 F.2d at 211.
35. 8 J. WIGMORE, *supra* note 1, § 2292, at 554; *see Fischel,* 557 F.2d at 211.
36. 8 J. WIGMORE, *supra* note 1, § 2294, at 559.

was expanded to cover all aspects of legal consultation.[37] Limitations on the privilege, however, do exist. Unprotected communications include an attorney's nonlegal advice,[38] communications concerning transactions which could be performed as well by another agent,[39] and advice sought to aid in the commission of criminal or fraudulent transactions.[40]

Privileged communications between the client and attorney must relate to the purpose for which the attorney was consulted.[41] The communication however, must be confidential.[42] Moreover, the client must intend the communication to be confidential.[43] For example, if the confidential communication is disclosed by the attorney or the client to a third person,[44] the communication probably would not be pri-

37. *Id. See* CAL. EVID. CODE § 952 (definition of confidential communication). The attorney-client privilege now includes communications made in seeking legal advice for any purpose. 8 J. WIGMORE, *supra* note 1, § 2294, at 560.

38. 8 J. WIGMORE, *supra* note 1, § 2294, at 559-65. *See, e.g.*, Estate of Perkins, 195 Cal. 699, 710, 235 P. 45, 49 (1925) (attorney's business advice held admissible).

39. 8 J. WIGMORE, *supra* note 1, §§ 2295-2297, at 565-72. *See, e.g.*, Marshall v. Marshall, 140 Cal. App. 2d 475, 480, 295 P.2d 131, 134 (1956) (communications from client to attorney, the latter serving as a notary public, were not privileged).

40. 8 J. WIGMORE, *supra* note 1, § 2298, at 572-77. *See, e.g.*, CAL. EVID. CODE § 956 (crime or fraud exception to the lawyer-client privilege). *See also id.* §§ 956-62 (exceptions to the lawyer-client privilege). Generally, advice protected by the privilege must come from an attorney duly qualified to practice law. 8 J. WIGMORE, *supra* note 1, § 2300, at 580-81. *But cf.* CAL. EVID. CODE § 950 (lawyer means a person authorized, *or reasonably believed by the client to be authorized,* to practice law in any state or nation). A person must be licensed to practice law in California. *See* CAL. BUS. & PROF. CODE § 6060. In addition, communications from the attorney must be rendered in the attorney's capacity as a legal advisor. 8 J. WIGMORE, *supra* note 1, § 2303, at 584. Communications between the clients and the agents of the attorney are also privileged. *Id.* § 2301, at 583. Disclosure of communications to agents of the attorney is often necessary. *Id. See also* CAL. EVID. CODE § 952. To satisfy the requirements for a confidential communication, the client may not disclose the communication to third persons other than those present to further the interest of the client, or those necessary for transmission of the information. *Id.*

41. *See, e.g.*, Hager v. Shindler, 29 Cal. 47, 67 (1856) (communication was not confidential when the client communicated to the attorney a fact unrelated to the purpose for which the attorney was retained).

42. CAL. EVID. CODE § 952. If the client intends the communication to be confidential, the privilege can attach to acts of the client witnessed by the attorney, and to the production of documents. 8 J. WIGMORE, *supra* note 1, § 2307, at 592-94. A client may not refuse to disclose the fact that privileged documents were delivered to the attorney. The production of the documents, however, may be excused due to the privileged status of the material within the documents. If the client could be compelled to produce the documents, then the attorney must produce those documents upon a court order, since the attorney is the agent of the client. If the document is the client's communication, then it may be excluded from admission into evidence. *Id.* Testimony concerning those documents can also be privileged. *Id.* §§ 2306-2309, at 588-98. Testimony regarding the content of documents is within the privilege, while testimony as to possession, execution, or existence of documents is generally not privileged. *Id.* §§ 2308-2309, at 595-96.

43. *See* CAL. EVID. CODE § 952 (definition of confidential communication).

44. "Third persons" do not include agents of the attorney, or those persons present to further the interest of the client. *See infra* notes 102-17 and accompanying text. *See also* CAL. EVID. CODE § 952 (definition of confidential communication).

vileged since confidentiality no longer exists.[45] Although confidentiality is presumed in California,[46] in other jurisdictions the burden of proof is on the party objecting to the introduction of the communication.[47]

To qualify as privileged, the communication must originate from, and be directed toward, either the client or the attorney.[48] Accordingly, the attorney-client privilege can apply to communications sent through an agent of either the client or the attorney.[49] Communications originating with an agent of the client and made to the attorney may also be privileged.[50] Communications made by any other third person are not privileged communications between client and attorney.[51]

The attorney-client privilege can be exercised and waived only by the client.[52] An attorney may not exercise or waive the privilege unless authorized by the client.[53] Furthermore, the client need not be a party to the litigation in which the privilege is invoked.[54] For example, the privilege could be asserted during litigation in which the client is not a party, but merely a witness.[55]

The privilege continues beyond the litigation,[56] even after the death of the client.[57] The personal representative of the client may assert

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45. 8 J. WIGMORE, *supra* note 1, § 2311, at 601-03; *see* Benge v. Superior Court, 131 Cal. App. 3d 336, 346, 182 Cal. Rptr. 275, 280 (1982) (a communication is not confidential if made in the presence of third persons since the confidentiality is not preserved).

46. CAL. EVID. CODE § 917. Under Evidence Code § 917, when the attorney-client privilege is claimed vis-a-vis a communication, the burden of proof is on the opponent of the privilege to establish that the communication was not confidential. *Id. See id.* § 952.

47. 8 J. WIGMORE, *supra* note 1, § 2311, at 599. A client may contact an attorney for reasons other than those which would be privileged, so the burden of demonstrating the existence of the privilege should be on the party objecting to introduction of the communication. *See* Collette v. Sarrasin, 184 Cal. 283, 286-89, 193 P. 571, 572-73 (1920). *Contra* CAL. EVID. CODE § 917. Under Evidence Code § 917, when the attorney-client privilege is claimed vis-a-vis a communication, the burden of proof is on the opponent of the privilege to establish that the communication was not confidential. *Id. See id.* § 952.

48. *See* CAL. EVID. CODE §§ 954 (definition of attorney-client privilege), 951 (definition of client); 8 J. WIGMORE, *supra* note 1, § 2317, at 618.

49. 8 J. WIGMORE, *supra* note 1, § 2317, at 618.

50. *Id.* at 618-19.

51. *Id.* §§ 2317-2320, at 618-29.

52. *Id.* § 2321, at 629.

53. *See id.* In California, the privilege may be claimed only by the holder of the privilege, a person authorized by the holder to waive, or the lawyer at the time of the communication. CAL. EVID. CODE § 954. The lawyer may only claim the privilege if a holder exists and the attorney is not otherwise instructed by the holder. *Id.* A "holder of the privilege" means (1) the client, (2) the client's guardian or conservator, (3) the personal representative of a deceased client, or (4) a successor, assign, trustee in dissolution, or any similar representative of an entity that is no longer in existence. *Id.* § 953.

54. 8 J. WIGMORE, *supra* note 1, § 2321, at 629; CAL. EVID. CODE § 954.

55. *See, e.g.*, People v. Kor, 129 Cal. App. 2d 436, 446, 277 P.2d 94, 100 (1954) (privilege maintained despite allegation that witness was using the privilege to conceal the truth).

56. 8 J. WIGMORE, *supra* note 1, § 2323, at 630.

57. *Id.* at 631.

the privilege if the client is deceased.[58] A client also may assert the privilege indirectly through an authorized representative, such as a guardian or conservator.[59]

The attorney-client privilege, like all privileges, may be waived.[60] Since the privilege belongs only to the client, however, only the client may waive the privilege.[61] Thus, an attorney cannot waive the privilege without the client's consent.[62] Three justifications exist for recognizing a waiver of privileged communications. The first justification is that since the privilege belongs to the client, the client may waive the privilege.[63] The client may believe that waiving the privilege is the best course of action to take because the client has more to gain than to lose through disclosure of the communication.[64] The second justification involves the client's desire for confidentiality. If evidence is offered demonstrating that confidentiality is not intended, courts often will find a waiver since the purpose behind the privilege no longer would be served.[65] The third justification for permitting a waiver is dictated by fairness.[66] A client should not be allowed to disclose the communication when disclosure is beneficial, and subsequently invoke the privilege when disclosure becomes unfavorable.[67] To the extent the privilege has been waived, it cannot be invoked subsequently.[68] If an adverse party relied on the disclosure in preparing the case for trial, allowing the privilege could result in an injustice.[69]

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58. CAL. EVID. CODE § 953(c).

59. *Id.* § 953(b). A corporate client may also invoke the privilege. *Id.* § 953(d); Department of Pub. Works v. Glen Arms Estate, Inc., 230 Cal. App. 2d 841, 856, 41 Cal. Rptr. 303, 311 (1964) (privilege is the same for corporations as for natural persons). *See generally* H. MILSTEIN, *supra* note 31, at A-1; Annot., 98 A.L.R. 2d 241 (1964) (right of a corporation to assert the attorney-client privilege).

60. *See* 8 J. WIGMORE, *supra* note 1, §§ 2327-2329, at 634-41. *See also* CAL. EVID. CODE § 912(a) (waiver of privilege).

61. 8 J. WIGMORE, *supra* note 1, § 2327, at 634-35 (waiver belongs solely to the client). *See* CAL. EVID. CODE § 912(a).

62. 3 B. JONES, *supra* note 32, § 21:22, at 802. At times, courts will find an *implied* consent of the client to the attorney's waiver, particularly when the disclosure was for the client's benefit in negotiations on his behalf. *See, e.g.*, Klang v. Shell Oil Co., 17 Cal. App. 3d 933, 938, 95 Cal. Rptr. 265, 268 (1971).

63. C. MCCORMICK, *supra* note 3, § 93, at 223.

64. *See* Note, *supra* note 22, at 609.

65. Article, *Limitations on California Professional Privileges: Waiver Principles and the Policies They Promote,* 9 U.C.D. L. REV. 477, 498. *See also* 3 B. JONES, *supra* note 32, § 21:22, at 802; 8 J. WIGMORE, *supra* note 1, § 2327, at 634. Resolution of inadvertent disclosure issues turns on whether the client has demonstrated that confidentiality was not intended. *See infra* notes 118-313 and accompanying text. Depending on the approach followed, a particular act may or may not demonstrate that confidentiality is not intended. *See id.*

66. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 91 (1978).

67. *See* 3 B. JONES, *supra* note 32, § 21:22, at 803.

68. *See* Article, *supra* note 65, at 498.

69. For example, if a party relies on a waiver of the privilege in preparing for trial, an

The attorney-client privilege may be waived expressly or impliedly.[70] For example, courts in many jurisdictions have held that waiver of the privilege in one trial acts as an implied waiver of that privilege in subsequent litigation.[71] The authority to waive the privilege can also be implied.[72] Authority to waive the privilege is implied when a party or that party's attorney testifies regarding a privileged communication,[73] and when the privilege is waived by the representative of a deceased client or by the guardian ad litem of an incompetent.[74] The privilege usually is not waived merely because a client brings an action in which confidential matter is relevant.[75] Nor is the privilege lost in a subsequent trial if the client was forced to disclose the confidential communication in previous litigation erroneously.[76] If a court determines that the privilege has been waived, however, the waiver is irrevocable despite a client's lack of intent to waive the privilege.[77]

B. Policy Considerations Behind the Attorney-Client Privilege

The attorney-client privilege furthers important policy goals by encouraging complete disclosure of all facts relevant to the client's case.[78] Originally, the privilege belonged to the attorney on the ground that the attorney had taken a solemn oath of secrecy, so any disclosure of the client's confidence would be dishonorable.[79] The rationale based upon protection of the attorney's honor eventually was replaced. Today the justification for the privilege is to enable the client to consult

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assertion of the privilege at trial would prejudice the party opposing assertion. *See, e.g., In re* Grand Jury Investigation, 604 F.2d at 675 ("[I]t 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 years.").

70. 3 B. JONES, *supra* note 32, § 21:22, at 803.

71. *Id. See, e.g.*, Agnew v. Superior Court, 156 Cal. App. 2d 838, 841, 320 P.2d 158, 160 (1958) (client testified to a confidential communication during prior litigation).

72. *See* 3 B. JONES, *supra* note 32, § 21:22, at 803-04.

73. *Id.* at 804.

74. *Id.* at 803-04; *see* 8 J. WIGMORE, *supra* note 1, § 2329, at 639-41; *see also* CAL. EVID. CODE § 953(b), (c) ("holders" includes decedents' representatives and guardians of incompetents). *See generally* Annot., 67 A.L.R.2d 1268 (1959) (waiver of the attorney-client privilege by a decedent's representative or by the guardian of an incompetent).

75. 3 B. JONES, *supra* note 32, § 21:22, at 805. When the client brings an action in which confidential matter is relevant, the privilege generally will be waived only if the client has placed the conduct of the attorney, or the attorney's state of mind, in issue. Article, *supra* note 65, at 518-19.

76. 3 B. JONES, *supra* note 32, § 21:22, at 804 n.14; CAL. EVID. CODE § 919.

77. Markwell v. Sykes, 173 Cal. App. 2d 642, 648, 343 P.2d 769, 773 (1959) ("[O]nce the privilege is waived it is gone for good."); 3 B. JONES, *supra* note 32, § 21:22, at 803.

78. *See infra* notes 314-35 and accompanying text (discussion of policy considerations behind the attorney-client privilege).

79. 8 J. WIGMORE, *supra* note 1, § 2290, at 543. This rationale is often referred to as the "point of honor" rationale. *Id.*

with an attorney free from any apprehensions concerning disclosures of the client's confidences.[80] In our complicated society, governed by complex and detailed laws, expert legal advice is essential.[81] To furnish sound legal advice, an attorney must receive honest communications given freely by the client.[82] If concerned about future disclosures, a client is unlikely to inform the attorney of all relevant information.[83] Thus, the attorney-client privilege is a recognition of the necessity for easing any apprehensions in the client's mind that could otherwise inhibit consultations with the attorney.[84]

Most commentators and judges agree that the attorney-client privilege is beneficial to our legal system.[85] The benefits, however, are sometimes not as apparent as the costs. A short-term cost of exercising the attorney-client privilege is the suppression of relevant evidence.[86] Because of this short-term cost, many courts have stated that the privilege should be defined narrowly.[87] The loss of relevant evidence due to an exercise of the attorney-client privilege, however, is rather small.[88] Moreover, since the privilege induces the client to disclose facts that may be useful to the case, the interests of justice are also furthered.[89] Thus, society benefits from the existence of the privilege.[90]

The attorney-client privilege has been criticized on the ground that the privilege essentially abets only unlawful conduct, since an innocent client would not fear disclosure of any communication.[91] In civil cases, however, often no clear line can be drawn between right and

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80. *Id. See also, e.g.*, People v. Meredith, 29 Cal. 3d 682, 690, 631 P.2d 46, 51, 175 Cal. Rptr. 612, 617 (1981) (the fundamental purpose of the privilege is to encourage full and open communication between client and attorney). One consequence of this theory is that the privilege no longer is thought to be held by the attorney. 8 J. WIGMORE, *supra* note 1, § 2290, at 544. Rather, as previously stated, the privilege belongs solely to the client. *Id.*

81. MODEL CODE OF EVIDENCE Rule 210, Comment (1942).

82. *Id.*

83. *See* American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 593, 113 Cal. Rptr. 561, 572 (1974) (purpose of the attorney-client privilege is to encourage full, free, and open disclosure, and withholding the privilege is "morally reprehensible").

84. 8 J. WIGMORE, *supra* note 1, § 2290, at 543.

85. *See infra* notes 325-44 and accompanying text.

86. *See* 8 J. WIGMORE, *supra* note 1, § 2291, at 554.

87. *Id. See, e.g.*, Merritt v. Superior Court, 9 Cal. App. 3d 721, 730, 88 Cal. Rptr. 337, 342-43 (1970) (privilege is to be strictly construed). *But see, e.g.*, People v. Flores, 71 Cal. App. 3d 559, 563, 139 Cal. Rptr. 546, 548 (1977) ("Although it has been suggested to the contrary, the privilege has been and should be liberally construed.").

88. 8 J. WIGMORE, *supra* note 1, § 2291, at 554. "It is evident that the disclosure of his [the client's] admissions to his attorney would add little to the proof except so far as the client is a person capable of perjuring himself when interrogated in court." *Id.*

89. *Id.*

90. *See also infra* notes 314-44 and accompanying text.

91. M. DUMONT, *supra* note 6, at 246-47.

wrong.[92] Rarely are all the circumstances and practices on one side clearly and completely correct.[93] Likewise, the case of the opposition is rarely completely devoid of merit.[94] A client could have a valid claim despite the fact that he or she was not completely blameless.[95] Thus, the criticism that the attorney-client privilege aids only wrongful conduct is invalid.

Criminal defendants have additional rights and interests which are protected by the attorney-client privilege.[96] Critics of the attorney-client privilege have suggested that the privilege enables an attorney to further a client's illegal conduct by preserving the confidentiality of communications between the client and attorney.[97] The fear that an attorney will aid a client in illegal conduct by concocting a false defense, however, does not weigh against the existence of the attorney-client privilege since communications in furtherance of illegal activity are not privileged.[98]

While the attorney-client privilege is universally accepted, slight variations exist among the jurisdictions.[99] In California, the attorney-client privilege is codified in Evidence Code section 954.[100] Several other sections of the Evidence Code also affect the privilege.[101] California codification of the privilege will therefore be examined briefly.

Statutory Treatment in California

The California Legislature first recognized the attorney-client

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92. 8 J. Wigmore, *supra* note 1, § 2291, at 552.
93. *Id.*
94. *Id.*
95. *Id.*
96. 3 B. Jones, *supra* note 32, § 21:8, at 763.
97. 8 J. Wigmore, *supra* note 1, § 2291, at 553.
98. *Id.* While exceptions exist, attorneys generally do not aid clients in the perpetuation of unjust causes or illegal activity. *See id.* Either the attorney declines to accept the case, persuades the client the case has no merit and is hopeless, or attempts a settlement for the client to the extent the cause has merit. *Id.* Of course, some attorneys will be more creative in finding merit in a particular client's cause. In doing so, however, the attorney is acting as a strong advocate for the client, and this should not be regarded as a vice. To the extent the attorney is aiding the client in illegal conduct, the attorney-client privilege would not protect communications between the attorney and client, due to the crime-fraud exception to the attorney-client privilege. *Id.* Allowing clients with unjust causes freedom of consultation with an attorney is only an evil to the extent that the practicing bar is unprincipled, in which case more drastic remedies are needed than denial of the privilege. *Id.*
99. Although California law generally is in accord with the previous textual discussion, differences exist between the privilege generally and California codification of the privilege. *Compare supra* notes 31-98 and accompanying text *with* Cal. Evid. Code §§ 911-19, 950-62.
100. Cal. Evid. Code § 954.
101. *See* Cal. Evid. Code §§ 911-920, 950-962; *see also infra* notes 102-17 and accompanying text.

privilege in 1872.[102] Between 1872 and 1965, attempts were made to reform California evidence law.[103] The main impetus behind these attempted reforms was to promote predictability by the courts in deciding evidentiary issues.[104] Despite the failure of earlier reform efforts, the California Legislature adopted the California Evidence Code in 1965.[105] The code, while making some significant changes in evidence law, was essentially a restatement of existing California evidence law, including the provisions relating to the attorney-client privilege.[106]

The California Evidence Code lists three requirements for a client to refuse or prevent disclosure of a confidential communication between the client and lawyer.[107] First, the privilege must be claimed by (1) the holder of the privilege, (2) a person authorized to claim the privilege by the holder, or (3) the holder's attorney.[108] An attorney cannot claim the privilege if no holder exists or the attorney is instructed otherwise by a person authorized to permit disclosure.[109] Second, the person allowed to claim the privilege must not have waived the privilege.[110] Finally, no applicable exceptions to exercising the privilege may exist.[111]

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102. CAL. CIV. PROC. CODE § 1881(2) (enacted in 1872; repealed by 1965 Cal. Stat. ch. 299, § 64, at 1361). Part IV of the original Civil Procedure Code dealt with evidence law. California Law Revision Commission, *Recommendation Proposing An Evidence Code,* 7 CAL. L. REVISION COMM'N REPORTS 29 (1965) [hereinafter cited as *Recommendation*].

103. *See infra* note 105 and accompanying text.

104. *See Recommendation, supra* note 102, at 30.

105. A substantial revision of the evidence portions of the Civil Procedure Code was made in 1901, but was held unconstitutional since the enactment covered more than one subject, and because of deficiencies in the title of the enactment. *Id.* at 30. The California Code Commission began another revision in 1932, but this was abandoned when the American Law Institute began working on the Model Code of Evidence, later rejected in California. *Id.* at 31-32. The Uniform Rules of Evidence were the next national attempt at evidence law reform. Although accepted by some other jurisdictions, in 1965 the California Law Revision Commission recommended against adopting the Uniform Rules of Evidence. *Id.* at 33 (stating the reasons for not recommending the Uniform Rules of Evidence). Instead, the Commission recommended a new Evidence Code for California. *Id.* at 34.

106. *Id.* at 34. California Evidence Code §§ 911-920 relate to privileges generally, with § 912 permitting waiver. *See* CAL. EVID. CODE §§ 911-20. Sections 950-53 are definitions applicable to the attorney-client privilege. *See id.* §§ 950-53. The statute specifically providing for the privilege is found at § 954, and the exceptions to this privilege are contained in §§ 956-62. *See id.* §§ 954, 956-62. Section 955 states when an attorney is required to claim the privilege. *See id.* § 955.

107. *Id.* § 954.

108. *Id.* § 954(a), (b), (c). *See also id.* §§ 950 (definition of lawyer), 951 (definition of client), 953 (definition of confidential communication). A holder of the privilege includes a client; a client's guardian or conservator; a deceased client's personal representative; or a successor, assignee, bankruptcy trustee, or similar representative of a client no longer in existence. *Id.* § 953. The claimant of the privilege need not be a party to the litigation. *Id.* § 954.

109. *Id.* § 954(c).

110. *Id.* § 954. Waiver is defined in § 912 of the Evidence Code. *Id.* § 912.

111. *Id.* § 954. The exceptions to the privilege include situations in which the attorney's services were sought to further a crime or fraud, when the communication pertains to an issue

The legislature has provided specific provisions for waiver of the attorney-client privilege.[112] The privilege is waived if the holder, without coercion, has disclosed a significant part of the communication sought to be protected, or has consented to disclosure by anyone.[113] Consent may be manifested by statements or conduct indicating consent to disclose.[114] Conduct manifesting intent includes the failure to claim the privilege in any proceeding in which the holder had the opportunity to assert the privilege.[115] Furthermore, the scope of the waiver is defined by the extent of the act that causes the waiver.[116] With a disclosure, for example, the privilege usually is waived only for that portion of the communication divulged.[117]

The universal acceptance of the attorney-client privilege is illustrative of the importance that society ascribes to the existence of the privilege. The attorney-client privilege should be construed broadly within the limitations applied to the privilege, and courts should find a waiver only under compelling circumstances. Cases involving the inadvertent disclosure of privileged communications directly confront issues of waiver, and pose potential problems for the attorney-client privilege.

Inadvertent Disclosure as a Waiver of the Attorney-Client Privilege—Competing Approaches

One situation in which the issue of implied waiver may arise occurs

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between parties all of whom claim through a deceased client, when the issue pertains to a breach of duty arising out of the attorney-client relationship, when the issue pertains to the client's intent or competence in executing an attested document of which the attorney is the attesting witness, when the issue pertains to the intent of the client with respect to a writing affecting an interest in property, when the issue pertains to the validity of a writing affecting an interest in property, or when two or more clients have the same attorney in a matter of common interest. *Id.* §§ 956-62.

112. *See id.* § 912.

113. *Id.* § 912(a).

114. *Id.*

115. *Id. See* Mize v. Atchison, T. & S.F. Ry. Co., 46 Cal. App. 3d 436, 445-48, 120 Cal. Rptr. 787, 794-96 (1975) (attorney-client privilege was waived when counsel did not object to use of potentially privileged documents). *See also* Cope v. Cope, 230 Cal. App. 2d 218, 235, 40 Cal. Rptr. 917, 927 (1964) (failure to object to testimony of an attorney or physician waives the attorney-client or physician-patient privilege); *infra* notes 254-313 and accompanying text (discussing whether the client's intent to waive the attorney-client and physician-patient privileges is required).

116. Article, *supra* note 65, at 520; *see* 8 J. Wigmore, *supra* note 1, § 2327, at 634-38.

117. *See* Article, *supra* note 65, at 520. For example, if a communication discussed the client's pending divorce and a business lease, but the disclosure was limited to portions of the correspondence pertaining to the lease, only those portions relating to the lease lose privileged status. *Id.* at 521. Once part of a privileged communication is waived, all other communications relating to the matter in that part of the communication lose privileged status. *See id.* at 520. If the client places in issue the privileged matter, the scope of waiver may be more extensive. *Id.* at 521; *see id.* at 518-20 (waiver by placing attorney-client communications in issue).

when confidential communications are inadvertently disclosed. Whether the client has impliedly waived the attorney-client privilege depends upon the significance given to the intent of the client to waive the privilege by disclosing the communication.[118] Courts have placed varying levels of importance upon the client's intent to waive when analyzing whether an implied waiver of the privilege has occurred.[119] Some courts have opted for a "strict responsibility" approach.[120] The intent of the client is irrelevant if this approach is followed.[121] Other courts have used an approach that requires an analysis of all circumstances surrounding disclosure of the communication.[122] Under this second approach, some courts consider the intent of the client to waive the privilege in their analysis of the circumstances, but intent alone is never dispositive.[123] The third approach focuses upon the client's intent to waive the privilege by disclosure of the communication.[124] The shortcomings of the strict responsibility and circumstances analysis approaches lead to the conclusion that the focus of courts deciding inadvertent disclosure issues should be the intent of the client to waive the privilege.

A. The Strict Responsibility Approach

Application of the strict responsibility approach to issues of waiver through inadvertent disclosure was advocated by Professor Wigmore.[125] Under Wigmore's view, the confidential communication has been granted protected status by the legal system.[126] The law, however, cannot guarantee confidentiality of communications between the client and attorney.[127] The *client*, therefore, must ensure that sufficient protective measures are taken against the occurrence of inadvertent disclosure.[128] In addition, Wigmore stated that if intent is the main factor in determining whether a waiver has occurred in inadvertent disclosure cases, a person would seldom be found to have waived the privilege.[129] A court would have to place great weight on the client's

118. *See* Note, *supra* note 22, at 610 ("Modern courts agree that the test should focus on the client's intent to maintain confidentiality . . . .").
119. *See infra* notes 125-214 and accompanying text.
120. *See infra* notes 125-62 and accompanying text.
121. *Id.*
122. *See infra* notes 163-224 and accompanying text.
123. *Id.*
124. *See infra* notes 225-344 and accompanying text.
125. 8 J. WIGMORE, *supra* note 1, § 2326, at 633.
126. *Id.* The protected status is conferred by the attorney-client privilege. *See id.*
127. *See id.*
128. *Id.*
129. *Id.* § 2327, at 636.

testimony concerning the intent to waive the privilege, which could be biased due to the strong self-interest of the client.[130]

In *Underwater Storage, Inc. v. United States Rubber Co.*,[131] a federal district court applied the strict responsibility approach and refused to protect an otherwise privileged letter accidentally disclosed to the adverse party.[132] During the litigation, the plaintiff inadvertently produced a letter from the plaintiff's prior attorney for inspection by the defendant.[133] Plaintiff's prior attorney later refused to answer questions relating to the letter, relying on the attorney-client privilege.[134] The plaintiff claimed that disclosure of his prior attorney's letter was inadvertent.[135] Since no intent to waive the privileged status of the document was present, plaintiff argued that no waiver should be found.[136] The court, however, refused to look beyond the objective fact of disclosure in finding that waiver had occurred.[137] Whether the plaintiff *actually* had intended the disclosure was found irrelevant.[138] The court reasoned that the confidentiality of the letter had been breached.[139] Moreover, the breach destroyed any basis for allowing the privilege, since confidentiality is a prerequisite to the existence of the privilege.[140]

Two bases have been put forth in support of the strict responsibility approach.[141] The first rationale is that the client and the attorney have the ability to preserve the secrecy of the documents.[142] Any

130. *See id.*
131. 314 F. Supp. 546 (D.D.C. 1970).
132. *Id.* at 549.
133. *Id.* at 547. The letter was presented by the plaintiff pursuant to a consent order for examination of certain documents by the defendant. *Id.* at 548-49. The letter was inadvertently placed among the documents listed in the order. *See id.* at 549.
134. *Id.* at 547.
135. *Id.* at 549.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* "[W]here the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it." *Id.* (quoting United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954)). The decision of the court also was significant in terms of future litigation, since allowing use of a document concerning one subject permits use of all communications on the same subject. *See* Chubb Integrated Sys. Ltd. v. National Bank, 103 F.R.D. 52, 67 (D.D.C. 1984). One commentator has suggested that *Underwater Storage* did not create an absolute rule that inadvertent disclosure results in an implied waiver of the attorney-client privilege. The fact that the plaintiff did not assert the privilege prior to disclosure, and took no precautions to prevent disclosure, was thought to be significant. Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents,* 39 U. MIAMI L. REV. 511, 520 (1985).
141. Note, *supra* note 22, at 607.
142. *See* W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976) (defendant could have taken the steps necessary to protect confidentiality).

disclosure is thought indicative of a lack of intent to maintain confidentiality.[143] If the client and the attorney *genuinely* desire confidentiality, measures may be taken to ensure that confidentiality is preserved.[144] The client must bear the responsibility for the failure to take the precautionary measures, and therefore the privilege is waived.[145] If the attorney makes an inadvertent disclosure, the mistake would be chargeable to the client.[146]

This first basis, however, has been criticized repeatedly as too harsh.[147] The objective fact of disclosure alone does not necessarily demonstrate that a client did not intend confidentiality, especially when factors such as theft, electronic surveillance, or erroneously compelled disclosure are taken into consideration.[148] While these circumstances do not involve *direct* disclosure by the client or the attorney, following a strict responsibility approach could cause the disclosure to be attributed to a lack of sufficient precautions.[149] If the strict responsibility approach is followed, the privilege would be waived indirectly.[150] In response to criticism, some courts have modified adherence to the strict responsibility approach.[151] In California, the Evidence Code does not allow a waiver if disclosure was due to theft, electronic surveillance, or erroneously compelled disclosure.[152]

The second basis asserted in favor of the strict responsibility approach is that once a privileged document has been disclosed, precluding use at trial would amount to no more than mechanical obedience to a formula.[153] Since the confidentiality of the document has been lost after a disclosure, the purpose behind the privilege is

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143. *See id.*; Note, *supra* note 22, at 607.

144. *See W.R. Grace & Co.*, 446 F. Supp. at 775; Note, *supra* note 22, at 607.

145. *See supra* note 128 and accompanying text.

146. *Underwater Storage*, 314 F. Supp. at 549.

147. *See, e.g., Mendenhall*, 531 F. Supp. at 955 n.8 ("[the doctrine generates] harsh results out of all proportion to the mistake of inadvertent disclosure."); Grippando, *supra* note 140, at 516 ("[T]he trend is for courts to retreat from the strict responsibility standard."); Note, *supra* note 22, at 607-10 ("[C]ommentators have abandoned the traditional approach.").

148. Note, *supra* note 22, at 608.

149. *Id.*

150. *Id.*

151. *Id.* at 608 n.40, 612-16.

152. *See* CAL. EVID. CODE § 919 (erroneously compelled disclosure of a privileged communication does not constitute a waiver). *See also* California Law Revision Commission, *Evidence Code with Official Comments*, 7 CAL. L. REVISION COMM'N REPORTS 1167 (1965) (text of Evidence Code § 954 with official comments that clients are protected against the risk of disclosure by eavesdroppers and other wrongful interceptors) [hereinafter cited as *Evidence Code Comments*].

153. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954) (privilege was waived since Government had been allowed to inspect privileged documents and make photostatic copies); Note, *supra* note 22, at 608.

no longer served.[154] Thus, the client would receive no benefit from use of the document at trial.[155] This conclusion, however, is by no means compelled. If the privileged communication is damaging, the client clearly benefits when the communication is excluded from evidence, despite the fact that complete confidentiality is no longer possible.[156] If the information is embarrassing, the client's privacy rights are protected since the embarrassing information is not made public.[157] Moreover, the maintenance of the privilege in on-going litigation also preserves the privilege for future litigation, thereby benefiting the client again.[158] Finally, adverse parties often will stipulate that inadvertent disclosure will not constitute a waiver.[159] These stipulations show that both sides may benefit by maintaining the privilege despite disclosure, which a strict responsibility approach might not allow.[160] Therefore, exclusion of inadvertently disclosed communications benefits the client in many respects.

The modern trend is away from the strict responsibility approach, as indicated by proposed rule 503 of the Federal Rules of Evidence. Rule 503, approved by the United States Supreme Court but not adopted by Congress, stated in part that "communication is confidential if not *intended* to be disclosed to third persons . . . ." (emphasis added).[161] The language of rule 503 reflects the prevailing attitude of most modern courts to abandon the strict responsibility approach in favor of other approaches, including the analysis of circumstances approach.[162]

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154. Note, *supra* note 22, at 608.

155. *Id.*

156. *Id.*

157. *See* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956) ("Primarily [privileges] . . . are a right to be let alone, or a right to unfettered freedom, in certain narrowly prescribed relationships. . . ."). In recent years, society has attached increasing importance to an individual's privacy interests. Article, *supra* note 65, at 480. *See also* CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy.").

158. *See* Note, *supra* note 22, at 609.

159. *Id.*

160. *Id.* at 609-10; *see, e.g.*, Permian Corp. v. United States, 665 F.2d 1214, 1216 (D.C. Cir. 1981) (stipulation that disclosure would not constitute waiver was allowed); *cf.* United States v. Aronoff, 466 F. Supp. 855, 861 (S.D.N.Y. 1979) (court stated that the attorneys could have sought a stipulation to avoid inadvertent waiver). Some courts, however, refuse to recognize such stipulations. *See, e.g., W.R. Grace & Co.*, 446 F. Supp. at 775.

161. Deleted Fed. R. Evid. 503(a)(4), 56 F.R.D. 183, 235-36 (1973). Since rule 503 was not adopted by Congress, the rule is not binding on the federal courts. However, approval by the Supreme Court demonstrates that modern courts are abandoning the strict responsibility approach which regards intent as irrelevant. *See id. California Evidence Code* § 954 also requires intent that the communication not be disclosed to third persons. CAL. EVID. CODE § 954.

162. *See supra* note 147 and accompanying text. Rule 511 of the Proposed Federal Rules

B. Analysis of Circumstances Approach

A second mode of analysis for courts confronted with inadvertent disclosure issues is an analysis of the circumstances approach.[163] Under this approach, a court will review the totality of the circumstances to determine whether an individual has waived the attorney-client privilege through an inadvertent disclosure.[164] In making the determination, courts have considered factors such as the fact of inadvertence, unique circumstances, and the steps taken to ensure confidentiality.[165] Intent is a consideration for some, but not all, courts applying the analysis of circumstances approach.[166] In three significant cases, the courts have applied the analysis of circumstances approach.[167] The decisions are all from federal courts, and are not binding on California courts.[168] The decisions are, however, illustrative of this method of analyzing inadvertent disclosure issues.[169]

1. Transamerica Computer Co. v. International Business Machines Corp.

In *Transamerica Computer Co. v. International Business Machines Corp.*,[170] the defendant, IBM, had been compelled in prior litigation to produce for inspection seventeen million pages of documents within a three-month period.[171] IBM screened the documents for privileged

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of Evidence deals with waiver through voluntary disclosure. *See* Deleted Fed. R. Evid. 511, 56 F.R.D. 183, 258 (1973). The Advisory Committee to the drafters of the Federal Rules of Evidence felt that knowledge of the existence of the privilege was irrelevant. *Id.* at 259 (Advisory Committee note). Rule 511, however, was not adopted by Congress, due primarily to the controversial nature of the rule. *See* 21 C. WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5006 (1977). Although neither Rule 503 nor Rule 511 was adopted by Congress, modern courts have followed the approach of Rule 503. *See Mendenhall*, 531 F. Supp. at 955 n.8 (specifically adopting the approach of Rule 503). Rule 511 has not received similar judicial acceptance. *See* 21 C. WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5006 (1977). Thus, unlike Rule 503, Rule 511 should not be taken as indicative of any modern trend among the courts.

163. *See infra* notes 170-224 and accompanying text.

164. *Id.*

165. *See, e.g., Chubb*, 103 F.R.D. at 67 (waiver found due in part to inadvertent document inspection); *Transamerica*, 573 F.2d at 651 (unique circumstances involving large amounts of documents prevented waiver); *Suburban Sew 'N Sweep*, 91 F.R.D. at 259 (steps to ensure confidentiality); *Kelsey-Hayes*, 15 F.R.D. at 465 (steps to ensure confidentiality).

166. *See infra* notes 170-214 and accompanying text.

167. See id.

168. Claflin v. Houseman, 93 U.S. 130, 137 (1876) (federal courts have no power over state courts, except when the Federal Constitution or laws are involved). The decisions discussed in the text were not decided under the Federal Rules of Evidence concerning the attorney-client privilege (Rule 503), or voluntary disclosure of confidential communications (Rule 511), since these rules were not adopted by Congress.

169. *See infra* notes 215-24 and accompanying text.

170. 573 F.2d 646 (9th Cir. 1978).

171. *Id.* at 648.

communications,[172] but 1138 privileged documents were produced for inspection inadvertently.[173] Later, in the subsequent litigation, Transamerica wanted IBM to produce these documents again, arguing that the original disclosure, although inadvertent, waived any connected privilege.[174] The court of appeals noted several factors in determining that the privilege had not been waived.[175]

Although IBM had not been directly forced to produce the privileged documents during the prior litigation, the accelerated discovery proceedings[176] achieved essentially the same result.[177] IBM would not have produced the privileged documents had the discovery program proceeded under a less demanding schedule.[178] The court held disclosure of the documents had therefore been indirectly compelled, and no waiver had occurred.[179] The extraordinary order deprived IBM of an opportunity to claim the privilege, since ensuring that all privileged documents would be spotted by the screening process was virtually impossible.[180] Additionally, the appellate court noted that the judge who issued the order for production had ruled that no waiver had occurred.[181] The court in *Transamerica* did not refer to intent as a factor in their analysis.

2. *United States v. Kelsey-Hayes Wheel Co.*

In *United States v. Kelsey-Hayes Wheel Co.*,[182] a district court, in rejecting a claim of the attorney-client privilege, refused to consider the intent of the party claiming the privilege.[183] In *Kelsey-Hayes*, the defendant was asked by the Justice Department to allow examination of company files.[184] The reason for the request was to investigate alleged antitrust violations.[185] The defendant quickly agreed to the

172. The documents which IBM had to inspect were not grouped together, and were contained in copious files strewn throughout various IBM branch offices and divisional headquarters. Since each of the 17 million pages had to be examined, and time was short, IBM was forced to turn to outside attorneys and clerks, who were unfamiliar with IBM's business and lacked the motivation and competence that full-time IBM employees would have had. *Id.* The court also described the "herculean effort" of IBM, and IBM's screening process. *See id.* at 648-49.
173. *Id.* at 650.
174. *Id.*
175. *Id.* at 650-52.
176. *See supra* notes 171-72 and accompanying text.
177. 573 F.2d at 651-52.
178. *Id.*
179. *Id.*
180. *Id.* at 652.
181. *Id.*
182. 15 F.R.D. 461 (E.D. Mich. 1954).
183. *Id.* at 465.
184. *Id.* at 464.
185. *Id.*

request.[186] The Government copied approximately 1000 documents from the defendant's voluminous files.[187] Twenty-nine of the disclosed documents contained privileged information.[188] Subsequently, the Government requested that the defendant admit to the genuineness of the copied documents.[189] The defendant admitted that all of the documents were genuine except the twenty-nine that were privileged.[190]

The defendant claimed that due to the size of the files and the short time involved, the privileged documents could not have been located in time to prevent inadvertent disclosure.[191] The district court was unpersuaded by defendant's arguments.[192] The court held that privileged documents had been indiscriminately mingled with other documents, and considered insufficient precautions a significant factor in the decision to deny the privilege.[193] The court further reasoned that since the confidentiality of the documents had been violated, the privilege *had* to cease.[194] Finally, the court concluded that even if the privilege were recognized, enabling the defendant to refuse to admit the genuineness of the documents, the Government could still offer the *copies* of the documents at trial.[195] From the copies, the Government could attempt to prove genuineness.[196] Since recognizing the privilege would not serve the purpose behind the privilege,[197] and would result in laborious and time-consuming efforts for the Government at trial, the court refused to recognize the privilege.[198] The court in *Kelsey-Hayes* considered the intent of the defendants irrelevant in the analysis.[199]

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186. *Id.*
187. *Id.*
188. *Id.* Copies were made by both the Justice Department and another defendant, the Budd Company. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 465.
192. *Id.*
193. *Id.*
194. *Id.* at 464-65. "[W]here the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it." *Id.* at 465. The court considered this point universally conceded. *Id.* at 464 (quoting 8 J. WIGMORE, EVIDENCE § 2311, at 600 (3d ed. 1940)).
195. *Id.* at 465.
196. *Id.* This reasoning, however, is unsound. The court could have recognized the privileged status of the documents, and refused to consider them in the litigation. *See Transamerica*, 573 F.2d 646 (9th Cir. 1978). This exclusionary rule would work within the controlled environment of the courtroom. *Id.*
197. The purpose is to protect the confidentiality of the communication. *See supra* notes 78-98 and accompanying text; *infra* notes 317-35 and accompanying text.
198. *Kelsey-Hayes*, 15 F.R.D. at 465.
199. *Id.*

3. Data Systems of New Jersey, Inc. v. Philips Business Systems, Inc.

Data Systems of New Jersey, Inc. v. Philips Business Systems, Inc.[200] is an example of a decision in which the court considered the intent to waive the attorney-client privilege a relevant factor. In *Data Systems*, plaintiffs[201] prepared a report providing their counsel with the method used in computing the damages sought against the defendant.[202] The plaintiffs were asked during discovery to produce certain files for inspection.[203] These files were sent by the plaintiffs to their counsel.[204] Counsel reviewed the files for privileged documents, and removed the report.[205] The portion of the report showing the method of computation, however, had been detached and was produced inadvertently.[206] When opposing counsel sought to ask questions concerning the document at a deposition, plaintiffs' counsel asserted the attorney-client privilege, and advised the plaintiff not to answer the questions.[207]

At a pretrial hearing to resolve various discovery disputes, the court noted that some courts have not considered intent to waive the privilege as a factor in determining the existence of waiver.[208] Applying a "predominate theme of fairness" standard derived from other inadvertent disclosure cases,[209] however, the court sustained the privilege.[210] The court considered the enormous volume of documents screened for privileged material,[211] the precautions taken by counsel,[212] and the timely reassertion of the privilege by counsel.[213] The court also

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200. No. 78 Civ. 6015-CSH, slip op. (S.D.N.Y. January 8, 1981) (available on LEXIS, Genfed library, Dist file).

201. The suit involved 13 plaintiffs, each of whom were former corporate agents of the defendant, Philips Business Systems, Inc. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Two paralegals had detached the report, since the report did not appear to be a privileged document on its face. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. The court noted that thousands of files had to be screened. *Id.*

212. "[E]very possible precaution was taken to remove privileged documents." *Id.*

213. *Id.* When the report was introduced at the deposition, plaintiffs' counsel immediately objected:

> MR. SPINOGATTI: [L]et me just note an objection for purposes of the record. This document was prepared by Mr. Beazley at the request of counsel. How it found its way into the documents which were produced earlier this week to you right now escapes me, but it was certainly not meant to be in there. Please note for your purposes, since you have seen the document already, that we are not waiving any objection with respect to this document as to attorney work product or privileged com-

noted that no intent was present on the part of the plaintiffs to waive the privilege.[214] Thus, although the courts in *Kelsey-Hayes* and *Data Systems* both used the analysis of circumstances approach, the court in *Kelsey-Hayes* found intent to waive the privilege to be irrelevant in determining whether waiver occurred. The court in *Data Systems* found the lack of intent to be significant in holding that no waiver occurred.

4. Problems Raised by the Analysis of Circumstances Approach

The circumstances analysis approach is applied on a case-by-case basis. Any factor the court considers relevant to the client's intent to waive the privilege might be considered, and different courts may give the same factor different weight.[215] Courts using this approach usually focus upon factors surrounding the disclosure, the precautions taken to protect the privilege, and the attorney's reassertion of the privilege.[216] While the analysis of circumstances balancing approach has been used by a number of courts, the approach is unsatisfactory.[217] In *Transamerica, Kelsey-Hayes*, and *Data Systems*, the party claiming the privilege inadvertently disclosed the privileged document at least partially because of the tremendous number of documents involved.[218] The courts, however, were able to either allow or deny the privilege depending upon the emphasis placed upon a particular

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munications. . . . [after other questions concerning the report had been asked] Mr. O'Neill [for defendants], I am going to object to all questions having to do with Defendants' Exhibit 2 on the ground of attorney-client privilege and on the ground of work product. . . . It should not have been produced to you and I will object to any questions with respect to this document.

MR. O'NEILL: [I] want it clear on the record that your objections are invalid. I think you stated that you did not prepare this. Mr. Beazley prepared this.

MR. SPINOGATTI: That's right, at my request.

MR. O'NEILL: He is not an attorney.

MR. SPINOGATTI: So what? It is also attorney-client privilege, privileged communications [sic]. I mentioned that.

MR. O'NEILL: I am going to put my questions on the record and you make your objections.

Id. These objections are important in view of the significance many courts attach to a timely assertion of the privilege. *See* Grippando, *supra* note 140, at 526.

214. *Data Systems*, No. 78 Civ. 6015-CSH. The court ordered the document returned to the plaintiffs, and further ordered that the defendants could not base any questions to the plaintiffs on the information obtained from previous examination of the document. *Id.*

215. *See supra* notes 163-214 and accompanying text.

216. Grippando, *supra* note 140, at 514-15.

217. *See infra* notes 218-24 and accompanying text.

218. *See supra* notes 171-80, 187-93, 211, and accompanying text.

factor.[219] In both *Transamerica* and *Kelsey-Hayes*, the defendants had little time to produce the requested documents, but the courts reached opposite results.[220] These cases are illustrative of the unpredictability of courts in deciding inadvertent disclosure issues under the circumstances analysis approach.[221] Unpredictability in court decisions is particularly deleterious in the attorney-client privilege context, since the lack of certainty undermines the very purpose of the privilege.[222] The purpose of the privilege is to encourage full disclosure of all relevant circumstances by the client to the attorney.[223] If protection of the privilege is uncertain, a client's disclosures ultimately will be inhibited.[224] Because of this uncertainty, and due to the importance of the privilege involved, the circumstances analysis approach to determining whether a waiver of the attorney-client privilege should be implied in inadvertent disclosure cases provides an undesirable standard.

The strict responsibility approach to deciding inadvertent disclosure issues is viewed as too harsh, and has been rejected by most modern courts. The analysis of the circumstances approach is similarly unsatisfactory due to the lack of reliability and predictability in court decisions. A third approach focusing on the client's intent to waive the privilege augments the benefits of the attorney-client privilege while solving the problem of harshness using the strict responsibility approach, and the problem of unpredictability using the analysis of the circumstances approach.

The Case for an Intent Requirement

California Evidence Code section 912(a) states that waiver occurs, assuming no coercion has occurred, when (1) a significant part of the confidential communication has been disclosed, or (2) the holder

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219. *See id.*

220. *See id.*

221. Unpredictability has been the impetus behind the movements to reform evidence law in California. *See Recommendation, supra* note 102, at 30; *see also supra* notes 102-06 and accompanying text.

222. *See* Upjohn v. United States, 449 U.S. 383, 393 (1981) ("An uncertain [attorney-client] privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

223. *See supra* notes 78-98 and accompanying text. *See also infra* notes 317-35 and accompanying text.

224. *See Upjohn*, 449 U.S. at 393; Note, *supra* note 22, at 611-12 n.57.

> [Courts] have subjectively viewed situations after communications have been made, and have then retrospectively determined whether the privilege should apply. In so doing they have failed to provide objective guides for determining future conduct. As a result, an attorney and his client have little to rely on when attempting to predict whether a particular communication will be privileged.

Upjohn, 449 U.S. at 393.

has consented to disclosure made by anyone.[225] A court could find a basis for using any of the three possible approaches to deciding inadvertent disclosure cases in the language of section 912(a).[226] In light of the unsatisfactory or unpredictable results of the two approaches previously examined, the best approach to interpreting section 912(a) would include a requirement of intent by the holder to waive the attorney-client privilege. Definition of the standard of intent is the first step in determining whether waiver has occurred.

A. *The Standard of Intent*

To determine if an implied waiver of the attorney-client privilege exists under section 912(a), a court could use either a standard focusing solely on the client's subjective intent to waive the privilege, or a standard in which the client's subjective intent is irrelevant.[227] A purely subjective theory of intent would require a manifestation of the client's subjective intent to waive the privilege before a waiver could be found.[228] "Subjective" refers to whether the client waived the privilege with knowledge that the privilege was being waived.[229] A determination of the plaintiff's knowledge would be made simply on the basis of whether the client made a subjective manifestation of intent to waive the privilege, such as a statement that the client was waiving the privilege.[230] While a subjective standard of intent is theoretically possible, the self-interest of the client would raise significant questions concerning the reliability of a client's statement that

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225. CAL. EVID. CODE § 912(a).

226. *See* Jones v. Superior Court, 119 Cal. App. 3d 534, 547, 174 Cal. Rptr. 148, 155 (1981) (advocating a strict responsibility approach). Using an analysis of the circumstances approach, a party could argue for a broad interpretation of coercion. The court could find that, due to the circumstances, the party was, in effect, coerced into disclosure. *See, e.g., Transamerica*, 573 F.2d 646 (9th Cir. 1978).

227. *See supra* note 226 and accompanying text.

228. *See, e.g.*, Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) ("We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right.'"); Dunn Chemical Co. v. Sybron Corp., 1975-2 Trade Cas. ¶60,561, at 67,463 (S.D.N.Y. 1975).

229. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (definition of a knowing waiver). By contrast, an objective standard of intent would find irrelevant the fact that the privilege was not knowingly waived. *See, e.g.*, Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (court refused to look behind the "objective fact" of disclosure to determine whether the plaintiff really intended disclosure).

230. *See, e.g., In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 674 (D.C. Cir. 1979) (attorney explicitly advised the adverse party that no privilege was being claimed on a set of documents). *See also* Note, *supra* note 22, at 610. "Under this [subjective manifestations] test, the client would testify that he did or did not intend the inadvertently disclosed documents to remain private, and the court would accordingly deem the privilege waived or preserved." *Id.*

the privilege was not intended to be waived.[231] The client may have intended to waive the privilege without subjective manifestation of that intent.[232] Inherent problems of reliability are present when determinations of subjective intent are made.[233] Therefore, a purely subjective standard of intent is not the best alternative.

A standard in which subjective manifestations are irrelevant, however, would be only slightly better than the unpredictable circumstances analysis approach.[234] Since the client's subjective knowledge is irrelevant, the trier of fact must look to objective indications of the client's intent to waive the privilege.[235] Thus, using either standard, the trier of fact would be viewing the totality of the circumstances in making the determination.[236] The best approach is a combination of the two standards. This corroborative standard would require both objective and subjective manifestations of intent to waive the privilege.[237] The corroborative manifestations would increase the probability of a proper result in determining waiver issues.[238] The client's subjective intent to waive the privilege, without any outward indication that the privilege was intended to be waived, is not enough to constitute a waiver of the attorney-client privilege.[239] In addition, use of a corroborative standard would focus the attention of the court on *one* factor—the client's intent to waive the privilege—and would therefore yield more consistent results in inadvertent disclosure cases.[240] The corroborative standard would enhance both reliability and predictability of court decisions concerning inadvertent disclosure issues by ensuring more consistent results.[241]

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231. 8 J. WIGMORE, *supra* note 1, § 2327, at 636 ("A privileged person would seldom be found to waive, if his [subjective] intention not to abandon could alone control the situation.").

232. Note, *supra* note 22, at 611 n.54.

233. *Id.*

234. This standard of intent would consider circumstances relevant to the disclosure in determining the client's intent, such as voluntariness, precautions taken, and screening processes used. *See supra* notes 163-224 and accompanying text.

235. *See supra* note 229 and accompanying text.

236. *See supra* notes 163-214 and accompanying text.

237. *See, e.g., Dunn Chemical*, 1975-2 Trade Cas. at 67,463. In *Dunn Chemical*, the court maintained the privileged status of letters referring to legal advice. *Id.* Objective manifestations of intent to waive the privilege existed, since the documents had been disclosed to the adverse party. *Id.* at 67,459. The court, however, due to the lack of any subjective manifestations of the client's intent to waive the privilege, found that no valid waiver existed. *Id.* at 67,463.

238. *See id.* at 67,463 (interests of fairness are best served using the corroborative standard).

239. *See* Lohman v. Superior Court, 81 Cal. App. 3d 90, 95, 146 Cal. Rptr. 171, 174 (1978) (intent to waive, alone, does not constitute a waiver of the attorney-client privilege).

240. *See supra* notes 221-24 and accompanying text.

241. *Id.*

B. *Mendenhall v. Barber-Greene Co.*

An example of a court requiring the client's subjective intent to waive the attorney-client privilege is found in the recent case of *Mendenhall v. Barber-Greene Co.*[242] In a patent infringement action, plaintiff's attorney allowed defendant's attorney to inspect all files of plaintiff's attorney listing plaintiff, Mendenhall, as the applicant.[243] Included in the files were four privileged letters that plaintiff's attorney did not intend defendent's attorney to inspect.[244] When defense counsel later requested copies of the letters, plaintiff's trial counsel refused on attorney-client privilege grounds.[245] Defense counsel then sought an order to compel production of the letters, arguing that the privilege had been waived by the inadvertent disclosure.[246]

Although the court noted that authority existed for the position of defense counsel, the court denied the order.[247] The court held that mere inadvertent production could not act as an implied waiver of the attorney-client privilege.[248] The court stated that waiver traditionally is defined as the *intentional* relinquishment or abandonment of a known right.[249] Inadvertent production, then, is the "antithesis" of the concept of waiver.[250] The court stated that plaintiff's defense counsel might have been negligent in producing the letters for inspection.[251] Negligence of defense counsel, however, was not enough to find that the privilege had been waived.[252] The court held that safeguarding the welfare of the client is too important to allow mere negligence of defense counsel to impliedly waive the privilege.[253]

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242. 531 F. Supp. 951 (N.D. Ill. 1982).
243. *Id.* at 952; *id.* at 952 n.2.
244. *Id.* at 952 n.2.
245. *Id.*
246. *Id.* at 952.
247. *Id.* at 954.
248. *Id.*
249. *Id.* at 955. "We are taught from first year law school that waiver imports the 'intentional relinquishment of a known right.'" *Id.* (footnote omitted). The court also noted that the United States Supreme Court had used this definition of waiver. *Id.* at 955 n.9 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Although *Johnson* dealt with the waiver of constitutional rights, the court in *Mendenhall* believed that the definition applied to waiver generally. *Id.*
250. *Id.* at 955.
251. *Id.* Plaintiff's counsel should have removed the letters from the files prior to inspection by defense counsel. *Id.*
252. *Id.*
253. *Id.* "[I]f 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." *Id.*

C. History of Section 912(a)

Prior to 1964,[254] the Law Revision Commission requested a study relating to the Uniform Rules of Evidence, including waiver of the attorney-client privilege.[255] The study was to examine prior case law, compare the law to the corresponding rule of the Uniform Rules of Evidence, and make a recommendation to the Law Revision Commission.[256] The study was conducted by Professor James H. Chadbourn.[257] Results of the study indicated that prior California law was in accord with the idea that a waiver of the attorney-client privilege must be a knowing waiver.[258] The Chadbourn study stated that "[t]he thought probably is that waiver should depend upon intent to waive, and, *since intent requires knowledge*, knowledge is an element of waiver" (emphasis added).[259] The Chadbourn study recommended to the Commission that the new Evidence Code reject prior law and adopt Wigmore's strict responsibility approach.[260] This view, however, represented only the recommendation of Professor Chadbourn's study, *not* the view of the Commission.[261] In the comments to section 912(a), the Commission made no statement that would support a strict responsibility approach.[262] Moreover, while the original draft of the comments to Evidence Code section 912 included Chadbourn's recommendation, subsequent versions excluded his recommendation,[263] in-

254. California Evidence Code § 912(a) was enacted by the legislature in 1965 upon the recommendation of the California Law Revision Commission. California Law Revision Commission, *Recommendation relating to Erroneously Ordered Disclosure of Privileged Information,* 11 CAL. L. REVISION COMM'N REPORTS 1165 (1973). *See also* 1965 Cal. Stat. ch. 299, § 912, at 1323 (enacting § 912(a)).

255. California Law Revision Commission, *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence, Article V. Privileges,* 6 CAL. L. REVISION COMM'N REPORTS 301 n.* (1964) [hereinafter cited as *Study*]. Originally, the Commission was directed to determine whether California evidence law should be revised to conform with the Uniform Rules of Evidence. 1956 Cal. Stat. Res. ch. 42, at 263; California Law Revision Commission, *Tentative Recommendation and a Study relating to the Uniform Rules of Evidence, Article I. General Provisions,* 6 CAL. L. REVISION COMM'N REPORTS 3 (1964). The Commission recommended against this revision. *Recommendation, supra* note 102, at 33. Instead, a new Evidence Code was recommended, of which § 912(a) is a part. *Recommendation, supra* note 102, at 33-34.

256. *See Study, supra* note 255, at 301.

257. *Id.*

258. *Id.* at 510. *Accord* People v. Kor, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 100-01 (1954) (Shinn, P.J., concurring) (waiver should only be allowed when the client knowingly waives the privilege).

259. *Study, supra* note 255, at 510.

260. *Id.* "It is recommended that Rule 37 [§ 912(1)] be amended to conform to the Wigmorean view, deleting from the rule the requirement of knowledge." *Id.*

261. "The opinions, conclusions, and recommendations contained herein are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission." *Study, supra* note 255, at n.*.

262. *Evidence Code Comments, supra* note 152, at 1153.

263. *See Study, supra* note 255, at 262 (original 1964 recommendation against a require-

dicating that the Commission intentionally rejected Chadbourn's recommendation.[264] Although the comments of the Law Revision Commission do not have the force of law, they are highly persuasive authority concerning legislative intent.[265] The intentional omission by the Law Revision Commission of Professor Chadbourn's study supports the argument for an implied requirement of intent for section 912(a). The history of Evidence Code section 912(a) supports the argument for a requirement that the client must intend to waive the attorney-client privilege. Cases involving the waiver of the physician-patient privilege also support an intent requirement.

D. Analogy to the Physician-Patient Privilege

Analogizing to cases involving waiver of the physician-patient privilege is helpful in examining the law concerning waiver of the attorney-client privilege. Both the physician-patient privilege and the attorney-client privilege share similar underlying rationales.[266] A purpose of both privileges is to encourage full disclosure of relevant information to professionals.[267] In addition, both privileges are justified on a right to privacy rationale.[268] Perhaps the strongest reason for

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ment of knowledge); *Evidence Code Comments, supra* note 152, at 1153 (final 1965 draft which *excluded* recommendation against knowledge requirement).

264. In the tentative recommendation for what later became Evidence Code § 912, the Commission included Professor Chadbourn's view that knowledge of the privilege should be irrelevant. *Study, supra* note 255, at 262. This view, however, was not adopted by the legislature when § 912 was enacted. 1965 Cal. Stat. ch. 299, § 912, at 1323. According to the study, existing California law required that the client intend to waive the privilege, specifically requiring *knowledge* that the disclosed document was privileged. *Study, supra* note 255, at 510. The final draft of the Evidence Code by the Law Revision Commission, the version enacted by the legislature, excluded Chadbourn's recommendation that knowledge of the privilege be made irrelevant. *Evidence Code Comments, supra* note 152, at 1153. *Compare* 1965 Cal. Stat. ch. 299, § 912, at 1323 (enacting the Evidence Code), *with Evidence Code Comments, supra* note 152, at 1001-1325. Since the Commission chose not to include a comment to the contrary, existing law was intended to remain in force. *See supra* notes 262-63 and *infra* note 265 and accompanying text.

265. The California Supreme Court often has referred to the Law Revision Commission comments for support. *See, e.g.*, City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 65-72, 646 P.2d 835, 838-43, 183 Cal. Rptr. 673, 676-81 (1982) (citing various California Law Revision Commission Reports). *See also* People v. Dillon, 34 Cal. 3d 441, 471, 668 P.2d 697, 715, 194 Cal. Rptr. 390, 408 (1983). "When a statute proposed by the California Code Commission for inclusion in the Penal Code has been enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and determining the intent of the Legislature." *Id.*

266. Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 679, 156 Cal. Rptr. 55, 61 (1979) (physician-patient); *see supra* notes 78-98 and accompanying text (attorney-client).

267. *Gherardini*, 93 Cal. App. 3d at 679, 156 Cal. Rptr. at 61; *see supra* notes 78-98 and accompanying text.

268. *See* Article, *supra* note 65, at 479-84.

analogizing between the two privileges in inadvertent disclosure cases is that the law concerning implied waiver of a privileged communication through inadvertent disclosure includes decisions involving both the attorney-client *and* the physician-patient privileges.[269] Therefore, a case involving implied waiver of the physician-patient privilege, although decided prior to the enactment of section 912(a), may provide insight to analysis of implied waivers of the attorney-client privilege.

Prior to the enactment of Evidence Code section 912(a) in 1965, courts in three cases explicitly required that a patient intend to waive the physician-patient privilege for an implied waiver to be found.[270] In 1935, in *Kramer v. Policy Holders Life Insurance Association*,[271] a California appellate court held that while the physician-patient privilege may be waived, the patient's intent to waive the privilege must be clear.[272] Plaintiff was the beneficiary of an insurance policy in which his wife was the insured.[273] When the wife died the insurance company refused to pay the plaintiff, due to some alleged misinformation regarding the wife's medical history, and plaintiff instituted an action to recover payment.[274] At trial, the insurance company attempted to introduce into evidence the testimony of a physician who was present during one of the decedent's medical examinations.[275] The doctor was called to testify regarding the wife's medical history, and plaintiff's counsel objected relying on the physician-patient privilege.[276] Defense counsel argued that the privilege had been waived because the doctor was not the attending physician. Since the wife had made

269. *See* CAL. EVID. CODE § 912(a). Evidence Code § 912(a) is essentially a restatement of California law prior to enactment of the Evidence Code in 1965. *Recommendation, supra* note 102, at 34.

270. *See* Torbensen v. Family Life Ins. Co., 163 Cal. App. 2d 401, 329 P.2d 596 (1958); Newell v. Newell, 146 Cal. App. 2d 166, 303 P.2d 839 (1956); Kramer v. Policy Holders Life Ins. Ass'n, 5 Cal. App. 2d 380, 42 P.2d 665 (1935).

271. 5 Cal. App. 2d 380, 42 P.2d 665 (1935) (privileged information disclosed during a medical examination in the presence of a third person).

272. *Id.* at 391, 42 P.2d at 670. "It must clearly appear . . . that there is such an *intention* to waive, and a court will not run to such a conclusion." *Id.*

273. *Id.* at 381, 42 P.2d at 665. On the insurance application, the wife indicated that she had undergone a minor operation on her breast, but was presently in good health. Relying on the truth of these representations, the policy was issued. *Id.* Four months later, plaintiff's wife was examined again at a clinic maintained by the Kellogg Foundation. *Id.* at 382, 42 P.2d at 666. During this examination, a Dr. Harris was present doing research for the Foundation. *Id.* at 382-84, 42 P.2d at 666-67. Dr. Harris discovered that the wife's right breast had been removed shortly before the insurance policy had been issued, that the cancer had spread to her left breast, and that cancer had been in her system for more than two years. *Id.* at 382, 42 P.2d at 666. Dr. Harris also took the wife's medical history. *Id.*

274. *Id.* at 381, 42 P.2d at 665.

275. *Id.* at 382, 42 P.2d at 665.

276. *Id.* at 382, 42 P.2d at 666.

confidential communications in the presence of a third person not necessary for her treatment and diagnosis, the privilege had been impliedly waived.[277] The court sustained plaintiff's objection to the testimony of the doctor on the grounds that the wife had not intentionally waived the physician-patient privilege.[278]

In *Newell v. Newell*,[279] decided in 1956, another appellate court followed the holding of *Kramer* in upholding an objection to physician testimony.[280] Plaintiff attempted to attack the credibility of the defendant's husband by showing that he was homosexual and amoral.[281] To ensure the accuracy of plaintiff's offer of proof, however, the plaintiff needed a copy of a confidential report made by the physician of the defendant's husband.[282] The report had been made by the doctor for the court in a different dispute involving defendant's husband.[283] On appeal the plaintiff argued that the information was therefore no longer confidential.[284] The appellate court relied on the statute codifying the physician-patient privilege and upheld the exclusion of the physician's testimony by the trial court.[285] Citing *Kramer*, the court held that the patient must intend to waive the privilege.[286] The court held that plaintiff's offer of proof did not indicate a waiver had occurred.[287] The court also held that the physician-patient privilege should be construed liberally in favor of the patient.[288]

The third case, *Torbensen v. Family Life Insurance Co.*,[289] was decided in 1958. The plaintiff, Torbensen, brought an action to recover payment on a life insurance contract of which she was the beneficiary.[290] The defendant refused to pay on the ground that the insured had made false statements to the examining physician.[291] The

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277. *Id.* at 384, 391, 42 P.2d at 666, 670.
278. *Id.* at 391-93, 42 P.2d 670-71.
279. 146 Cal. App. 2d 166, 303 P.2d 839 (1956) (offer of proof calling for a physician's disclosure of confidential information).
280. *Id.* at 178, 303 P.2d at 847.
281. *Id.* at 177, 303 P.2d at 847.
282. *Id.* at 176, 303 P.2d at 846.
283. *Id.*
284. *Id.* at 177, 303 P.2d at 847.
285. *Id.*
286. *Id.* at 178, 303 P.2d at 847.
287. *Id.*
288. *Id.* at 177, 303 P.2d at 847.
289. 163 Cal. App. 2d 401, 329 P.2d 596 (1958) (waiver was found when plaintiff signed a waiver of privilege clause).
290. *Id.* at 402, 329 P.2d at 596.
291. *Id.* at 403, 329 P.2d at 597. The insured stated that he was in good health and free from bodily impairment, that he had consulted another physician during the prior five years for low blood pressure, that he did not have heart disease, and that he had never had an electrocardiogram taken. At the time the application was completed, the insured was undergoing treatment for heart disease, and an electrocardiogram of the insured had been taken. *Id.*

insured had signed a statement authorizing the release of any medical information to defendant upon request.[292] At trial, the defendant called the examining physician to testify concerning the insured's condition at the time the insurance was requested.[293] On appeal, plaintiff argued that the physician's testimony should have been excluded on the grounds of confidential communication between patient and physician.[294] The appellate court held that the physician-patient privilege had been waived.[295] The court relied upon the holdings in *Kramer* and *Newell* as statements of the existing law on the subject of whether intent is required to waive the physician-patient privilege.[296] The court then found that the statement signed by the insured authorizing disclosure of any medical information by the examining physician was an intentional waiver of the physician-patient privilege.[297] Accordingly, the court upheld the admission of the testimony of the examining physician.[298] Thus, in the pre-1965 cases directly addressing the issue, California courts required a patient's intent to waive the privilege to find that a waiver had occurred.[299]

In a 1981 case concerning the issue whether intent is necessary for an implied waiver of the physician-patient privilege, the appellate court in *Jones v. Superior Court*[300] held that intent to waive the privilege was not necessary.[301] *Jones* involved a daughter's claim for damages due to injuries resulting from her mother's ingestion of DES, a drug suspected of causing birth defects.[302] In *Jones*, the mother testified regarding circumstances surrounding the mother's ingestion of DES.[303] The mother also testified, during a deposition, concerning her medical history prior to the birth of her daughter.[304] An issue was raised re-

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292. *Id.* The statement read as follows: "I hereby authorize and request you to disclose any and all information and records concerning my condition when under observation by you, if requested to do so by [defendant]. . . ." *Id.*

293. *Id.* at 404, 329 P.2d at 597.

294. *See id.*

295. *Id.* at 404, 329 P.2d at 597-98.

296. *Id.* at 404, 329 P.2d at 598.

297. *Id.* "[T]he paragraph can only be interpreted to mean that the applicant was waiving his privilege of having his physician remain mute as to matters learned during the course of treatment of the applicant." *Id.*

298. *Id.*

299. *See supra* notes 270-98 and accompanying text.

300. 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981).

301. *Id.* at 550-51, 174 Cal. Rptr. at 158.

302. *Id.* at 540, 174 Cal. Rptr. at 152. The daughter in *Jones* claimed injury caused by her mother's ingestion of the drug DES (diethylstilbestrol) while plaintiff was *in utero*. *Id.* The daughter was suing a number of pharmaceutical companies alleged to have manufactured and distributed the drug. *Id.* at 540-41, 174 Cal. Rptr. at 152.

303. *Id.* at 542, 174 Cal. Rptr. at 152-53.

304. The mother's testimony included the doctor's administration of DES, but the mother

garding whether the mother could be compelled to answer questions concerning her DES-related medical history.[305] The questions included communications between the mother and her doctor, which normally would be considered privileged communications.[306] Defendants argued that the physician-patient privilege had been waived due to her testimony.[307]

The court in *Jones* held that the physician-patient privilege had been waived as to those matters upon which the mother originally testified.[308] The court focused upon whether the mother disclosed a significant part of the privileged communications.[309] The court did not indicate that intent was required to waive the privilege.[310] The decision on the necessity of intent, however, went to the determination of the *scope* of the waiver, rather than the *existence* of a waiver.[311] *Jones*, therefore, does not stand for the proposition that intent should be eliminated as a requirement to find an implied waiver of the physician-patient privilege.

Since both the attorney-client privilege and the physician-patient privilege have similar rationales, holdings concerning the latter may be persuasive in cases involving the former. In *Kramer* and *Torbensen*, objective manifestations of intent to waive the privilege existed, but the courts required a subjective manifestation as well.[312] Cases involving the physician-patient privilege, therefore, indicate that a corroborative standard of intent is warranted. Since the California Law Revision Commission considered these cases in the Commission report

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refused to disclose certain facts concerning her pregnancy, and refused to answer any questions relating to her medical history after the birth of her daughter. *Id.*

305. *Id.*

306. *Id.* at 542, 542 n.2, 174 Cal. Rptr. 152-53, 153 n.2. *See also* CAL. EVID. CODE §§ 990-1007 (describing the physician-patient privilege).

307. 119 Cal. App. 3d at 546-47, 174 Cal. Rptr. at 155-56.

308. *Id.* at 550-51, 174 Cal. Rptr. at 158.

309. *Id.* at 546, 174 Cal. Rptr. at 155.

310. *Id.* at 547, 174 Cal. Rptr. at 155-56.

311. *Id.* "Defendants observe, and we agree, that the *scope* of waiver is not limited to what the patient intends. . . ." *Id.* (emphasis added). The court cited a similar case, *Kerns Construction Co. v. Superior Court*, for support. *Id. See* Kerns Constr. Co. v. Superior Court, 266 Cal. App. 2d 405, 414, 72 Cal. Rptr. 74, 79 (1968). In *Kerns*, the attorney for the defendant had the witness refer to some privileged documents in order to refresh the witness' memory. *Id.* at 413, 72 Cal. Rptr. at 78. The witness then testified to matters of which he had no memory independent of the reports. The court held that the witness had given testimony from the privileged reports, which were furnished with *knowledge* of the intended use. Thus, the privilege was waived. *Id.* Testifying from a privileged document, however, easily fits into a recognized exception to the attorney-client privilege. When a witness testifies regarding privileged communications, the privilege is waived. *See supra* note 73 and accompanying text. Thus, *Kerns* should not be read as eliminating an intent requirement in finding an implied waiver of the attorney-client privilege.

312. *See supra* notes 271-78, 289-99, and accompanying text.

dealing with waiver of the attorney-client privilege, as well as in drafting the language of Evidence Code section 912(a),[313] section 912(a) should include an implied requirement of intent. Thus, an implied requirement that an individual must intend to waive the attorney-client privilege is supported in the history of Evidence Code section 912(a), as well as by analogy to cases involving the physician-patient privilege. In addition, an intent requirement for waiver of the attorney-client privilege is supported by sound policy considerations.

E. Policy Considerations

While detractors have existed in the past,[314] few today would suggest complete abrogation of the attorney-client privilege.[315] Arguments have been made, however, that the privilege is a barrier to the truth, and should be defined narrowly.[316] An analysis of both the concerns and the advantages, however, will show that, overall, the attorney-client privilege yields substantial benefits to society.

1. Benefits Promoted by a Corroborative Standard

The fundamental purpose of the attorney-client privilege is to encourage complete disclosure by the client to the attorney without fear that the information will be disclosed.[317] Full disclosure by the client yields substantial benefits.[318] The client benefits by obtaining legal advice without losing confidentiality.[319] If confidentiality were not pro-

313. *See supra* notes 254-65 and accompanying text.

314. M. DUMONT, *supra* note 6, at 246-47.

315. *See, e.g.*, Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826) (the privilege is indispensable); C. MCCORMICK, *supra* note 3, at 206 (society would be outraged at any attempt to eliminate the privilege); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978) ("[T]he issue concerning the attorney-client privilege is not whether it should exist, but precisely what its terms should be.").

316. 8 J. WIGMORE, *supra* note 1, § 2291, at 554. *E.g.*, Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981) (privilege is strictly construed); Brunner v. Superior Court, 51 Cal. 2d 616, 618, 335 P.2d 484, 486 (1959) (privilege to be strictly construed). *But cf.* People v. Flores, 71 Cal. App. 3d 559, 563, 139 Cal. Rptr. 546, 548 (1977) ("Although it has been suggested to the contrary, the privilege has been and should be liberally construed."); People v. Kor, 129 Cal. App. 2d at 436, 447, 277 P.2d 94, 100-01 (1954) (Shinn, Vallee, JJ., concurring) (privilege should be regarded as sacred).

317. *See* Upjohn v. United States, 449 U.S. 383, 389 (1981) ("Its [the attorney-client privilege] purpose 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."); People v. Meredith, 29 Cal. 3d 682, 690, 631 P.2d 46, 51, 175 Cal. Rptr. 612, 617 (1981) ("The fundamental purpose of the attorney-client privilege is, of course, to encourage full and open communication between client and attorney."); 8 J. WIGMORE, *supra* note 1, § 2290, at 543.

318. *See infra* notes 319-35 and accompanying text.

319. Note, *supra* note 22, at 600-01.

tected, the client might be deterred from consulting with an attorney.[320] Thus, by ensuring confidentiality, the client is not deprived of effective consultation with an attorney.[321] In addition, the client's privacy rights are protected by preventing disclosure of the confidential information without the client's approval.[322] The client, however, is not the only beneficiary of the attorney-client privilege. Full disclosure also aids the attorney by allowing the advice given to be based upon all the relevant facts.[323] Further, the legal profession gains from full disclosure.[324] If the privilege did not exist, fewer individuals would consult attorneys due to a fear that communications could later be disclosed.[325] Society also realizes benefits from the existence of the attorney-client privilege,[326] in that the attorney helps the client comply with the law.[327] The public interest is served if citizens comply with the law, and the result is decreased litigation.[328] Litigation can be avoided since the attorney will be able to judge the client's case on all the merits, not just those the client is unafraid to disclose.[329] Similarly, general knowledge of the law is promoted by the attorney-client privilege.[330] Therefore, clients, attorneys, and society realize significant benefits from the existence of the attorney-client privilege.

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320. *See* cases cited *infra* note 325.

321. In criminal cases, an individual has the right to consult with an attorney. U.S. CONST. amend. VI; CAL. CONST. art. I, § 15; CAL. PEN. CODE § 686.

322. *See, e.g.*, Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach,* 64 GEO. L.J. 613, 651-52 (1976) ("By providing individuals with a tool to control the limits of the dissemination of personal information they choose to disclose, testimonial privileges serve as important protectors of the right of privacy."); *see also* Louisell, *supra* note 157, at 110-11 ("Primarily [privileges] . . . are a right to be let alone, or a right to unfettered freedom, in certain narrowly prescribed relationships. . . ."); *see generally* Article, *supra* note 7, at 1480-83.

323. Note, *supra* note 22, at 601.

324. *See id.* at 601 n.18.

325. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (legal advice can only be safely sought when free from the consequences or apprehensions of disclosure); Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (privilege assures the client that all statements made in seeking legal advice will remain confidential) (quoting United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980)); *In re* Penn Cent. Commercial Paper Litig., 61 F.R.D. 453, 464 (S.D.N.Y. 1973) (basis of the privilege is that confidentiality is necessary to promote the attorney-client relationship); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (privilege is a necessity to induce clients to make communications with attorneys).

326. *See infra* notes 327-35 and *supra* notes 317-25 and accompanying text.

327. *See* Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 640 (S.D.N.Y. 1981) (attorney-client privilege "serves the overall public interest in ensuring adequate legal representation for litigants and encouraging knowledge and compliance with the law.").

328. Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CALIF. L. REV. 487, 491 (1928).

329. *Id.*

330. *Teachers Ins. & Annuity Ass'n,* 521 F. Supp. at 640; *see also* Article, *supra* note 7, at 1505-06.

If a corroborative standard of intent to waive the attorney-client privilege is used, clients will be assured that, under proper circumstances, confidential communications will remain confidential.[331] Clients will not be inhibited from fully disclosing relevant information to the attorney.[332] In addition, with corroborated intent to waive the privilege as the analytical focus in inadvertent disclosure cases, reliability and predictability in court decisions will be enhanced.[333] Moreover, the attorney would be able to accurately advise the client of what should be done to protect the privilege.[334] While the client, the attorney, and society all realize benefits from the privilege, however, the privilege may also result in a cost to society by excluding relevant evidence from the trial.[335]

2. *Concerns Raised by the Attorney-Client Privilege*

Those who would limit the attorney-client privilege usually assert two disadvantages associated with the privilege. The first is that the trier of fact is precluded from viewing evidence that is relevant to the proceeding.[336] This rationale, however, is not compelling. The attorney-client privilege encourages full disclosure of information by guaranteeing that the information will remain confidential.[337] If the privilege did not exist, less information would be disclosed by the client.[338] The United States Supreme Court has stated that operation of the attorney-client privilege puts the adversary in no worse position than if the communication had never taken place.[339] Therefore, the assertion that the attorney-client privilege results in a loss of evidence is unfounded.

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331. *See infra* notes 332-35 and accompanying text.

332. *See* Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982). *See also supra* note 325 and accompanying text.

333. *See supra* notes 240-41 and accompanying text.

334. If predictability in court decisions is enhanced, the attorney will better be able to predict which actions will result in a loss of the privilege. *See supra* note 104 and accompanying text.

335. *See infra* notes 336-44 and accompanying text.

336. *See* Article, *supra* note 7, at 1507-08.

337. *See supra* note 325 and accompanying text.

338. *See* Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 352 (1981). *See also supra* notes 222-24, 317-35, and accompanying text.

339. *Upjohn*, 449 U.S. at 395; *see also* Commission on Professional Responsibility, Roscoe Pound—American Trial Lawyer's Code of Conduct Rule I comment (discussion draft 1980) ("If we were to remove that safeguard [the attorney-client privilege], by permitting lawyers to divulge their clients' confidences, lawyers would come to have few truths to divulge at all."); Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 610 (1980) ("Because the same information might not exist were it not for the privilege, any loss of information when the privilege is upheld may be more imagined than real." (footnotes omitted)).

The second asserted drawback of the privilege is that a dishonest client will seek protection behind the privilege.[340] To prevent this abuse, the crime-fraud exception to the privilege has developed.[341] The exception allows the attorney-client privilege to protect all but those communications intended to further ongoing or future illegal activity.[342] Additionally, while the privilege is required to preserve a client's confidences, an attorney is forbidden from using it to obstruct justice.[343] Attorneys are capable of serving their clients without lying to the courts.[344] Fear that dishonest clients will abuse the privilege is not a significant concern, and therefore should not militate against a requirement that intent be the analytical focus of courts in deciding inadvertent disclosure issues.

CONCLUSION

Since inception, the attorney-client privilege has been regarded as significant, and today the privilege is even more important. The privilege has critics, however, and this dichotomy between proponents and opponents of the privilege has resulted in three approaches to resolving inadvertent disclosure issues. The harshest critics prefer the strict responsibility approach to resolve issues raised by the accidental disclosure of privileged information. The approach, however, is regarded by most judges and commentators as too severe. The analysis of the circumstances approach is advocated by some courts, but the results are unpredictable and unreliable. The third approach advocated by courts focuses on whether the client intended to waive the privilege. California Evidence Code section 912(a), defining waiver of the attorney-client privilege, should be interpreted to require the client's corroborated subjective intent to waive the privilege. Not only is California Evidence Code section 912(a) amenable to the corroborative standard, but the history of section 912(a), as demonstrated by the California Law Revision Commission Reports and California case law,

340. *See* Article, *supra* note 7, at 1508; M. DUMONT, *supra* note 6, at 246-47.

341. CAL. EVID. CODE § 956; *see generally* Article, *supra* note 7, at 1509-14.

342. CAL. EVID. CODE § 956. *See also supra* notes 40 & 98 and accompanying text.

343. CAL. BUS. & PROF. CODE § 6128(a) (attorney guilty of a misdemeanor for any deceit or collusion with intent to deceive the court or any party); *id.* § 182 (conspiracy to obstruct justice is illegal). *See Meredith*, 29 Cal. 3d at 693-95, 631 P.2d at 53, 175 Cal. Rptr. at 619 (privilege should not extend to cases in which counsel has altered or removed evidence).

344. Alschuler, *The Search For Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 79-80 (1982); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1979).

indicates the propriety of the corroborative standard. Analogy to cases of inadvertent disclosure of the physician-patient privilege lends further support to this interpretation. A corroborative standard of intent to waive the attorney-client privilege would promote the purpose and benefits of the privilege, which is regarded as a significant and necessary aspect of our legal system. The importance of the attorney-client privilege demands that the privilege not be waived unless the client has intended to waive the privilege. California courts should therefore use the corroborative standard of intent in determining whether the inadvertent disclosure of confidential communications will act as an implied waiver of the attorney-client privilege under section 912(a).

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