

# ADMISSIBILITY OF FRUITS OF BREACHED EVIDENTIARY PRIVILEGES: THE IMPORTANCE OF ADVERSARIAL FAIRNESS, PARTY CULPABILITY, AND FEAR OF IMMUNITY

ROBERT P. MOSTELLER\*

## I. INTRODUCTION

Imagine that a patient goes to her psychiatrist and in confidence reveals that some years earlier she committed a homicide, describing where she hid the body and the murder weapon. Assume alternatively that the psychiatrist either is careless in discussing the case, gets very drunk, is overcome by concern for the victim,<sup>2</sup> or makes a mistake about the scope of the privilege,<sup>3</sup> and reveals this information to others, including the police. The authorities locate the body and the weapon, which they acknowledge they otherwise would never have found, and they assemble a case against the patient based on the information provided. The psychiatrist is not called as a witness because the government accepts that the evidentiary privilege bars his testimony.

What then of the use of his statement by the prosecution to build its case? What then of the indirect use of the “violation of the privilege”?<sup>4</sup> May the prosecution go forward, or does the defendant have protection against both direct and indirect use of the unauthorized disclosure? Although the case-law discussion is relatively undeveloped, the near

---

1. Chadwick Professor of Law, Duke University. B.A., 1970, University of North Carolina at Chapel Hill; J.D., 1975, Yale University; M.P.P., 1975, Harvard University. I wish to thank Ken Broun, Dan Capra, and Andy Taslitz for their helpful comments on an earlier draft of this Article; participants in the 2002 AALS Conference on Evidence for their reactions when presented my initial research; and Chris Hart for his help as my research assistant.

2. The psychiatrist in *Gruzen v. State*, 591 S.W.2d 342, 349 (Ark. 1979), apparently acted with this motivation.

3. Apparently the psychiatrist in *Commonwealth v. Fewell*, 654 A.2d 1109 (Pa. Super. Ct. 1995), revealed confidential information for this reason. See *infra* note 12.

4. It is entirely unclear that an out-of-court revelation of a confidential communication—covered in court by an evidentiary privilege—constitutes a “violation of the privilege,” although semantically it is often labeled as such. As a matter of formalism, the unauthorized out-of-court disclosure of a confidence is a violation of confidentiality principles, and the in-court admission of a protected confidence is a violation of an evidentiary privilege. Largely because of the unwieldiness of maintaining this distinction, I will generally term the out-of-court revelation a “violation of the privilege.” However, the distinction is real as a matter of doctrinal analysis, and it has consequences in how cases are decided.

universal answer is that there is no protection given to the indirect or derivative use (also termed the “fruits” of the violation) when only an evidentiary privilege is involved. The statement, “no court has ever applied [the ‘fruits of the poisonous tree’] theory to *any* evidentiary privilege,”<sup>5</sup> is a bit of an overstatement, but it is close to accurate.<sup>6</sup>

Surely this answer is not correct, one might think, for the attorney-client privilege. The result may be altered in some situations where lawyers are involved, not because the attorney-client privilege differs in kind as a privilege, but rather because of concerns for unfairness in litigation practices.<sup>7</sup> In civil cases, breaches of attorney-client confidentiality during litigation sometimes result, not only in exclusion of communication, but also in an order prohibiting use of the information obtained from the communication in any way. In criminal prosecutions, provisions of the Constitution under certain fact patterns give protection to attorney-client confidentiality, including the attorney-client privilege, which also prohibits derivative use of the confidential communications.

This Article examines two general conclusions reached by the case law. The first is the general non-protection of derivative use of the disclosure of confidential information covered by evidentiary privileges. The second concerns special situations where protection is sometimes granted. In Part II, I describe a series of cases which show the generally accepted result that out-of-court disclosures of confidential communications are not protected against derivative use. In Part III, I

---

5. *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990).

6. Among the cases other than *Marashi* reaching the result that the fruits of an out-of-court violation of an evidentiary privilege should not be suppressed are: *United States v. Squillacote*, 221 F.3d 542, 558-60 (4th Cir. 2000); *Nickel v. Hannigan*, 97 F.3d 403, 408-09 (10th Cir. 1996); *SEC v. OKC Corp.*, 474 F. Supp. 1031, 1039-40 (N.D. Tex. 1979); *Walstad v. State*, 818 P.2d 695, 700 (Alaska Ct. App. 1991); *Gruzen v. State*, 591 S.W.2d 342, 348-50 (Ark. 1979); *State v. Sandini*, 395 So. 2d 1178, 1180-82 (Fla. Dist. Ct. App. 1981); *Chase v. State*, 706 A.2d 613, 617 (Md. Ct. Spec. App. 1998); *State v. Smith*, 704 A.2d 73, 78-80 (N.J. Super. Ct. App. Div. 1997); *People v. Ward*, 604 N.Y.S.2d 320, 320 (N.Y. App. Div. 1993); *Commonwealth v. Fewell*, 654 A.2d 1109, 1116 (Pa. Super. Ct. 1995). *See also* *United States v. Lefkowitz*, 618 F.2d 1313, 1318 & n.8 (9th Cir. 1980) (finding fruits exclusion inapplicable to privilege for adverse spousal testimony and expressing doubt that violation of confidential marital communications privilege would exclude derivative evidence); *but see* James J. Dalessio, Comment, *Evidentiary Privileges and the Exclusion of Derivative Evidence: Commentary and Analysis*, 26 SAN DIEGO L. REV. 625, 625, 643-47 (1989) (arguing that a minority of courts seem willing to exclude derivative evidence, but basing that conclusion on abstract statements rather than actual results).

7. *People v. Kaiser*, 606 N.E.2d 695 (Ill. App. Ct. 1992), which deals with a violation of the doctor-patient privilege by improper use of a subpoena, is unusual in imposing a remedy against derivative use as to a privilege other than the attorney-client privilege. The case resembles cases in the civil area where the court cures what it considers an affront to judicial control of discovery with a punitive and effective remedy—exclusion of derivative evidence. *See also* discussion in *infra* notes 81-99 and accompanying text.

discuss some of the doctrinal underpinnings of this result. This analysis gives a relatively thin, but perhaps adequate, explanation of why fruits of evidentiary privilege violations are not generally protected. In Parts IV and V, I discuss special situations in which derivative evidence is sometimes excluded.

The analysis in Parts IV and V involves an interesting intersection of doctrines related to privileges, but privilege doctrines *per se* provide little explanation for when fruits of out-of-court violations are excluded. The civil cases examined in Part IV come principally from the area of “inadvertent disclosure” of confidential attorney-client communications involved in complex civil litigation, and the criminal cases discussed in Part V concern primarily situations where the Sixth Amendment right to counsel protects attorney-client communications. As to both sets of cases, two significant factors explain whether derivative uses will be allowed or prohibited: interference with fairness between adversaries in the litigation process and clear responsibility of the adversary either for the initial violation of the confidence or for its purposeful exploitation. As to criminal prosecutions, the restrictive approach to excluding derivative evidence also appears to be motivated by a desire not to saddle the public with the consequences of private violations of rules designed to protect confidential relationships. As a result, courts rarely impose sanctions unless party/governmental responsibility, through some purposeful conduct of law enforcement or prosecutorial officials, makes such action “fair.” Fear of immunity—fear of immunizing criminal conduct as a practical matter if the potentially onerous burden of demonstrating no derivative use of lawyer-client confidences is placed on the government—helps explain judicial reticence to provide for such an expanded remedy.

In Part VI, I summarize the result: evidentiary privileges provide only limited protection for confidential communications, and one of these understandable limitations is that fruits of unauthorized disclosures are not excluded. If a stronger remedy is to be had, a justification in addition to privilege must be found to support protection of the confidence. I also recommend how privilege rules may be drafted to clarify the law as to both fruits and the somewhat related area of reporting requirements.

## II. EXAMPLES IN THE CASE LAW

Several cases provide real-world illustrations of the derivative-use problem.<sup>8</sup> In *Commonwealth v. Fewell*,<sup>9</sup> Vicki Jean Fewell was hospitalized in a mental health facility as a result of severe depression and suicidal ideation following the suffocation death of her four-month-old son.<sup>10</sup> That death had been investigated by the police and ruled accidental. However, during therapy, Fewell told her psychiatrist that she purposefully placed a plastic bag over her son's head to stop his crying.<sup>11</sup>

Although mistaken, her psychiatrist apparently believed that he was statutorily required to report this child abuse<sup>12</sup> and revealed Fewell's incriminating statements to the coroner's office, which changed the manner of death to homicide. Some time later, Fewell was questioned by a police trooper regarding her son's death, and she confessed.<sup>13</sup>

The appellate court found that Ms. Fewell confessed to the trooper only after she knew that her psychiatrist had breached her confidence and that the trooper would never have questioned her had the confidence not been breached.<sup>14</sup> Nevertheless, the court held that Fewell could not exclude her confession under "the exclusionary rule and 'fruit of the poisonous tree'" concepts.<sup>15</sup>

The court noted that Fewell did not claim that she was subjected to any police or government misconduct with respect to the revelation of the

---

8. *United States v. Benner*, 55 M.J. 621 (A. Ct. Crim. App. 2001), as to the opinion of the Army Court of Criminal Appeals, is similar to the other cases discussed in this section. The case involved the erroneous disclosure of child sexual abuse by a military chaplain in violation of the clergy privilege, and the court did not support suppression of derivative evidence—the defendant's confession. *Id.* at 627-29. However, the case was reversed on further review on the grounds that the confession was inadmissible because constitutionally involuntary. *United States v. Benner*, 57 M.J. 210, 213-14 (C.A.A.F. 2002). In reversing the conviction, the majority did not examine the issue of derivative use of the violation of an evidentiary privilege. *Id.* at 213. However, the dissenting judge would have affirmed, *inter alia*, on the basis that the violation of an evidentiary privilege does not support the exclusion of derivative evidence. *Id.* at 214-15 (Crawford, C.J., dissenting).

9. 654 A.2d 1109 (Pa. Super. Ct. 1995).

10. *Id.* at 1111.

11. *Id.*

12. In a related civil case by Fewell against her doctor, the court explained that Dr. Besner was not required to report the suspected abuse because only those who come into contact with abused children are required to report under Pennsylvania's statute. *Fewell v. Besner*, 664 A.2d 577, 579 (Pa. Super. Ct. 1995). However, the court concluded Besner was shielded from civil liability by a provision of a child abuse reporting law that provides immunity for those who report in good faith, *id.* at 579-80, which the court concluded could be found because another child lived in Fewell's home who could have been the victim of abuse. *Id.* at 581.

13. *Fewell*, 654 A.2d at 1111.

14. *Id.* at 1116.

15. *Id.*

privileged information. It reasoned that the exclusionary rule was created to deter future unlawful police conduct and does not apply to evidence obtained by private individuals and turned over to the police.<sup>16</sup> After finding that the trooper's interrogation had not itself violated any statutory or constitutional privilege of the defendant, the court concluded that the confession constituted untainted admissible evidence<sup>17</sup> and sustained her conviction.<sup>18</sup>

The court in *State v. Smith*<sup>19</sup> similarly refused to suppress the confession of a psychiatric patient to hospital medical staff that the patient committed aggravated assault, even though the court assumed that the physician-patient privilege applied to the staff.<sup>20</sup> Smith claimed that his confession to authorities should have been suppressed because it was derived from the revelation of his confidential communication. Among the reasons given by the court for rejecting his claim, the court stated:

Assuming that a member of the treatment team violated the privilege, it is undisputed that the police were blameless. . . . The police in no way violated defendant's privileged communication. Instead, they did no more than investigate the facts brought before them. To punish the police, and the public, for unlawful actions of private citizens would be an unwarranted extension of the exclusionary principles applicable to involuntary confessions.

. . . .

. . . If defendant's confidences were violated by a member of the treatment team, he may sue the offending party. But to conceal

---

16. *Id.* The court in *Gruzen v. State*, 591 S.W.2d 342 (Ark. 1979), used similar analysis. It stated: "The exclusionary rule was developed as a deterrent to unlawful action of police officers. It is not applicable to action by private citizens, even when they inform state officers of matters coming to their knowledge." *Id.* at 349.

17. *Fewell*, 654 A.2d at 1116.

18. *Id.* at 1119. In addition to triggering the investigation, Dr. Besner in fact testified at trial as to the statements made by Ms. Fewell to him. The court found admission of his testimony harmless error given the proper admission of the trooper's testimony. *Id.* at 1117.

19. 704 A.2d 73 (N.J. Super. Ct. App. Div. 1997).

20. *Id.* at 78-80. The revelation came though an anonymous caller to a police detective, who related a conversation she had overheard between a psychiatric patient and a member of the hospital medial staff in which the patient admitted to an assault. *Id.* at 75. Because the person revealing the communication was unidentified, the court was unable to determine whether that person was a member of the treatment team, who violated a duty of confidentiality, or instead was an interloper/eavesdropper who overheard the conversation and whose revelation might not be considered a violation of the privilege. *Id.* at 79. In rejecting the defendant's claim, the court assumed that the physician-patient privilege had been violated. *Id.* at 80.

evidence of defendant's guilt to the end that he may escape conviction would constitute a serious insult to the judicial process.<sup>21</sup>

In *Walstad v. State*,<sup>22</sup> the court reached this same conclusion—that fruits of intercepted confidences protected in some instances by both the psychotherapist-patient and clergy privileges should not be excluded—but it offered a different rationale. Therran Walstad revealed child sexual abuse during counseling to a minister and certified counselor, William Webb, who reported the abuse to the authorities.<sup>23</sup> As a result of the report, Alaska state troopers began an investigation, which culminated in the successful prosecution of Walstad. He moved to suppress all the evidence obtained by the troopers because it resulted entirely from the minister/counselor's disclosure of privileged information, which he contended “was tainted and subject to suppression as a fruit of the poisonous tree.”<sup>24</sup>

The court rejected Walstad's contention principally<sup>25</sup> because it concluded that the scope of *evidentiary* privileges did not cover the out-of-court revelation of his confidences.<sup>26</sup> It ruled that privileges are of a “limited, testimonial nature” and “are not intended to restrict or govern communications between persons in general, but are instead meant to regulate disclosures occurring in the context of civil or criminal proceedings.”<sup>27</sup> Since the report was an out-of-court statement that was not

---

21. *Id.* at 80; *see also* United States v. Seiber, 31 C.M.R. 106, 109-10 (C.M.A. 1961) (ruling that evidence derived from voluntary submission by defendant's spouse of information covered by marital confidential communications privilege was admissible because there was no misconduct by government agents); State v. Sandini, 395 So. 2d 1178, 1180 (Fla. Dist. Ct. App. 1981) (ruling that derivative evidence should not be excluded as to information provided by attorney regarding his client that formed basis for probable cause in part because the police engaged in no “misconduct” but rather were passive recipients for whom deterrence was not appropriate).

22. 818 P.2d 695 (Alaska Ct. App. 1991).

23. *Id.* at 696.

24. *Id.* at 697.

25. The court also expressed some doubt whether, even if an evidentiary privilege had been violated, the “fruit of the poisonous tree” doctrine should be applied. It quoted with apparent approval a statement from Weinstein's treatise that “[i]f the government was a party to the improper breach and a constitutional privilege was involved the legal fruits doctrine will apply. In other instances the court has some discretion. Generally it will admit, bearing in mind the general policy in favor of truth rather than exclusion.” *Id.* at 699 n.6 (quoting 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 512[02] (1991) (footnote omitted)).

26. *Walstad*, 818 P.2d at 669-700. Whether laws requiring reporting of child abuse abrogated the physician-patient privilege was a matter of some uncertainty, which the court concluded it did not need to resolve given that the appeal dealt only with the evidence gathered as a result of the disclosure and given the court's limited construction of the scope of the privilege. *Id.* at 699 n.5.

27. *Id.* at 698. One part of the justification given by the court for this result was that the rules were promulgated by the state Supreme Court as part of its authority to ““make and promulgate rules governing practice and procedure in civil and criminal cases,”” *id.* at 697 (quoting ALASKA CONST. art.

related to “any action, case or proceeding then pending,” the court concluded that

[A]lthough it divulged confidential communications between Walstad and Webb, the report did not amount to a violation of the psychotherapist-patient or communications with clergy privileges. In the context in which Webb’s report was made, neither privilege attached. Because Webb’s report violated no privilege, the fruits of his report were not tainted by the violation of a privilege.<sup>28</sup>

*Nickel v. Hannigan*<sup>29</sup> presented a similar fact pattern but this time involved revelations of confidences by an attorney.<sup>30</sup> Willie Nickel, after a fight with his employer, went to the office of Dan Boyer, an attorney who had previously represented him in various matters. In the course of his conversation with the attorney, Nickel confessed to killing a woman and disclosed where he had buried the body.<sup>31</sup> After further conversations with Nickel and his employer and after Nickel had left his office, the attorney called the police and reported that Nickel had possibly committed a homicide, a crime of which the police were entirely unaware.<sup>32</sup> The

---

IV, § 15), which limited the impact of the rules established under “the court’s procedural rulemaking authority,” *id.* at 697-98, to the judicial realm. This explanation may limit the impact of this ruling to jurisdictions where evidentiary rules are established pursuant to limited judicial rulemaking power. However, the court also relied on the language of the rules, which mirror the federal rules language, in that they are applicable “in all proceedings in the courts of the State of Alaska,” ALASKA R. EVID. 101(a), and “at all stages of all actions, cases, and proceedings,” ALASKA R. EVID. 101(b), in finding that the out-of-court revelation was not a part of a covered proceeding. *Walstad*, 818 P.2d at 698.

28. *Walstad*, 818 P.2d at 699; *see also* *Chase v. State*, 706 A.2d 613, 616 (Md. Ct. Spec. App. 1998) (ruling that information privileged as confidential marital communications was properly used to provide probable cause for search since privilege only applied to “witnesses in judicial proceedings, and not to police investigations of criminal activity”); *but cf.* *Muetze v. State*, 243 N.W.2d 393, 397-99 (Wis. 1976) (ruling that under evidence rules privileges are specifically applicable to search warrants and that statements of spouse of confidential marital communications were improperly included in warrant affidavit).

The court in *People v. Ward*, 604 N.Y.S.2d 320 (N.Y. App. Div. 1993), also rejected an effort to exclude “fruits” of revelation of confidential information covered in court by an evidentiary privilege using similar analysis. It stated that “the ‘clergyman-penitent’ privilege is an evidentiary rule proscribing the revelation of privileged communications at a trial when the privilege is asserted by the protected party . . . . Here, revelation of defendant’s confession to the police provided probable cause for her arrest and subsequent prosecution.” *Id.* at 320 (citation omitted).

29. 97 F.3d 403 (10th Cir. 1996).

30. *Id.* at 405; *see also* *State v. Sandini*, 395 So. 2d 1178, 1180-81 (Fla. Dist. Ct. App. 1981) (refusing to apply fruits rationale to disclosure of information violating the attorney-client privilege but not the Sixth Amendment right to counsel).

31. *Nickel*, 97 F.3d at 405.

32. *Id.*

attorney later advised Nickel to go to the police station, which he did. While there, Nickel confessed to the murder.<sup>33</sup>

The district court concluded that at the time of his confession to attorney Boyer, Nickel had no Sixth Amendment right to counsel,<sup>34</sup> and, as a result, his disclosures could not constitute ineffective assistance of counsel.<sup>35</sup> Although Nickel did not dispute that conclusion on appeal, he did contest the violation of attorney-client privilege through another avenue. He challenged the failure of his trial lawyer both to move to suppress his confession to the police on the grounds that “it was ‘directly traceable to Boyer’s violation of attorney-client privilege,’”<sup>36</sup> and to object on grounds of privilege to the testimony of the attorney.<sup>37</sup>

The court of appeals rejected both arguments, albeit with little analysis of the justifying rationale. It held that the confession was not suppressible as a “fruit of the poisonous tree,” and as a result, the failure to object to Boyer’s testimony was not consequential because, even if suppressed, Nickel’s confession to the police detective would have been admissible.<sup>38</sup> The court stated:

[A]lthough Mr. Nickel’s confession to [the police detective] could be considered the result of Mr. Boyer’s breach of Mr. Nickel’s attorney-client privilege in reporting Mr. Nickel to the police, there is no indication that [state law, here the law of Kansas] requires the exclusion of all evidence derived from a breach of an attorney-client privilege. Further, other courts have refused to apply such a broad evidentiary rule of exclusion to breaches of privilege.<sup>39</sup>

In reaching the conclusion that “fruits” should not be suppressed, courts cite the admonition that, since privileges “undermine the search for the truth,”<sup>40</sup> they should be “strictly construed.”<sup>41</sup> In one form or another,

---

33. *Id.*

34. *Id.* at 407. This conclusion is clearly correct under Sixth Amendment doctrine as developed by the United States Supreme Court. *See* discussion *infra* notes 189-90 and accompanying text.

35. *Id.* at 407.

36. *Id.* at 409 (quoting Nickel’s brief).

37. *Id.* at 407.

38. *Id.* at 409. In addition, it found that statements of another person (Susan Perret) to whom Nickel confessed before he spoke to attorney Boyd would have been admissible. *Id.* at 409.

39. *Id.* at 409 (quoting the broad statement from *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) that “no court has ever applied [the “fruits of the poisonous tree”] theory to any evidentiary privilege.” (alteration in original)). In part, the result in some federal cases may be explained by the fact that they are reviewing convictions in state court and the evidentiary privilege involved is a matter of state law, which does not present a constitutional issue that can be reviewed by the federal court.

40. *See, e.g., State v. Smith*, 704 A.2d 73, 80 (N.J. Super. Ct. App. Div. 1997).



they frequently acknowledge Dean Wigmore's admonition of caution against broadly applying privileges:

[T]he [attorney-client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.<sup>42</sup>

### III. THE DOCTRINE OF EVIDENTIARY PRIVILEGES AS APPLIED TO "FRUITS"

#### A. *A Tradition of Narrow, Cautious Formulation*

One reason for the limited remedy for violation of evidentiary privileges, indeed a major reason, is formalistic. The general scope of an evidentiary privilege is to exclude evidence at trial. As Judge Posner observed, the defendant could prevent "the admission of any testimony . . . that violated the attorney-client privilege—that is what an evidentiary privilege *means*."<sup>43</sup>

In the example cases described in the preceding section, the indirect use of the confidential information arguably presented no violation of these *evidentiary* privileges because such privileges apply only to the admission of the communication when offered in a judicial proceeding. Prohibited direct use of the protected communications was not at issue.<sup>44</sup>

41. *See, e.g.*, United States v. Squillacote, 221 F.3d 542, 560 (4th Cir. 2000) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

42. 8 WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. 1961) [hereinafter 8 WIGMORE].

43. United States v. White, 879 F.2d 1509, 1513 (7th Cir. 1989). In the case, however, the communications themselves had not been introduced in evidence, and Judge Posner noted that "it is far from clear that the proper remedy for a violation of the attorney's duty of confidentiality is exclusion from the client's criminal trial of probative evidence obtained as an indirect consequence of that violation." *Id.*

44. There is both a similarity and a clear distinction between the concept developed here and that described in the plurality opinion of Justice Thomas in *Chavez v. Martinez*, 123 S. Ct. 1994 (2003). There Justice Thomas argues that no Fifth Amendment violation occurs until evidence is introduced in court despite the presence of compulsion in producing the statement outside of the courtroom. He argues that it is the admission of evidence that completes the constitutional violation when the defendant is made to be a "witness" against himself in violation of the Fifth Amendment. *Id.* at 2003. He considers that something must be admitted; he did not relate his opinion at all on whether that something had to be the words uttered by the defendant or could be satisfied as well by an indirect use of his statement.

Consistent with Justice Thomas' argument, I accept that an evidentiary privilege is not violated until the communication is admitted at trial. Thus, if nothing is admitted, the privilege is not violated. Justice Thomas does not take a position on the issue that would be of most relevance to this Article,

The professionals who received the communications were never called as witnesses, and the communications by the client were not offered in evidence. At least superficially, the out-of-court disclosure of the communication does not violate an evidentiary privilege, which has the important, but limited, purpose of allowing the privilege's holder to exclude the privileged communication when it is offered in evidence.<sup>45</sup>

This narrow application of a privilege was taken as a given by the United States Supreme Court in *Trammel v. United States*.<sup>46</sup> The case dealt with the somewhat unusual and restricted "privilege against adverse spousal testimony"<sup>47</sup> as to which limiting the privilege to excluding courtroom testimony is particularly defensible.<sup>48</sup> Instead of confining its

---

which is whether only admission of the communication itself violates the privilege or whether admission of indirect evidence is sufficient.

45. While other policies may support further sanctions, analyzed in terms of privilege theory alone, evidentiary privileges only prevent a witness from being compelled to disclose the communication in judicial proceedings (and perhaps if otherwise legally compelled). Evidentiary privileges do not typically speak to the disclosure of communications outside judicial settings. An unjustified disclosure if done by a professional authorized to receive privileged communications will frequently violate rules of professional responsibility. Such disclosures may in limited circumstances waive the privilege, but as a matter of orthodox privilege analysis, they do not constitute a violation of the privilege, which concerns conduct in judicial proceedings.

46. 445 U.S. 40 (1980).

47. *Id.* at 43. Two distinct privileges cover marital communications. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 5.31 & 5.32 (3d ed. 2003) [hereinafter MUELLER & KIRKPATRICK]. The one involved in *Trammel*, which bears little resemblance to any of the other evidentiary privileges treated in this Article, creates an "immunity" from testifying by one spouse as to communications of the other. It is not focused on protecting confidential communications and indeed does not require that the communications be confidential when made. Instead it focuses on allowing the spouse to avoid testifying against his or her spouse. As to this privilege, it is particularly appropriate not to recognize a violation when one spouse reveals communications of the other spouse to authorities outside of the courtroom. The privilege is about preventing the forced testimony of one spouse against the other in court. That is fully preserved if derivative evidence is admitted.

The other marital privilege, not at issue in *Trammel*, protects confidential marital communications. It is similar in theory and operation to the other evidentiary privileges discussed in this Article in being focused on protecting confidential communications. The issue of whether an evidentiary privilege should prohibit admission of evidence derived from out-of-court revelations is the same here as with those other privileges.

48. Cases such as *United States v. Winfree*, 170 F. Supp. 659 (E.D. Pa. 1959), allow out-of-court use of statements by one spouse against another that would have been excluded under spousal immunity if they were offered at trial. *Id.* at 660. This privilege is a form of testimonial incompetency. *See Muetze v. State*, 243 N.W.2d 393, 398-99 (Wis. 1976) (ignoring out-of-court use is conceptually easy since it is designed to prevent the destructive impact to the marriage of requiring testimony). *See also Winfree*, 170 F. Supp. at 660 n.2 (quoting *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (Black, J.)). A broader set of considerations come into play when the marital privilege at issue is based on confidential communications. *See Muetze*, 243 N.W.2d at 398-99 (arguing that continued protection is needed for marital confidential communications for the general benefit of marriages even if the spouse involved in the specific case had disclosed the communication outside of court). The result with respect to admission of derivative evidence may not change when this second privilege is

discussion to that particular privilege, the Court appeared to give a more general description of evidentiary privileges as only restricting in-court testimony and not at all barring the securing of information outside the testimonial setting. It stated:

It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.<sup>49</sup>

At least part of the explanation for why *evidentiary* privileges do not require suppression of evidence derived from their "violation" is located in this courtroom-focused formalism. The privilege is designed to exclude communications, and its focus is on excluding such communications when they are offered in testimony at trial or some other proceeding. Disclosures of confidences outside the courtroom are not the primary concern of privileges. Outside the courtroom setting, people covered in court by privileges make countless numbers of decisions to disclose or not to disclose their private communications. This out-of-court conduct is concerned with a broader and somewhat different concept of confidences,<sup>50</sup> which underlies evidentiary privileges to be sure but nevertheless remains a broader and different concept.

This formalism is also a good starting point for analyzing the traditional limitation that derivative evidence is not excluded as a result of a violation of evidentiary privileges, or perhaps more properly, a violation of confidences protected by the privilege if offered at trial. At one level, by definition, no evidence is derived from a violation of the privilege because a confidence, not the privilege, is violated. No violation of the

---

involved. See *United States v. Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir. 1980); *State v. Kerr*, 531 S.W.2d 536, 541 (Mo. Ct. App. 1975) (ruling that spouse's tip to police may be used to support search even if confidential communications are involved). However, this result requires the rejection of a set of instrumental concerns regarding the revelation of confidential communications on marital harmony not directly implicated by the differently focused privilege that governs adverse spousal testimony.

49. *Tramell*, 445 U.S. at 52 n.12; see also *State v. Rush*, 456 S.E.2d 819, 823 (N.C. 1995) (construing the spousal privilege to cover only protection from being compelled to testify and not statements made out of court and offered in evidence by another witness).

50. MUELLER & KIRKPATRICK, *supra* note 47, § 5.2 (discussing the important distinction between confidences and privileges).

privilege occurs until the communication is offered and received in evidence, which we are assuming never occurs.<sup>51</sup>

At another level, this explanation cannot or should not be totally correct because, if played out fully, privileges would have little meaning. They would have little value in encouraging free communication outside the courtroom if they applied only in the courtroom, and the underlying confidential communications could be uncovered with impunity anytime and in any way imaginable outside the courtroom. In other words, confidential communications could hardly be expected to be made freely if the party receiving the confidence could be routinely compelled to disclose them, and if despite such compulsion, every use of the evidence other than actual testimony were permissible.<sup>52</sup>

For the erosion in privileges to become serious, however, the threat of uncovering communications out of court would need to be, or at least be perceived to be, somewhat substantial or beyond the control of the communicating parties. One reason protecting privileges by prohibiting testimony but not prohibiting nontestimonial use of disclosed confidences does not have the devastating result of impairing confidential communication is that our laws do not provide many mechanisms to force disclosure of confidences that do not involve judicial proceedings.

I have noted elsewhere that mandatory reporting laws for suspected child abuse are an exception to that general pattern.<sup>53</sup> These laws create a legal duty to promptly report information, often enforced by criminal

---

51. Professor Ed Imwinkelried states the point in the context of the attorney-client privilege as follows:

Technically, the evidence proffered at trial is neither privileged nor the product of a privilege violation. To begin with, the evidence is not itself privileged. On its face, the testimony introduced at trial does not explicitly describe a [confidential] communication between the attorney and client. . . . Furthermore, the proffered testimony is not the product of a privilege violation. The testimony is the product of a breach of confidentiality that occurred out of court. . . . Because the attorney does not make the statement in court subject to compulsory process, the privilege itself is inapplicable.

1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.6.6, at 617-18 (2002) [hereinafter 1 IMWINKELRIED]; *see also* Wharton v. Calderon, 127 F.3d 1201, 1205 (9th Cir. 1997) (“The attorney-client privilege . . . is an *evidentiary* privilege—it protects against the compelled disclosure in court, or in court-sanctioned discovery, of privileged communications. It is not a roving commission to police voluntary, out-of-court communications.”).

52. Privilege laws protect against being compelled to disclose the communication when that compulsion occurs in the form of testimony at a judicial proceeding. Whether privilege laws should cover legally compelled disclosures in other contexts, such as required reporting, is a question discussed in the Conclusion, *infra* Part VI.

53. Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 226, 275-76 (1992) (noting the rarity of laws in the United States requiring the reporting of criminal conduct) [hereinafter Mosteller].

penalty for non-compliance.<sup>54</sup> Privilege laws, traditionally creatures of common law, are typically not prepared to deal with reporting requirements. Their general scope does not cover out-of-court-required reporting, and typically, they make no specific reference to their applicability to such required reports. However, the traditional limitation is changing or may easily be altered as privilege laws become part of legislatively enacted codes and as some legislatures decide explicitly to extend or not to extend the protection of privilege to cover reporting obligations.<sup>55</sup>

The threat posed by out-of-court disclosures to the effectiveness of privileges is further moderated by the principle that privileges are not waived when the privileged material is disclosed under compulsion or without an opportunity for the holder to claim the privilege. For example, Rule 512 of the Proposed Federal Rules of Evidence declares that the privilege is not waived under these circumstances. In the Advisory Committee's Note, the drafters list "disclosure by an eavesdropper, by a person used in the transmission of a privileged communication, by a family member participating in psychotherapy, or privileged data improperly made available from a computer bank" as "illustrative possibilities" of situations in which there is no opportunity to claim the privilege.<sup>56</sup>

However, that such disclosures do not waive the privilege does not resolve the issue of whether the use of information derived from their out-of-court disclosure may be excluded. On that issue, the Proposed Federal Rules and the Uniform Rules of Evidence, which produce the same

---

54. *Id.* at 212-13.

55. A number of states explicitly address whether privilege laws provide an excuse for not reporting child abuse. Some of them do so in the reporting statutes. For example, Oregon provides that psychiatrists, psychologists, and members of the clergy are not required to report abuse if learned through a privileged conversation and that attorneys are not required to report client confidences. OR. REV. STAT. § 419B.010 (2001). North Carolina does not require reporting when the "knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case." N.C. GEN. STAT. § 7B-310 (2003). The Rhode Island reporting statute makes clear that, except for the attorney-client privilege, privileges do not constitute grounds for failure to report suspected child abuse. *See* R.I. GEN. LAWS § 40-11-11 (1997). Oklahoma reporting law specifies that no privilege shall relieve any person of the obligation of reporting. 10 OKLA. STAT. tit. 10, § 7103(A)(3) (1998). Connecticut spells out the result in its privilege law instead. For psychologists it creates an exception to the privilege that permits reporting "[i]f child abuse . . . is known or in good faith suspected." CONN. GEN. STAT. ANN. § 52-146(c)(4) (West Supp. 2003). As discussed in the Conclusion, *infra* Part VI, I believe explicit resolution of the issue is to be preferred, and I argue that the better way to reach this result is through provisions in reporting laws rather than general exceptions in the laws regulating privileges.

56. Advisory Committee's Note to Proposed Federal Rule of Evidence 512, 56 F.R.D. at 260.

result,<sup>57</sup> are silent. Nevertheless, the protection against derivative use of confidences could easily be made a part of this doctrine if such protection were deemed appropriate. Rules enforcing privileges could be redrafted to establish that, not only would the privilege not be waived, but also any use of the confidential communication disclosed under compulsion or without an opportunity for the holder to claim the privilege would be excluded as part of the concept of non-waiver.

However, that expansive view of privilege has not been the path of recent legal development codifying rules of evidence. Current trends are likely influenced by history. It was not part of the common-law tradition regarding evidentiary privileges. The common-law position on this subject may in turn have been influenced by a related narrow view of the protection of the privilege for eavesdroppers.

At least as described and shaped by Wigmore, the common-law position was that conversations overheard by eavesdroppers were not protected by the privilege, and the same rule applied to one who surreptitiously read or obtained a privileged document.<sup>58</sup> The McCormick treatise argues that this view, which was based in part on the concept that once the confidence is disclosed the privilege has no remaining legitimate function to perform, is inconsistent with sound policy and that under a more modern view some voluntary action that disclosed the confidence is generally required to “waive” the privilege.<sup>59</sup> Nevertheless, under the older, rougher view, there was less potential conflict between protecting the communication in court and formally ignoring out-of-court use of disclosed confidences. In many situations, disclosures outside the courtroom were considered entirely outside the privilege, unprotected, and indeed themselves admissible.

However, Wigmore’s view did not come out squarely against maintaining the privilege in the situations described at the beginning of

---

57. UNIF. RULES OF EVIDENCE R. 510(b) (amended 1999), 13A U.L.A. 98 (Supp. 2003-2004) (establishing that privileges are not waived by a disclosure that was “compelled erroneously or made without an opportunity to claim the privilege”).

58. 8 WIGMORE, *supra* note 42, § 2326, at 633-34. The McCormick treatise describes a similar rule for the privilege for confidential marital communications under which the privilege is lost where statements are overheard or documents mis-delivered. 1 MCCORMICK, EVIDENCE § 82, at 333 (5th ed. 1999) [hereinafter 1 MCCORMICK]. However, concern about “sophisticated eavesdropping techniques has led to curbs upon the admissibility” of such overheard communications in some jurisdictions. *Id.* at 335.

59. 1 MCCORMICK, *supra* note 58, § 93, at 372-73; *see also* 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:26, at 68 (2d ed. 1999) [hereinafter RICE] (ascribing the older view to the argument that the client had not used sufficient efforts to prevent overhearing and attributing the change in the law to a different modern view about confidentiality).

this Article where the person receiving the communication purposefully conveyed it to another. As to marital confidences, Wigmore argued that the privileged communication could not be introduced where the disclosure was made with the cooperation of a marital partner.<sup>60</sup> Likewise, if the attorney betrayed the interest of the client and purposefully communicated the information, the privilege was not breached.<sup>61</sup> Maintaining the privilege when the communication was offered in court was, however, as far as his preservation argument went. Given that the privilege was accepted as completely lost unless the marital partner cooperated in the disclosure or the attorney betrayed the client's interest, the privilege concept probably could not have been assumed to provide the type of muscular protection needed to prohibit derivative use of the disclosed confidence when connivance or betrayal meant that the privilege was not destroyed. Whether or not these areas of privilege analysis are formally linked, there are certainly no indications that derivative protection was assumed to be part of our common-law tradition.

In sum, privileges are indeed doctrinally focused on the courtroom and on the regulation of evidence offered there. Traditionally, they were not seen as having such a broad application as to routinely regulate confidential communications outside the courtroom.

#### *B. The Theory of Exclusion of Derivative Evidence of Constitutional Violations*

An evidentiary privilege contains an implicit limited exclusionary rule: it excludes from evidence testimony covered by the privilege. The communication is excluded despite unauthorized out-of-court disclosure by the person to whom the statements were made.<sup>62</sup> The issue in this Article is thus not whether privileges should exclude evidence but whether

---

60. 8 WIGMORE, *supra* note 42, § 2339, at 668 (arguing that oral communications remain privileged when conveyed by the other spouse to a third party because the privilege belongs to the spouse who uttered the protected communication and that written communications should remain privileged when voluntarily delivered by the addressee spouse to a third party, "for otherwise the privilege could by collusion be practically nullified for written communications"); *see also* 1 MCCORMICK, *supra* note 58, § 82, at 335 (reaching identical conclusion); *Muetze v. State*, 243 N.W.2d 393, 399 (Wis. 1976) (stating that "[m]arital confidences would not be meaningful if a spouse could decide to reveal the confidence to a third person and thereby destroy the protection of the privilege").

61. 8 WIGMORE, *supra* note 42, § 2325, at 632.

62. UNIF. RULES OF EVIDENCE R. 510(b) (amended 1999), 13A U.L.A. 98 (Supp. 2003-2004) (stating black-letter principle that privileges are not waived by a disclosure that was "made without an opportunity to claim the privilege").

the “exclusionary rule” should go further and cover evidence derived from the unauthorized out-of-court disclosure.

The law does provide a clear example of derivative protection. The exclusionary rule courts apply to violations of the United States Constitution suppresses derivative evidence, often called the “fruit” of such violations. In determining whether the same treatment should be applied to violations of evidentiary privileges, a brief examination of the theory underlying general constitutional exclusionary principles may prove helpful.

The origin of the constitutional principle of suppressing derivative evidence lies in *Silverthorne Lumber Co. v. United States*.<sup>63</sup> There Justice Holmes stated the now-familiar words: “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”<sup>64</sup> In *Nardone v. United States*,<sup>65</sup> the Court stated an instrumental justification for the principle that has developed further in exclusionary-rule jurisprudence: “To forbid the direct use of methods . . . but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty.’”<sup>66</sup> On the other side of the instrumental justification is the familiar argument of the “general need for untrammelled disclosure of competent and relevant evidence.”<sup>67</sup>

In addition, when suppression of evidence in a criminal prosecution is involved, both other constitutional principles<sup>68</sup> and the basic theory of deterring future governmental violations require that the initial violation be the government’s responsibility. The Court in *Silverthorne Lumber Co.* itself recognized the importance of the government’s responsibility.<sup>69</sup> Fundamental to suppressing fruits is a deterrence rationale that the derivative evidence should generally be suppressed to deter the government from future violations of constitutional rights.<sup>70</sup>

---

63. 251 U.S. 385 (1920).

64. *Id.* at 392.

65. 308 U.S. 338 (1939).

66. *Id.* at 340 (quoting *Nardone v. United States*, 302 U.S. 379, 383 (1937)).

67. *Elkins v. United States*, 364 U.S. 206, 216 (1960).

68. *See, e.g.*, *Burdeau v. McDowell*, 256 U.S. 465 (1921) (holding that private party search does not violate Fourth Amendment prohibition).

69. *Silverthorne Lumber Co.*, 251 U.S. at 391, 392 (stating that the case was “not that of knowledge acquired through the wrongful act of a stranger,” but one involving “knowledge gained by the Government’s own wrong”).

70. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 908-13 (1984) (discussing the central place the deterrence rationale holds in suppression of evidence obtained in violation of the Fourth



*C. Theory of Derivative Protection Related to Evidentiary Privilege Violations*

Assuming there is a way to move beyond the formal problem that disclosure of information outside the courtroom does not constitute an evidentiary privilege violation (as discussed earlier in this section), then both normative and instrumental questions must be addressed to determine whether derivative evidence should be suppressed. These questions include: whether the values protected by privileges are important enough that they should be protected by this stronger remedial measure; and whether a “suppression remedy” that excludes fruits of privilege violations is necessary to achieve important policy interests protected by these privileges.

Relatively little has been written regarding whether the values behind evidentiary privileges merit such protection. One district court baldly concluded that, with respect to protection of fruits, they do not: “The ultimate truth is that the attorney-client privilege does not enjoy that level in the hierarchy of values . . . .”<sup>71</sup> No one has yet made a counter-argument. Sometimes privileges are linked to concepts of privacy, which has a constitutional element,<sup>72</sup> but privileges cover interests beyond privacy. Quantifying the importance of the policies behind evidentiary privileges is a difficult task, but it is easy to conclude that they do not occupy the same high level of the constitutional protections afforded criminal defendants under the Bill of Rights.

Professor Ed Imwinkelried, using a non-instrumental rationale for the privilege, has provided an argument for why the attorney-client evidentiary privilege should not be treated in the same way as a constitutional violation. He contends that the privilege should rest on an “autonomy-based humanistic theory,” which is intended to provide a “non-constitutional means of protecting a person’s right to autonomous decision-making” and under which protection of fruits would likely not be granted.<sup>73</sup> As distinct from a theory that the attorney-client privilege is based on “informational privacy,” which would likely suggest constitutional protection for the communication, his view of the basis of

---

Amendment).

71. SEC v. OKC Corp., 474 F. Supp. 1031, 1040 (N.D. Tex. 1979).

72. See, e.g., Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (finding privacy right to protect sexual acts between consenting adult males in private); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965) (ruling constitutional privacy concern to make decision about contraception).

73. 1 IMWINKELRIED, *supra* note 51, § 6.6.6, at 618.

the attorney-client and other evidentiary privileges does not logically support suppression of derivative evidence associated with constitutional violations.<sup>74</sup>

Professor Paul Rice argues in a limited fashion that the attorney-client privilege should include protection against derivative use:

Even though the attorney-client privilege is not directly guaranteed by the U.S. Constitution, the logic of the derivative evidence rule could justify the exclusion of evidence discovered by violations of the . . . privilege absent constitutional implications. . . . In principle, as a matter of judicial discretion, the purposes underlying the . . . privilege and the importance of the privilege to our adversarial system could justify the same protection. Although the privilege is not guaranteed by the constitution, it gives life and meaning to constitutional guarantees and should assiduously be protected with the same rigor and by the same remedies.<sup>75</sup>

As to the attorney-client privilege, Rice argues that its violation should be treated as would a constitutional violation when that privilege supplements those constitutional protections. Thus, his argument is not for derivative protection for evidentiary privileges in their own right but when evidentiary privileges are acting in aid of constitutional rights. Moreover, he recognizes that this expansive remedy should not be automatic but should be exercised as a matter of judicial discretion.<sup>76</sup>

Professor Rice's argument is certainly tenable.<sup>77</sup> It is basically an argument for extension of the protection, recognized at least theoretically

---

74. *Id.* at 618-19.

75. RICE, *supra* note 59, § 10:10, at 56.

76. *Id.* In making the argument Professor Rice cites *United States ex rel. Shiflet v. Lane*, 815 F.2d 457 (7th Cir. 1987), and *United States v. White*, 879 F.2d 1509 (7th Cir. 1989), cases where the expanded remedy would be appropriate. The court in *Shiflet v. Lane* found no due process violation because, although a defense investigator provided privileged information to the police, the government conduct was not considered sufficiently egregious. 815 F.2d at 465-66. In *White*, after remand, the court of appeals agreed with the district court that no privileged information obtained from the defendant's prior attorney had been used at trial and that the defendant had shown no substantial prejudice. *United States v. White*, 950 F.2d 426, 431-32 (7th Cir. 1991). Contrary to Professor Rice's statement in his treatise that the court had found that confidential communications from White's former attorney had "provided leads to evidence that the government did use," RICE, *supra* note 59, § 10.10, at 56 (quoting *White*, 879 F.2d at 1513), the court made no such finding. Rather, in remanding the case, the court speculated that "some of them [the arguably privileged documents] may, for all that appears, have provided leads to evidence that the government did use." *White*, 879 F.2d at 1513 (emphasis added).

77. Professor's Rice's argument is not inconsistent with my approach in criminal cases. I believe the Due Process Clause can handle the most meritorious cases, and unlike Professor Rice, I find it difficult to justify an exclusion of derivative evidence in criminal cases if the Constitution is not

by courts under the Due Process Clause,<sup>78</sup> which he would apparently apply to a somewhat larger, but undefined, set of cases. It also offers some justification for distinguishing in most situations the attorney-client privilege from other privileges. However, his argument for occasional special treatment of the attorney-client privilege does not cover the attorney-client privilege generally but rather depends on a more specific examination of the need for fairness in the criminal litigation process as it implicates constitutional protections.

The second inquiry is instrumental. The principal concerns are whether failure to exclude derivative evidence will encourage violations and thereby undermine the goals supported by these privileges, and whether alternative remedies such as civil liability or disciplinary sanctions are adequate when professionals are involved.<sup>79</sup> The answers to these questions, which are empirical in nature, are not entirely clear. However, there is no evidence of any major erosion of the effectiveness of privileges as a consequence of the denial of exclusion of fruits and thus no strong indication that a change in the law is required based on instrumental reasons.

Party culpability may play an important role here. We know from the suppression of derivative evidence when a constitutional violation is involved that unless the government is an active agent in some fashion, the Constitution does not support a remedy. We will see in later sections that a similar rule of thumb appears to be used when derivative evidence is suppressed in the civil context. These outcomes are likely supportable for instrumental reasons. Where the opposing party is responsible, indeed culpable, for the disclosure of the confidence, exclusion of not only the direct evidence but also the indirect benefits of the breach of confidentiality may be important to discourage actions eroding privileges in the future. In criminal cases, such party responsibility would require active governmental involvement, which was not present in the example cases discussed in Part II.

---

directly violated. However, like Professor Rice, I suggest a somewhat broader application of due process and thereby would reach a result not very different than what he seems to be advocating. *See infra* Part VI.

78. *See* discussion of due process cases *infra* in Part V.D.1.

79. *See* *State v. Sandini*, 395 So. 2d 1178, 1181 (Fla. Dist. Ct. App. 1981) (concluding that alternative remedies are not clearly inadequate to deter claimed emasculation of attorney-client privilege); *State v. Smith*, 704 A.2d 73, 80 (N.J. Super. Ct. App. Div. 1997) (arguing that rather than suppression of fruits, the defendant's remedy is to sue members of the treatment team who may have violated his physician-patient privilege).

#### IV. EXCLUDING “FRUITS” IN CIVIL CASES TO CONTROL JUDICIAL PROCEEDINGS, SANCTION VIOLATIONS OF ADVERSARIAL FAIRNESS, AND PROTECT JUDICIAL AUTHORITY

In contrast to the introductory group of (criminal) cases, where courts uniformly refuse to prohibit derivative use of privileged communications acquired out of court, courts in another group of (civil) cases sometimes prohibit derivative use of confidential materials that are “improperly” obtained. A common example is found when materials covered by the attorney-client privilege are inadvertently or purposefully obtained by opposing counsel. Courts frequently order their exclusion and sometimes prohibit indirect use of the documents obtained as well.<sup>80</sup>

##### A. *Judicial Power To Impose Remedies for Violations of Information-Disclosure Procedures*

One element of exclusion of derivative use rests on concerns of the type announced in *In re Shell Oil Refinery*,<sup>81</sup> in which the district court dealt with willful actions by a party considered by the court to have violated principles of litigative fairness. In that case, Shell learned that its adversaries, the Plaintiffs’ Legal Committee (PLC), had obtained Shell documents outside the discovery process through a current Shell employee.<sup>82</sup> Shell sought a listing of all documents written or received by Shell that had been obtained by PLC.<sup>83</sup>

The district court ordered PLC to return the documents to Shell, and it also prohibited PLC “from mak[ing] any use of the documents.”<sup>84</sup> The trial judge found that PLC effectively circumvented the discovery process and

---

80. Exclusion of evidence derived from inadvertently disclosed information may also result from the parties’ negotiated confidentiality agreements or protective orders. *See* *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, No. IP96-1718-C-H/G, 2001 WL 699850, at \*1 (S.D. Ind. May 29, 2001) (enforcing agreement that if recipient is notified within specified period that it shall return all copies of inadvertently disclosed documents and “not use the information in the document for any purpose”). Such agreements are common, although it appears that more commonly they may require only the return or destruction of all inadvertently disclosed materials and not explicitly prohibit indirect use. *See, e.g.*, *VL T Corp. v. Unitrode Corp.*, 194 F.R.D. 8, 10 (D. Mass. 2000); *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, No. 96 CIV.7590(DAB)(JCF), 1997 WL 734726, at \*3 (S.D.N.Y. Nov. 26, 1997).

81. 143 F.R.D. 105 (E.D. La. 1992).

82. *Id.* at 107.

83. *Id.* Shell also asked that the court order PLC to identify the person who supplied the documents so that it could determine if PLC had violated LOUISIANA RULES OF PROF’L CONDUCT R. 4.2 (2002), Louisiana’s prohibition against *ex parte* contacts with represented parties. *Id.* at 108. The court declined to provide the identity because doing so was unnecessary to an effective remedy. *Id.*

84. *Shell*, 143 F.R.D. at 109.

thereby prevented Shell from being able to argue against, and to prevent, production of proprietary documents. The court also concluded that PLC's conduct was "inappropriate and contrary to fair play."<sup>85</sup>

The court justified its power to fashion this remedy, not under the Federal Rules of Civil Procedure,<sup>86</sup> but pursuant to its "inherent authority to control and preserve the integrity of its judicial proceedings"<sup>87</sup> and "to remedy litigation practices that threaten . . . the adversary processes."<sup>88</sup> Under this authority, it ruled that "plaintiffs may not make any use of the documents obtained from the Shell-employee source or any use of the information contained therein."<sup>89</sup>

*B. Protection Against Indirect Use of Privileged Information in the Area of "Inadvertent Disclosure" of Attorney-Client Confidences*

*In re Southeast Banking Corp.*<sup>90</sup> shows the operation of the court's equitable power moving from the context of purposeful acquisition of privileged materials<sup>91</sup> to an "inadvertent disclosure" of confidential

---

85. *Id.* at 108. Elsewhere, it referred to an "unfair advantage" gained by PLC. *Id.* It also described its effort as being one of "balancing the scales." *Id.* at 108-09.

86. The court rested its remedy on inherent powers because it concluded that, as to documents obtained outside the court's discovery processes, Rule 26 of the Federal Rules of Civil Procedure did not authorize district courts to issue protective orders. *Id.* at 109 & n.3 (citing *Kirshner v. Uniden Corp.*, 842 F.2d 1074, 1080 (9th Cir. 1988)).

87. *Id.* at 109.

88. *Id.* at 108.

89. *Id.* at 109. Also, in *Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994), the New York Court of Appeals approved dismissal of the case as a sanction for knowing and deliberate use of documents covered by the attorney-client and work-product privileges that gave the plaintiff knowledge the court believed could never be purged. *Id.* at 1304. In reaching the conclusion, the trial court had emphasized the nature and persistence of the party's misconduct. *Id.* at 1304-05.

90. 212 B.R. 386 (S.D. Fla. 1997).

91. For a sampling of views on this issue, see John T. Hundley, "Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?, 19 S. ILL. U. L.J. 263, 289 (1995) [hereinafter Hundley] (recognizing that efforts "to 'put the genie back in the bottle'" are defensible where disclosure results from the party's culpable conduct); Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1635 (1986) [hereinafter Marcus] (assuming courts can "suppress" evidence when it has been stolen, much as illegally seized evidence is suppressed in criminal cases).

Case law supporting the suppression remedy is relatively sparse. See, e.g., *EEOC v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local Union No. 189*, 311 F. Supp. 464, 468 (S.D. Ohio 1970) (coerced interviews ordered not to be used "for any purpose whatsoever"). Commentators treat the "suppression" of evidence, including the prohibition of derivative use, as a special situation and justifiable where culpable conduct is involved by the party securing the privileged information. Indeed, in an unusually broad remedy in a criminal case not involving a constitutional violation, the court in *People v. Kaiser*, 606 N.E.2d 695 (Ill. App. Ct. 1992), excluded any use of a violation of the doctor-patient privilege. There the court concluded that the prosecutor used a subpoena to secure confidential medical information covered by the doctor-patient

materials which would be covered at trial under the attorney-client privilege.<sup>92</sup> In *Southeast Banking*, through what the trial court determined was an error,<sup>93</sup> counsel for the Trustee was given access to a group of “post-closing” documents that the parties agreed were protected by the attorney-client privilege and work-product doctrine and to which the FDIC had formally denied the Trustee access.<sup>94</sup> The Trustee’s review was supposed to be made of another set of materials—“pre-closing” documents.<sup>95</sup> However, despite notice that “post-closing” documents had been erroneously provided, the Trustee copied a number of them, used them to fashion his complaint, and sought to use them in the litigation.<sup>96</sup>

The court determined that the privilege had not been waived.<sup>97</sup> Citing, *inter alia*, *In re Shell Oil Refinery* and a court’s power to sanction actions of errant lawyers practicing before it,<sup>98</sup> the court ordered the immediate return of the post-closing documents. It also entered a protective order prohibiting the Trustee “from using any of the post-closing documents or the information contained therein, directly, or indirectly, for any purpose whatsoever.”<sup>99</sup>

---

privilege and that the subpoena was used to avoid ordinary discovery mechanisms that would have permitted litigation of the privilege before the communication was revealed. *Id.* at 699.

92. A substantial literature has developed analyzing “inadvertent disclosures.” See George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637 (1986); Shawn T. Gaither, *The Attorney-Client Privilege: An Analysis of Involuntary Waiver*, 48 CLEV. ST. L. REV. 311 (2000); James M. Grippando, *Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents*, 39 U. MIAMI L. REV. 511 (1985); Roberta M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465 (1993); Hundley, *supra* note 91; Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles To Guide Ethical Decision Making*, 48 EMORY L.J. 1255 (1999); Marcus, *supra* note 91; Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513 (1990); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept*, 47 FLA. L. REV. 159 (1995); Gloria A. Kristopek, Note, *To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel*, 33 VAL. U. L. REV. 643 (1999).

93. *Southeast Banking*, 212 B.R. at 392-93. The Trustee contended that the documents were “voluntarily produced,” but the court concluded they were produced through error, relying on the fact that in the litigation the FDIC was vigorously contesting the turnover of these same documents to the Trustee. *Id.* at 393.

94. *Id.* at 390.

95. *Id.*

96. *Id.* at 390-91.

97. *Id.* at 392-93. Under either the rule that only intentional action waives the privilege or the balancing test, the court concluded that the privilege had not been waived. It rejected the approach under which inadvertent disclosure always waives the privilege. *Id.*

98. *Id.* at 395 (citing *inter alia*, *Shell*, 143 F.R.D. at 109).

99. *Id.* at 397. Sanctions were also imposed against the offending attorney. *Id.* at 396-97.

In *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187 (N.D. Ohio 1996), the court ordered return of the inadvertently disclosed document and the avoidance of any

Fashioning remedies, which may include precluding a party from making any derivative use of confidences disclosed, is consistent with the law of inadvertent disclosure of privileged documents, which are often disclosed during discovery in complex civil cases.<sup>100</sup> Courts apply three major approaches to determine whether inadvertent disclosure should be treated as a waiver of the attorney-client privilege.<sup>101</sup> These have variously been called: (1) the “lenient approach” or the “subjective intent approach”; (2) the “strict (liability) approach”; and (3) the “middle test,” “pragmatic approach,” or “totality of the circumstances test.”<sup>102</sup> Jumping to the end of the story, the majority of courts follow the third test,<sup>103</sup> which, it turns out, fits well with an approach that allows prohibition of any use of the disclosure in some cases where the privilege is found not to have been waived by inadvertent disclosure.

Under the first approach, called the “lenient” or “subjective intent” approach, an inadvertent disclosure cannot waive the privilege: the privilege is waived only by the intentional act taken or authorized by the client. This approach is most consistent with a central principle of the attorney-client privilege—that it exists to protect the client, belongs to the client, and must be waived by the client.<sup>104</sup> However, several major objections are raised to this approach. First, it ignores the importance of confidentiality, which, when lost, eliminates much of the purpose of the privilege.<sup>105</sup> Second, it establishes a burden that is arguably too difficult to

---

further use of the document or information gained as a result of the disclosure. *Id.* at 1189. It also required the offending party to list all those who had learned of the contents of the documents and to describe the steps taken to ensure that no improper use of the information learned would be made during the course of the litigation. *Id.*

100. The suppression of derivatively obtained evidence in this context may address a frequent concern in the inadvertent disclosure area: of the degree to which revelation of a confidence about one subject destroys the privilege as to all documents related to that subject. Marcus, *supra* note 91, at 1609 (noting that where waiver is found “it is effective as to all related matters, precluding later assertion of the privilege as to any material related to the same subject”). The order prohibiting the derivative use of the disclosed information has the effect of ruling that the related documents are likewise protected. When used or understood in this fashion, the result is not an expansive one but is rather the consequence of a ruling that the privilege remains intact as to the original disclosure.

101. When the disclosure is truly inadvertent, it is technically inappropriate to use the term “waiver,” which normally entails an intentional relinquishment of a known right. Rather “forfeiture” may be a more appropriate term, which some courts believe is “designed ‘to punish the person claiming the privilege for a mistake.’” United States *ex rel.* Bagley v. TRW, Inc., 204 F.R.D. 170, 175 n.8 (C.D. Cal. 2001) (quoting *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997)).

102. *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996); *TRW*, 204 F.R.D. at 176.

103. *TRW*, 204 F.R.D. at 176-77.

104. *Bicknell*, 86 F.3d at 1483.

105. *Id.* at 1483; *see also* *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970).

meet. Requiring the opponent to show an explicit intent to waive through disclosure allows clients, upon discovery of a damaging disclosure, to deny such an intention to waive despite having given counsel a general authorization to handle litigation.<sup>106</sup> Third, it provides too little incentive for lawyers to protect confidential and privileged information.<sup>107</sup>

The second approach, called the “strict (liability) approach,” has a wisdom in that conduct often reflects intention: “Normally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege.”<sup>108</sup> This approach was favored by Wigmore, who stated his position and the justification as follows:

. . . All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney’s possession, are not protected by the privilege, on the principle . . . that, since the law has granted secrecy so far as its own process goes, it leaves the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client.<sup>109</sup>

However, the problems with this second approach are also obvious. Clearly, action does not always reflect intent. The test converts what is at best a forfeiture into a waiver, and it encourages sharp practices by opponents. In simple terms, this test is simply too harsh.

Under the third test, termed the “middle test,” the “pragmatic approach,” or the “totality of circumstances test,” which as noted earlier is the majority position, courts examine a number of factors:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production,
- (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) the promptness of measures taken to rectify the

---

106. *Cf. Hydraflow, Inc., v. Enidine Inc.*, 145 F.R.D. 626 (W.D.N.Y. 1993). Wigmore argued that all disclosures voluntarily made by counsel during the course of negotiations or litigation should be receivable as being made under an implied waiver by the attorney who is considered to have authority to disclose confidences when necessary in the opinion of the attorney, unless the attorney appears to have acted in bad faith toward the client. 8 WIGMORE, *supra* note 42, § 2325, at 633.

107. *Bicknell*, 86 F.3d at 1483.

108. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

109. 8 WIGMORE, *supra* note 42, § 2325, at 633.



disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.<sup>110</sup>

This inquiry goes in part toward determining the intent of the party with regard to waiver, but it focuses even more on fairness: “The middle test is best suited to achieving a fair result. It accounts for the errors that inevitably occur in modern, document-intensive litigation, but treats carelessness with privileged material as an indication of waiver.”<sup>111</sup> In this balancing process of determining whether the privilege has been waived, courts often engage in an inquiry that combines a number of factors relating to the diligence of the disclosing party, the reliance of the receiving party, the destruction of confidentiality, and the possibility of meaningful, limited relief.<sup>112</sup>

Particularly related to our inquiry, one court articulated its focus as being on “[t]he degree to which the disclosed information has been allowed to ‘weave itself into the fabric . . . of pre-trial discovery so as to create reliance by the opponent.’”<sup>113</sup> Another found that work product privilege had been waived when the complaining party did not file a timely motion to compel the return of the documents because “the grand jury’s use of the seized file potentially could have tainted its investigation.”<sup>114</sup> Similarly, a third court, looking at the difficulty of fashioning a remedy, stated that

[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 several years. The Government attorneys’ minds cannot be expunged, the grand jury is familiar with the documents, and various witnesses’ testimony regarding the papers has been heard. This is not a case of mere inadvertence where the breach of confidentiality can be easily

---

110. *Hydraflow*, 145 F.R.D. at 637; see also *Bicknell*, 86 F.3d at 1484.

111. *Bicknell*, 86 F.3d at 1484.

112. The court in *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644 (S.D. Ind. 2000), combined a number of the factors examined as to inadvertent disclosure under its concern for whether effective relief was possible. It found no waiver in large part because the privileged information had not been shared with opposing counsel and was not related to the testimony of the one witness who had reviewed the documents. *Id.* at 649-50. As a result, continuing or restoring the privilege to the documents was effective and did not distort the litigation process. *Id.* at 650.

113. *Hydraflow*, 145 F.R.D. at 637.

114. *In re Grand Jury (Impounded)*, 138 F.3d 978, 982-83 (3d Cir. 1998).

remedied. Here, the disclosure cannot be cured simply by a return of the documents. The privilege has been permanently destroyed.<sup>115</sup>

Other courts discuss these same issues in terms of whether confidentiality can be meaningfully restored through reasonable remedies. In one case, the court found the documents had “not worked their way into the fabric of the case” because, although known to a government investigator, they had not been presented to the grand jury nor shown to witnesses or experts.<sup>116</sup> The court did not assume the minds of the government attorney or expert could be expunged, but the documents would be excluded from evidence, and that remedy “would not be a meaningless or empty gesture.”<sup>117</sup>

Even when the information has been disclosed to counsel, an effective remedy may still be possible by disqualifying counsel. However, that remedy is not one that courts easily embrace because of obvious ways that the disqualification remedy can be abused by an adversary for tactical benefit and delay,<sup>118</sup> and disqualification is generally rejected if prejudice can be avoided by other means.<sup>119</sup>

Taken together, these factors from the middle test produce a concept of privilege that can allow for a variegated protection of the privilege. In appropriate circumstances, it may prohibit exclusion of the fruits-of-privilege violation. Its multi-factored analysis may result in protection only against admission of the documents in court, but it may also prohibit any use whatsoever. Both party responsibility (sometimes culpability) and practicality are part of the analysis.

If the documents have woven themselves into the fabric of the case, particularly if the intermingling is with the acquiescence of the party who held the privilege, the test tends to lead one to conclude that the privilege has been waived. If the confidence has been breached only in a limited fashion, the test is likely to lead one to conclude that the privilege still exists and that exclusion of the evidence itself may be a sufficient remedy.

---

115. *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979) (citations omitted).

116. *In re Grand Jury Investigation*, 142 F.R.D. 276, 281 (M.D.N.C. 1992).

117. *Id.*

118. *See, e.g., Holland v. The Gordy Co.*, Nos. 231183, 231184, 231185, 2003 WL 1985800, at \*10-\*11 (Mich. App. Apr. 29, 2003); *Milford Power Ltd. v. New England Power Co.*, 896 F. Supp. 53, 58 (D. Mass. 1995).

119. *See The Gordy Co.*, 2003 WL 1985800, at \*12. In *Resolution Trust Corp. v. First of America Bank*, 868 F. Supp. 217 (W.D. Mich. 1994), the court denied disqualification in part because even disqualification would be ineffective since the party already knew the content of the document. *Id.* at 220-21.

In extreme cases, the test allows an extreme result. When the equities stand on the side of the party who inadvertently disclosed (or who was the victim of misconduct by the adversary), a broader remedy may be appropriate. These outcomes are reasonable as part of the court's effort to control complex civil litigation between private parties. Fashioning appropriate remedies is partly a determination of attorney-client privilege principles, but it is even more influenced by developing a fair process (or at least avoiding one party getting an unfair advantage) between competing litigators involved in a joint enterprise.

This freedom to fashion remedies in civil litigation rests in part on the fact that the only interests involved are those of two opposing private parties. Moreover, the orders preventing indirect use of the disclosed communication in civil cases typically have a more limited impact than they do in criminal cases. Such orders frequently exclude only a subset of documents and guarantee that the remedy is effective by protecting related documents as well.<sup>120</sup> In the typical case, exclusion of derivative evidence does not appear to resolve or terminate the litigation effectively.

### *C. Implications for Rules Drafting Regarding Inadvertent Disclosure*

Like most "codifications" of privilege rules, the Uniform Rules of Evidence, through Rule 510, cover how privileges are waived but do not address directly the important and complicated subject of waiver through "inadvertent disclosure."<sup>121</sup> By contrast, a subcommittee of the Advisory Committee on the Federal Rules of Evidence attempted to develop rules to govern when inadvertent disclosure waives the attorney-client privilege as part of a preliminary effort to draft rules of privilege.<sup>122</sup> The draft proposal also treated the issue of derivative use of material when waiver was not found,<sup>123</sup> presumably to deal with an aspect of existing case law. Although the Advisory Committee has now moved away from attempting to draft rules of privilege,<sup>124</sup> its preliminary effort is instructive.

---

120. *See, e.g.*, *Van Hull v. Marriott Courtyard*, 63 F. Supp. 2d 840 (N.D. Ohio 1999) (denying both production of inadvertently disclosed document and use of the information to obtain other communications regarding same subject matter); *Telephonics Corp. v. United States*, 32 Fed. Cl. 360, 362 (Fed. Cl. 1994) (accepting that information could not be eliminated from opponents' minds but denying requests for other documents bearing on the same subject matter). *See also* discussion in *supra* note 100.

121. UNIF. RULES OF EVIDENCE R. 510 (amended 1999), 13A U.L.A. 98 (Supp. 2003-2004).

122. Memorandum from Professor Dan Capra, Reporter, and Ken Broun, Consultant, regarding "New Drafts of Privilege" 48 (Mar. 21, 2002) (on file with author).

123. *Id.*

124. The Committee has decided that, rather than attempting to draft privilege rules, it will

After setting out a test for loss of the privilege through inadvertent disclosure, the draft stated regarding direct and derivative use:

If the court finds that an inadvertent disclosure does not result in the loss of the privilege, the party who received the privileged information is prohibited from proffering that information at trial. The receiving party is also prohibited from proffering any evidence that is derived directly or indirectly from the privileged information. The party who disclosed the privileged information has the burden of showing, by a preponderance of the evidence, that the information proffered by the receiving party is derived from the privileged information.<sup>125</sup>

This proposed provision would have provided one possible solution to the issue of derivative use of evidence from a violation of the privilege. However, it would have created a potential unexplained inconsistency with other areas of privilege where derivative use is generally permitted under current law. Alternatively, it might have been read to suggest that all out-of-court disclosures that did not waive the privilege (i.e., violations of confidences underlying evidentiary privileges) should generally result in the prohibition of derivative use of evidence. Such a reading would have constituted a major change in the law.

The proposal would have protected indirect uses more broadly than current case law dealing with inadvertent disclosures. While exclusion of derivative evidence is sometimes ordered by courts when inadvertent disclosures are found not to waive the attorney-client privilege, such exclusion is not generally a consequence of determining that, despite an out-of-court disclosure, the attorney-client privilege continues to exist. For example, in a situation where the privilege is not waived because of intentional disclosure by the person receiving the information, courts frequently do not suppress derivative evidence even though the law is clear that the privilege is not waived.

Although frequently the same factors that lead the court to determine the privilege has not been waived through an inadvertent disclosure will indicate that derivative uses should be excluded, the two issues are not the same. In some situations, the privilege might reasonably be maintained,

---

develop a survey of federal evidentiary privileges, providing a descriptive, non-evaluative presentation of existing federal law. Advisory Committee on Evidence Rules, Minutes of the Meeting of October 18, 2002, at 14-15; Advisory Committee on Evidence Rules, Minutes of the Meeting of April 25, 2003, at 18-19.

125. *Id.*

but the court might nevertheless determine that only direct use of the communication would be prohibited.

While the clarity of a rule as to waiver through “inadvertent disclosure” may be generally helpful, I suggest that, with respect to the issue of derivative use, the better solution is to leave a solution out of privilege rules. With regard to inadvertent disclosure, automatic exclusion of fruits does not appear to be appropriate or justified every time the court concludes that the attorney-client privilege has not been waived. Without the explicit authority of a rule, federal courts have felt themselves able to impose the broad remedy of excluding indirect uses in appropriate cases, and that broad remedy is likely better left to the exercise of judicial discretion in situations of special justification.<sup>126</sup>

V. INTRUSION OF GOVERNMENT AGENTS INTO ATTORNEY-CLIENT  
CONFIDENCES IN CRIMINAL CASES: A FOCUS ON INTENTIONAL  
GOVERNMENTAL ACTION AND A PATTERN OF CAUTIOUS AND  
LIMITED RELIEF

A body of federal case law dealing with intrusion into confidential attorney-client relations and interception of communications helps both to flesh out the limits on the attorney-client privilege and to identify where violations of attorney-client confidences, typically communications protected by the attorney-client privilege, result in suppression of derivative use of the information acquired in criminal cases. The analysis involves a number of doctrinal areas. These include: the Sixth Amendment right to counsel and the concomitant right to protection against ineffective assistance of counsel; the Fifth Amendment privilege against compulsory self-incrimination; the Due Process Clauses of the Fifth and Fourteenth Amendments; and the attorney-client privilege and rules of professional responsibility. In examining the area, one finds surprisingly limited power

---

126. An earlier draft had permitted the party receiving the information to use the fruits in part because of the perceived unfairness of requiring that party to establish that other information was not derived from the privileged material. *See* Advisory Committee on Evidence Rules, Minutes of the Meeting of April 17, 2000, at 11. As a result of Committee suggestions, the Subcommittee on Privileges redrafted the provision, excluding derivative evidence but placing the burden on the party asking for exclusion to show that the evidence was derived from privileged material. The change was a sensible response to the potentially onerous burden of imposing a *Kastigar*-type regime on the party who received the privileged information in these civil cases. However, it neither eliminated the initial question of whether derivative use of privileged information should always be suppressed where the disclosure could be categorized as inadvertent nor the question of whether inadvertent disclosure provided a justification for different treatment of the derivative evidence.

for the attorney-client privilege and an apparent reluctance to reverse based on possible intrusion into defense confidences.

Dividing violations into two types is useful. In the first are revelations of confidences by defense attorneys or their agents. There, a constitutional violation may be found as a consequence of ineffective assistance of counsel without further governmental involvement, and indirect uses of communications are covered if the client is materially affected. In the second kind of violation, action is by law enforcement personnel and members of the prosecution. Here, party responsibility/culpability is absolutely critical. As to cases in this category, courts simply do not find a violation of the attorney-client privilege by private parties sufficient to justify suppressing fruits of the violation, often noting the important public interest in prosecuting crime. A constitutional violation, based on governmental responsibility in a form that varies with the constitutional right at issue, is required.

#### *A. The Relationship Between Principles of Confidentiality and the Sixth Amendment*

The central concept of the attorney-client privilege—protecting confidences between the accused and his or her counsel—is constitutionally protected under the Sixth Amendment right to counsel in some of its aspects. While few would doubt the essential correctness of the statement, “the essence of the Sixth Amendment right is . . . privacy of communication with counsel,”<sup>127</sup> the precise relationship between the attorney-client privilege and the protection given to confidences under the Sixth Amendment right to counsel has not been carefully examined by the courts. Although related, these concepts obviously do not have identical dimensions.

The relationship between the attorney-client privilege and the Sixth Amendment is conceptually clear in two situations. The first is where the defendant has formally become the accused, the Sixth Amendment has “attached,”<sup>128</sup> and the attorney or an agent discloses privileged communications to the government. The question here is whether the

---

127. *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973); *see also* *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) (stating that “the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney”); *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981).

128. See discussion of when the Sixth Amendment attaches, *infra* notes 189-90 and accompanying text.

revelation violates the Sixth Amendment right to effective assistance of counsel.

Professional standards regarding confidentiality and the Sixth Amendment right to counsel intersect here. In *Strickland v. Washington*,<sup>129</sup> the court required a party challenging counsel's conduct to show both deficient performance under objective standards of reasonable effectiveness and that prejudice resulted from that deficient performance.<sup>130</sup> In determining whether defense "counsel's representation fell below an objective standard of reasonableness,"<sup>131</sup> the Court observed that the "proper measure" of performance is "reasonableness under prevailing professional norms."<sup>132</sup> The Court noted that as to the standard of practice, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable,"<sup>133</sup> but it cautioned that "they are only guides."<sup>134</sup> In *Nix v. Whiteside*,<sup>135</sup> the Court, without defining the weight to be given to such standards, found them dispositive where "virtually all of the sources speak with one voice."<sup>136</sup>

The "duty of loyalty" is one of the essential components of reasonable performance by defense counsel identified by *Strickland v. Washington*.<sup>137</sup> Within the duty of loyalty, the "duty of confidentiality," covered by ABA Model Rule of Professional Conduct 1.6, is very widely recognized.<sup>138</sup> It

---

129. 466 U.S. 668 (1984).

130. *Id.* at 687.

131. *Id.* at 688.

132. *Id.*

133. *Id.* (citation omitted).

134. *Id.*

135. 475 U.S. 157 (1986) (ruling that an attorney's revelation of prospective client perjury did not constitute ineffective assistance). The Court reiterated its statement from *Strickland v. Washington*, that "[p]revailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides," 466 U.S. at 165, but it cautioned against constitutionalizing specific standards that might restrict states in their future development of professional standards. *Nix v. Whiteside*, 475 U.S. at 165-66.

136. *Id.* at 165-66. The conduct in question was the lawyer's refusal to cooperate with the client's giving perjured testimony and the lawyer's threat to inform the trial judge if the client took the stand to testify falsely and to withdraw as counsel. *Id.* at 161.

137. 466 U.S. at 688.

138. See *McClure v. Thompson*, 323 F.3d 1233, 1242-43 (9th Cir. 2003). In *McClure*, the court of appeals found that the revelation of the location of homicide victims' bodies did not constitute ineffective assistance—even though the appellate court gave the required deference to the conclusions of the state courts and the federal district court—because of the exception to the duty of confidentiality for prevention of future crimes. *Id.* at 1245-47. The argument was that the lawyer believed the victims may have still been alive and disclosed the information to potentially avoid the escalation of kidnapping into murder. *Id.* at 1245.

protects confidences and secrets of a client. Confidences covered by the attorney-client privilege are assuredly within that protected confidentiality.

Clearly, the purposeful revelation of client confidences covered by the attorney-client privilege constitutes ineffective assistance if the revelation is sufficiently material to satisfy the prejudice requirement of *Strickland v. Washington*. In defining prejudice, the Court in no way suggested that the prejudice to be considered excluded evidence derived from the attorney's conduct. Indeed, such a distinction would be inconsistent with the other types of deficient performance examined, such as the failure to seek out and present witnesses regarding mitigation.<sup>139</sup>

Thus, confidentiality of communications between lawyer and client is a part of the Sixth Amendment right to counsel, and the protections of the attorney-client privilege and rules of professional responsibility regarding client confidences are associated with that protection. While the attorney-client privilege is not directly constitutionalized, its dimensions are important in defining and limiting the protections for confidentiality. Indeed, when the attorney-client relationship is protected by the Sixth Amendment right to counsel, fundamental infringements of the privilege should violate the Sixth Amendment as well if prejudice ensues. When the defendant has been formally accused and Sixth Amendment protection has attached,<sup>140</sup> use of revelations by counsel of the type discussed earlier in *Nickel v. Hannigan*,<sup>141</sup> regarding the location of key evidence, should result both in reversal of the conviction and in exclusion of all direct and indirect evidence on retrial.<sup>142</sup>

It is interesting to note that in this context no affirmative governmental action is required. The Sixth Amendment right to counsel is violated by the private attorney's action when defense counsel's representation is so deficient and prejudicial that it constitutes "a breakdown in the adversary process that renders the result unreliable."<sup>143</sup>

---

139. *Strickland*, 466 U.S. at 675. The Court rejected the argument, not because the prejudice was of a type not to be considered, but rather because the Court concluded the witnesses would have had no impact. *Id.* at 699-700.

140. The right to counsel under the Sixth Amendment is limited to cases where formal charges have been filed. See *infra* notes 189-90.

141. 97 F.3d 403 (10th Cir. 1996); see discussion *supra* notes 29-39 and accompanying text.

142. Because the Sixth Amendment right is limited to cases where the defendant becomes the accused, see *infra* notes 189-90, and is restricted to those specific offenses formally charged, see *Texas v. Cobb*, 532 U.S. 162, 167-73 (2001) (narrowly construing the charged offense), protection could not be extended to a case like *Nickel v. Hannigan*, 97 F.3d 403 (10th Cir. 1996), where the authorities had no prior knowledge of the offense. The Sixth Amendment cannot be applicable to such an offense that is unknown to authorities. However, surely items of evidence as to formally charged offenses, such as the location of the murder weapon, could be under Sixth Amendment protection.

143. *Strickland*, 466 U.S. at 687.



In a second area, the relationship between privilege and constitutional violation under the Sixth Amendment is also relatively clear. The typical situation involves revelation of defense confidences, not by the defense attorney voluntarily revealing confidential information, but instead by a private individual, frequently an informant, who intrudes into client confidences or more generally defense confidences. Unless the communication is protected by the attorney-client privilege (or involves defense strategy), lack of governmental involvement in the intrusion means that no constitutional violation will be found.<sup>144</sup> Even when the communication is privileged or defense strategy is involved, whether government involvement in causing the intrusion to occur is required for a constitutional violation is a significant issue, which is discussed in the next section.

The principal fact pattern involves a private actor, who at the time of her “intrusion” has no relationship with the prosecution. If that person, without any deception whatsoever, is invited into the defense camp, the attorney-client privilege guides the dimensions of the constitutional protection. The communication can potentially still be covered by the attorney-client privilege if it lies within the concept of a “joint defense privilege.”<sup>145</sup> However, if under the rules of privilege revealing the information to the “turncoat” renders it non-privileged because it is considered not to have been made in confidence, then use of the information—indeed even admission of the conversation at trial—would

---

144. In *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), the court of appeals noted that violation of the privilege does not necessarily violate the protections of the Constitution:

The attempted disclosure of the content of a joint conference of co-defendants with the lawyer of one of them may possibly give rise to a claim of privilege, see Proposed Rules of Evidence for the United States Court, Rule 503(b)(3), but the breach of a common law privilege, as such, is not necessarily of constitutional dimension.

*Id.* at 1227. It is obviously correct that the dimensions of the attorney-client privilege and the confidentiality protection that is part of Sixth Amendment right to counsel are not identical, yet it is unclear why in situations where the Sixth Amendment applies, a significant revelation of privileged information would not violate the Sixth Amendment if the communication were used to prejudice the defendant.

145. For cases recognizing this extension of the attorney-client privilege, see, e.g., *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989); *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979). See generally MUELLER & KIRKPATRICK, *supra* note 47, § 5.15 (describing “joint defense or pooled information” aspect of attorney-client privilege); RICE, *supra* note 59, § 4.35 (discussing generally extension of privilege for multiple clients on matters of common legal interest); Craig S. Lerner, *Coconspirators’ Privilege and Innocents’ Refuge: A New Approach to Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1490-1514 (2002) (setting out the “core of certainty” and the “confounding uncertainty as to the precise details” of joint defense privilege); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000) (defining privilege for communications regarding joint defense).

not violate the Sixth Amendment. This third party could testify regarding the communication because it is not privileged. Whether that person becomes a witness as a matter of civic responsibility or comes to cooperate with the prosecution as an informant, the result should not differ. No evidentiary or constitutional violation occurs in this situation because the privilege has not been violated.<sup>146</sup>

### *B. The Importance of Purposeful Governmental Action*

Except when ineffective assistance of counsel is involved, purposeful governmental intrusion into the confidential relationship or acquisition of confidential information is critical to finding a violation recognized as constitutionally protected. Confidential communications may be protected under two different constitutional rights—the Sixth Amendment right to counsel and the Due Process Clauses of the Fifth and Fourteenth Amendments. Governmental involvement is required as to both, but as might be expected, the required degree of involvement and culpability differs between these two constitutional provisions.

### *C. Intrusion into Confidences Protected by the Sixth Amendment Right to Counsel*

In examining Sixth Amendment claims involving informants who are present during confidential conversations and discussions of defense

---

146. In *United States v. Melvin*, 650 F.2d 641 (5th Cir. Unit B July 1981), the court of appeals argued that whether or not the attorney-client privilege defines or limits the Sixth Amendment right generally, the privilege provided the limits in the case at hand. Thus, when conversations were held with an informer who had not joined the defense team, the court of appeals stated that the Sixth Amendment right would not exist if there were no reasonable expectation of confidentiality because of the informant's presence. *Id.* at 645-46. The court remanded for a determination of that issue. *Id.* at 646; see also *Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir. 1985) (finding no violation of right to counsel from disclosure made by agent working for defense attorney where the defense counsel had a duty under state law to provide the same physical evidence to the prosecution because counsel undertook the obligation of disclosure by virtue of removing the evidence from its original location); *United States v. Gartner*, 518 F.2d 633, 637-38 (2d Cir. 1975) (no Sixth Amendment violation as to overheard conversation by lawyer and client with a co-defendant known to be cooperating with the prosecution). However, as the later cases suggest, when the agent is sent into the attorney-client relationship or when confidential information is subsequently obtained and used even if the agent was not purposefully placed by the government in the defense camp, the Sixth Amendment may be violated. See *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984) (suggesting that a formal attorney-client relationship required for the attorney-client privilege is not a required element of a Sixth Amendment violation if the government uses the accused's former attorney either intentionally to intrude into the defense camp or the government uses against the defendant prejudicial information from the former attorney, now informant, even if not intentionally obtained by the government).

strategy, *Weatherford v. Bursey*<sup>147</sup> provides the principal Supreme Court guidance. There, the Court found no constitutional violation when an informant, who was operating as a fictive co-defendant, met with the defendant and his counsel on two occasions and had a conversation about their upcoming criminal case. The Court observed:

[T]his is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly. *Weatherford* [the informant] . . . did not intrude at all; he was invited to the meeting, apparently not for his benefit but for the benefit of *Bursey* [the defendant] and his lawyer. . . . *Weatherford* went, not to spy, but because he was asked and because the State was interested in retaining his undercover services on other matters and it was therefore necessary to avoid raising . . . suspicion . . . .<sup>148</sup>

It also found significant the fact that the informant communicated nothing about the meetings to either the police or the prosecutor.<sup>149</sup>

The Court recognized that a critical law enforcement concern would be jeopardized if the informant's presence during attorney-client communications constituted a *per se* constitutional violation. It concluded that such a rule could frequently lead to the unmasking of informants, who the Court recognized play an important role in criminal investigations: "[I]t would require the informant to refuse to participate in attorney-client meetings, even though invited, and thus for all practical purposes to unmask himself."<sup>150</sup>

While conceptually not required for a constitutional violation, if the protected confidential communications are admitted and prejudice the defendant, governmental involvement in the initial intrusion into the confidential communication is an extremely important factor in finding a violation.<sup>151</sup> Several cases have suggested that, if the conversation was

---

147. 429 U.S. 545 (1977).

148. *Id.* at 557.

149. *Id.* at 556.

150. *Id.* at 557.

151. Stating with confidence what is required under *Weatherford v. Bursey* to constitute a violation of the Sixth Amendment is somewhat difficult because the Supreme Court found no constitutional violation. In so doing, it noted all the potential wrongs that the government did not commit, and in mentioning each, the implication is that the result would have been different had any of those facts been different. However, it may be that some combination of those factors is required before the Sixth Amendment is violated; but if so, the Court obviously gave no guidance.

In *United States v. Brugman*, 655 F.2d 540 (4th Cir. 1981), the court of appeals listed four factors

received by a real co-defendant, who was acting without any governmental involvement, then the subsequent disclosure of the information, albeit confidential and privileged when initially conveyed, would not violate the Sixth Amendment.<sup>152</sup>

That position is a misreading of the doctrine and is not consistent with the case law. Although governmental involvement in the intrusion appears to be of critical concern in many cases, knowing governmental involvement in acquiring or conveying the information is sufficient to establish a constitutional violation if the information is subsequently used to prejudice the accused, even if the initial intrusion was not with governmental involvement.<sup>153</sup> More significantly for the development of

---

from *Weatherford v. Bursey* that “must be considered” in determining whether the Sixth Amendment right to counsel was violated based on what the Supreme Court noted did and did not happen in that case. *Id.* at 546. It listed:

... (1) whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged information, or whether the presence of the informant was a result of other inadvertent occurrences; (2) whether the government obtained, directly or indirectly, any evidence which was used at trial as a result of the informant’s intrusion; (3) whether any other information gained by the informant’s intrusion was used in any other manner to the substantial detriment of the defendant; and finally, (4) whether the details about trial preparation were learned by the government.

*Id.* When set out as a list, which is how they effectively appeared in *Weatherford v. Bursey*, see 429 U.S. at 554, it is easy to understand the difficulty of turning them into a positive test for when a constitutional violation occurs.

152. *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981); *United States v. Rosner*, 485 F.2d 1213, 1227 (2d Cir. 1973).

There is some suggestion that some courts believe that when the intrusion is by a private individual no constitutional violation occurs whatever the subsequent disclosure and use of the information may be. *Brugman*, 655 F.2d at 546 (because the person was a real defendant, “there was no constitutional restraint on his ultimately divulging whatever he had learned.”); *Rosner*, 485 F.2d at 1226 (same). However, these statements, which were made prior to the Supreme Court’s decision in *United States v. Morrison*, 449 U.S. 361 (1981), which requires some prejudice for reversal of a conviction because of a Sixth Amendment violation, were probably meant to be limited to whether a purposeful violation is required for a Sixth Amendment violation if it is not shown that the information was conveyed to the prosecution and prejudiced the defendant. See *Brugman*, 655 F.2d at 546 (finding insufficient prejudice); *Rosner*, 485 F.2d at 1227-28 (requiring inquiry into whether the defendant was in fact prejudiced).

153. Knowing or willful governmental acquisition of confidential information is often distinct from the initial intrusion and constitutes a separate violation of constitutional principles whether or not it constitutes an additional violation of privilege principles. Courts have recognized that the need to maintain credible cover for informants may justify their participation in lawyer-client conferences when invited by co-participants. Acquisition of confidence in such situations is not considered a purposeful intrusion. However, when the prosecution knowingly or purposefully acquires the informant’s information regarding attorney-client conversations, it takes action that may itself support the violation of the right to counsel even though the initial intrusion was not improper. See *United States v. Mastroianni*, 749 F.2d 900, 906-07 (1st Cir. 1984) (finding informant’s actions proper but concluding the debriefing regarding conversations between attorney and client was unjustified by any valid reason and therefore supported finding a Sixth Amendment violation).

this Article, the cases draw no distinction between direct and derivative use.

However, the main distinctions drawn in the cases are not whether the violation occurred in the initial intrusion or its later acquisition by the government or whether the remedy excludes derivative use. Rather, the major differences between the circuits have to do with whether and when prejudice may be presumed,<sup>154</sup> and the major factual issues involve whether prejudice has been shown. In finding prejudice from knowing governmental actions, courts do not draw a distinction between direct and derivative use of the evidence when the defendant can show a harmful impact to his or her defense from the disclosure.<sup>155</sup> Also, courts do not distinguish between governmental involvement in acquisition, rather than the initial intrusion, both being treated as sufficient.

Three post-*Weatherford* cases involved what the courts consider purposeful intrusion.<sup>156</sup> In *United States v. Levy*,<sup>157</sup> law enforcement agents sought, after indictment, to learn from a government informant who was represented by a lawyer also representing another defendant about their joint trial strategy. Such information was conveyed. The court concluded:

---

154. See 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.8(b), at 642-43 (2d 1999) (discussing approaches of circuits when an intentional invasion of lawyer-client relationship occurs and some information is disclosed by informant to prosecution); Joshua T. Friedman, Note, *The Sixth Amendment, Attorney-Client Relationship and Government Intrusions: Who Bears the Unbearable Burden of Proving Prejudice*, 40 WASH. U. J. URB. & CONTEMP. L. 109 (1991) (analyzing allocation of burden of showing prejudice from intrusion); see also David R. Lurie, Note, *Sixth Amendment Implications of Informant Participation in Defense Meetings*, 58 FORDHAM L. REV. 795 (1990).

155. The court in *Clutchette v. Rushen*, 770 F.2d 1469 (9th Cir. 1985), made this point explicitly: "We recognize that the introduction of evidence obtained *either directly or indirectly* through interference with the attorney-client relationship is a paradigm example of the kind of prejudice that warrants finding a denial of the right to counsel." *Id.* at 1472 (emphasis added); see also *United States v. Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003) (imposing on the government a requirement of satisfying a *Kastigar*-type hearing and noting that it required a showing that information obtained was used neither directly nor indirectly); cf. *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985) (stating that prejudice could be shown, for example, by establishing that "a prosecution witness testified concerning privileged communications, that prosecution evidence originated in such communications, or that such communications have been used in any other way to the substantial detriment of the defendant").

156. Courts frequently cite two pre-*Weatherford* cases from the D.C. Circuit, *Coplon v. United States*, 191 F.2d 749 (D.C. 1951) and *Caldwell v. United States*, 205 F.2d 879 (D.C. 1953), as illustrating purposeful intrusions. *Coplon* involved governmental interception of telephone messages between the accused and her lawyer before and during trial. 191 F.2d at 759. *Caldwell* involved continued use of an informant after he became a defense assistant who reported to the prosecution concerning "many matters connected with the impending trial" of an indicted defendant. 205 F.2d at 880.

157. 577 F.2d 200 (3d Cir. 1978).

Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.<sup>158</sup>

The court's decision was based on the two findings that government enforcement officials sought confidential information from the informant and that defense strategy was actually disclosed.<sup>159</sup> It thus found a *per se* violation of the Sixth Amendment, and concluding that no other remedy would be sufficient given that the information was now in the public domain, the court ordered dismissal of the indictment.<sup>160</sup>

In *Bishop v. Rose*,<sup>161</sup> a fourteen-page statement prepared by the defendant at the request of his lawyer regarding his activities at the time of the crime, for which he was formally charged, was seized from the defendant's cell and used by the prosecutor in cross-examining the defendant at trial.<sup>162</sup> The court concluded that the use of the document to attack the defendant's credibility prejudiced his case and that this knowing use of the confidential letter constituted a Sixth Amendment violation, requiring reversal.<sup>163</sup> In reaching this conclusion, the court rejected the state's argument that using the evidence to impeach the defendant's testimony was permissible.<sup>164</sup>

Going somewhat further, the court in *Shillinger v. Haworth*<sup>165</sup> ruled that when the intrusion is intentional and groundless, prejudice is presumed if information is obtained by the prosecution: "[W]hen the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate

---

158. *Id.* at 208.

159. *Id.* at 210.

160. *Id.*

161. 701 F.2d 1150 (6th Cir. 1983).

162. *Id.* at 1153, 1156-57.

163. *Id.* at 1156-57. Whether a prohibition against using information, as opposed to strategy, obtained in violation of the Sixth Amendment right to counsel is any longer valid given subsequent Supreme Court decisions, is not clear. *See* *United States v. Danielson*, 325 F.3d 1054, 1067 (9th Cir. 2003); *see also* discussion *infra* note 181.

164. *Bishop*, 701 F.2d at 1157.

165. 70 F.3d 1132 (10th Cir. 1995). In this case, a deputy sheriff was present during conversations between a charged defendant and his counsel in the trial courtroom. *Id.* at 1134. The court of appeals found purposeful conduct in the prosecutor's inquiry of the deputy "for the purpose of determining the substance of Haworth's conversation with his attorney," and that the "attorney-client communications were actually disclosed." *Id.* at 1141.

justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed.”<sup>166</sup> The court determined that “evidence obtained through an intentional and improper intrusion into a defendant’s relationship with his attorney, as well as any ‘fruits of [the prosecution’s] transgression’ . . . must be suppressed.”<sup>167</sup> Here the evidence was information about sessions between the defendant and his counsel preparing the defendant’s testimony, which was used to impeach the defendant’s testimony at trial.<sup>168</sup> The court of appeals remanded for the trial court to determine whether a remedy beyond retrial was required (such as retrial by a new prosecutor or even dismissal).<sup>169</sup>

Several other cases found the Sixth Amendment violated by knowing acquisition of protected information even without an improper governmental intrusion.<sup>170</sup> In *United States v. Singer*,<sup>171</sup> the district court had found that the government “knowingly intruded, though in good faith, into the attorney-client relationship”<sup>172</sup> that was protected by the Sixth

---

166. *Id.* at 1142.

167. *Id.* at 1143 (quoting *United States v. Morrison*, 449 U.S. 361, 366 (1980)) (alteration in original).

168. *Id.* at 1134-35, 1139. As noted with regard to *Bishop v. Rose*, see *supra* note 163, in contrast to use of trial strategy, it is unclear that *Haworth* is any longer good law in concluding that it is constitutionally impermissible to use a defendant’s statements obtained in violation of the Sixth Amendment confidentiality protection to impeach his or her testimony at trial.

169. *Haworth*, 70 F.3d at 1143.

170. In *United States v. Ofshe*, 817 F.2d 1508 (11th Cir. 1987), the court assumed acquisition constituted sufficient government action although it found no constitutional violation for other reasons. *Id.* at 1512-14. The informant, who was the defendant’s attorney in an ongoing criminal prosecution, had his own separate concerns about criminal responsibility and became a government informant. As an informant, he wore an electronic transmitting device in conversations with his client, Ofshe. The purpose of the conversation was to learn of new criminal conduct by Ofshe, but the conversation contained some “unplanned discussions” about Ofshe’s case despite the fact that the attorney had been warned not to “violate any attorney-client privilege.” *Id.* at 1511. The court of appeals found no need to dismiss the indictment because the only information that related to the pending case concerned matters of public record, and no strategic decisions were discussed. Moreover, the conversation was not “provided to the prosecuting attorney,” the “conversation produced no tainted evidence,” and the court concluded that the intrusion into any privileged matters “was not purposeful.” *Id.* at 1515.

In *United States v. Sanchez*, 2003 WL 21036199 (S.D. N.Y. May 6, 2003), *opinion withdrawn as moot*, *id.* (May 9, 2003), the district court found sufficient governmental action in acquiring the information by opening, reading, and using the contents of a letter from the accused, who was represented by counsel, which was addressed to the prosecutor but labeled “legal mail.” The court stated that

[a]lthough the Government did not solicit the communication and was unaware of its content, it intended, when it opened the envelope, to engage in an ex parte communication. Thus, the Government’s interference with Sanchez’s relationship with counsel was purposeful—albeit not ‘manifestly and avowedly corrupt’—and therefore violated defendant’s Sixth Amendment rights.

*Id.* at \*3 (quoting *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975)).

171. 785 F.2d 228 (8th Cir. 1986).

172. *Id.* at 232.

Amendment.<sup>173</sup> The court had found the government had a legitimate purpose in examining protected materials provided by a co-defendant where the government played no role in their wrongful procurement and had been told they contained evidence of the commission of perjury.<sup>174</sup> However, the court concluded the government violated the Sixth Amendment when it undertook to examine the entire file, not attempting to limit its examination to documents substantiating the criminal allegation, and in the process, it reviewed confidential trial strategy files.<sup>175</sup>

The district court refused to dismiss. Instead, it ordered the return of the irrelevant material, ordered that no government agent with knowledge of the file could participate in the retrial, and further ordered that no law enforcement officer with knowledge of the file could use or mention the protected contents while working on the case with the attorney retrying it.<sup>176</sup> The court refused to prohibit the officer who had seen the files from working on the case or the officer or informant familiar with its contents from testifying.<sup>177</sup> The court of appeals found the district court's remedy to be effective and therefore adequate. Dismissal was not required,<sup>178</sup> and the failure to exclude the testimony of the two witnesses was not erroneous both because the appellate court was not convinced that the confidential information influenced their testimony and because the defendant failed to show any prejudice.<sup>179</sup>

In *United States v. Danielson*,<sup>180</sup> the court distinguished obtaining evidence in violation of the Sixth Amendment from obtaining the defendant's trial strategy. In the former situation, the court accepted that the burden of showing prejudice could properly be placed on the

---

173. *Id.*

174. *Id.* at 230-32.

175. *Id.* at 232.

176. *Id.*

177. *Id.* at 232.

178. *Id.* at 236-37. The court of appeals concluded under *United States v. Morrison*, 449 U.S. 365 (1981), that dismissal was not appropriate if a lesser remedy could assure effective assistance in a later trial. *Singer*, 785 F.2d at 237.

179. *Singer*, 785 F.2d at 235-36. The court found no impact from its examination and stated that the defendant had failed to point to any. *Id.* at 236.

The inquiry here appeared to put the burden on the defendant and thus clearly differs from cases governed by *Kastigar v. United States*, 406 U.S. 441 (1972), where the government must bear that burden. See discussion *infra* notes 186-88 and accompanying text. Nevertheless, it is clear that the inquiry is focusing not only on evidence admitted but also on evidence derived from the improper intrusion into lawyer-client confidences.

180. 325 F.3d 1054 (9th Cir. 2003).



defendant.<sup>181</sup> In the latter situation, the court found that the questions of prejudice were “more subtle” and concluded that the government should bear the burden because it would typically have superior information to resolve issues of prejudice.<sup>182</sup>

In *Danielson*, the informant took affirmative steps to learn defense strategy after he had become a government agent, and government officials, including the attorney prosecuting the case, continued to receive the information after they had notice that a potential Sixth Amendment violation was occurring.<sup>183</sup> In the situation where the government agent was not “involuntarily present at a meeting” and did not “passively receive[] privileged information about trial strategy,” but instead “acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged [trial strategy] information,”<sup>184</sup> the burden shifted to the government to show no prejudice.<sup>185</sup>

The *Danielson* court explicitly modeled its system after the protections called for when “use immunity” is granted as developed in *Kastigar v. United States*,<sup>186</sup> which it noted prohibited both direct and indirect use.<sup>187</sup>

---

181. *Id.* at 1070. The court felt the defendant was in as good a position as the government to demonstrate prejudice from evidence that was obtained. *Id.*

As to evidence, as opposed to trial strategy, the court also accepted that the government could use unlawfully obtained evidence to impeach the defendant if he testified. *Id.* at 1067 (citing *Michigan v. Harvey*, 494 U.S. 344, 349-53 (1990) (allowing use of information obtained in violation of the Sixth Amendment “to impeach conflicting testimony by the defendants”)).

182. *Danielson*, 325 F.3d at 1070.

183. *Id.* at 1068-69.

184. *Id.* at 1071.

185. *Id.* How the burden of showing prejudice will be allocated is considered a critical issue in cases where the government intruded into the attorney-client relationship. *See supra* note 154. The burden-shifting approach recently adopted by the Ninth Circuit in *Danielson* is similar to that of the First Circuit in *United States v. Mastroianni*, 749 F.2d 900, 908 (1st Cir. 1984).

186. 406 U.S. 441 (1972). *Kastigar* applies when a grand jury target or witness asserts his or her Fifth Amendment privilege and is compelled to testify under a grant of use-immunity. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Supreme Court struck down a statute that compelled testimony while granting only protection against use of the witness’ testimony in any subsequent prosecution. *Kastigar* ruled constitutional a later statute that protected against both direct and indirect use, including investigatory leads. However, only immunity against use of the evidence (“use immunity”) is required and not immunity from prosecution (“transactional immunity”). *Kastigar*, 406 U.S. at 453.

As noted above, formal “use immunity” protects against both direct and indirect use of the compelled testimony and any information derived from the evidence compelled. If evidence is compelled under a grant of immunity and the target is subsequently prosecuted, the government has the burden of demonstrating that its evidence is untainted. It bears an “affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.” *Id.* at 460.

Particularly for the testimony of witnesses, as opposed to documentary or physical evidence, the burden of showing lack of taint is difficult and often means that granting use immunity is inconsistent with prosecuting the grand jury target. In *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), the testimony of witnesses was at issue and was affected by exposure to tainted testimony. In order to

When testimony is compelled after such immunity is granted, the government must show that “‘all of the evidence it proposes to use,’ and all of its trial strategy, were ‘derived from legitimate independent sources.’”<sup>188</sup>

These cases demonstrate that in situations where the Sixth Amendment right to counsel has attached, a constitutional violation occurs if the government purposefully intrudes into that relationship or knowingly acquires confidential information and uses it to the prejudice of the accused. When examining the facts to determine whether the information was used to prejudice the accused, the courts consider derivative use as well.

Two different types of governmental involvement can be seen as sufficient to constitute a violation of the Sixth Amendment. The gravest, but the most unlikely, is the purposeful intrusion into the confidential communication itself. The cases also find that, even if the government is not responsible for the actual intrusion, if it knowingly acquires communications made when the Sixth Amendment applies, that conduct constitutes a violation if the information acquired is used to prejudice the accused.

Not only does knowing or purposeful conduct by the government in intruding into the confidential relationship or in acquiring the confidential communication justify excluding fruits, but its absence would make such exclusion an unfair and inappropriate remedy. Unless the government consciously uses improperly obtained information, it has no opportunity to avoid using tainted evidence and no ability to protect itself from irreparable taint.

Although the remedy is based on the Sixth Amendment, the situations where derivative use of the violation of attorney-client privilege is prohibited resemble the civil cases where this same remedy is imposed. These are cases where formal adversarial proceedings have begun and where the intrusion poses a substantial threat to the fairness of the litigation process.

---

show lack of taint, the court of appeals required that the testimony have been fixed or “canned” in advance of the illegality. *Id.* at 872. If courts follow the analysis of *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (opinion on rehearing), the requirements are particularly onerous. In that case, the District of Columbia Circuit ruled that both prosecutors and witnesses must be shielded from exposure to immunized testimony and emphasized that proof must be shown to be independent of evidence indirectly derived from immunized testimony. *Id.* at 947.

187. *Danielson*, 325 F.3d at 1072.

188. *Id.* (quoting *Kastigar*, 406 U.S. at 460).

*D. Intrusion into Confidential Communications Between Client and Attorney Where the Sixth Amendment Provides No Protection for Attorney-Client Confidentiality*

Under Supreme Court precedent, the Sixth Amendment right to counsel does not attach until the defendant formally becomes the accused by way of formal accusation.<sup>189</sup> Thus, an intrusion into attorney-client communications before formal accusation cannot not violate the Sixth Amendment.<sup>190</sup> If fruits are to be suppressed under a constitutional remedy, another provision must be enlisted. The most likely candidates are the Fifth/Fourteenth Amendment due process right and the Fifth Amendment privilege against self-incrimination. Courts have recognized only the Due Process Clause as potentially providing such protection.

*1. Due Process Protection Against Egregious Governmental Conduct*

A group of cases decided by the United States Courts of Appeals have recognized as a theoretical matter that governmental intrusion into privileged communications between client and attorney could violate the Due Process Clause. However, in each of the cases, the court ultimately found that on the facts presented no constitutional violation had occurred.

In *United States v. White*,<sup>191</sup> the Seventh Circuit assumed that, in the absence of a constitutionally protected interest under the Sixth Amendment, a due process violation may require the exclusion of the

---

189. *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977) (ruling that the Sixth Amendment right attached upon arraignment on a warrant); *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (holding that Sixth Amendment rights attach at “formal charge, preliminary hearing, indictment, information, or arraignment”).

190. *See, e.g.*, *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998) (concluding that the Sixth Amendment right to counsel did not cover materials seized before formal adversarial proceedings began and that use of those materials after indictment did not qualify as Sixth Amendment violation); *Nickel v. Hannigan*, 97 F.3d 403 (10th Cir. 1996) (holding that client’s confession of murder to his attorney, who had represented him on other (civil) matters, was not protected by Sixth Amendment because at the time of the confession adversarial proceedings had not yet begun); *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989) (finding Sixth Amendment claim without merit where, although confidential documents were obtained from an attorney, the lawyer was neither representing the defendant in a criminal case nor had the case moved from the investigative to the accusatorial stage); *United States ex rel. Shiflet v. Lane*, 815 F.2d 457, 464-65 (7th Cir. 1987) (ruling that confidential communication from client to investigator working for his retained lawyer regarding murder that was provided by investigator to police was not covered by Sixth Amendment because the client had not yet been formally charged).

191. 879 F.2d 1509 (7th Cir. 1989). Several related cases involved brothers, Daniel and Richard White, with the involved brother’s name shown in parentheses. This case involved Richard White.

indirect consequences of a violation of the attorney-client privilege.<sup>192</sup> In remanding, the circuit court focused on two issues: “first, whether the government procured or was otherwise complicit in a violation of the attorney-client privilege and, second, if so, whether the violation resulted in the introduction of evidence sufficiently material and adverse to [defendant] White that the failure to exclude it denied him his basic procedural rights.”<sup>193</sup>

After remand, the appellate court affirmed the district court’s conclusion that reversal was not required for three reasons: first, that there was no privilege because the documents were not confidential since the defendant intended to disclose them;<sup>194</sup> second, that the government did not induce the attorney to violate the attorney-client privilege (if it had existed);<sup>195</sup> and third, that none of the information was used at trial.<sup>196</sup> The required governmental involvement is most notable. Even though the attorney copied documents and delivered those documents to the prosecutor, and the prosecution apparently used those documents in front of the grand jury,<sup>197</sup> such use did not violate constitutional limits because the government had not induced the lawyer to violate the privilege.<sup>198</sup>

In *United States v. Voigt*,<sup>199</sup> the court of appeals stated the requirements for finding actionable (outrageous) government action violating the Due Process Clause: “(1) the government’s objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.”<sup>200</sup> In *Voigt*, the government’s informant was alleged by the defendant to be his attorney, but the Sixth Amendment right to

---

192. *Id.* at 1513.

193. *Id.* at 1514.

194. *United States v. (Richard) White*, 950 F.2d 426, 430 (7th Cir. 1991) (finding intent to disclose information as part of bankruptcy filing).

195. *Id.* at 431.

196. *Id.*

197. *Id.* at 429.

198. *Id.* at 431. The prosecutor had understood that the attorney was going to review the potentially confidential files, but the prosecutor had not expected the attorney to copy them or to provide a copy to the government. However, the prosecutor accepted those records when provided. *Id.* at 429, 431; see also *United States v. (Daniel) White*, 970 F.2d 328, 335 (7th Cir. 1992) (stating in a related case that “the government did not induce that violation” and concluding that the attorney’s hope for leniency in his own prosecution by providing information was insufficient to show a constitutional violation without an explicit or implicit agreement).

199. 89 F.3d 1050 (3d Cir. 1996).

200. *Id.* at 1067 (footnote omitted).

counsel did not apply. On the issue of purposefulness, the court found that there was no evidence that the disclosure, if it occurred, was at the behest of government agents and found the record fell “woefully short of establishing the sort of purposeful intrusion” required.<sup>201</sup>

As in *Voigt*, the deliberateness of the government’s conduct was the central concern of the court in *United States ex rel. Shiflet v. Lane*.<sup>202</sup> In that case, a defense investigator obtained the defendant’s incriminating revelations about how he committed a murder and conveyed it to law enforcement authorities. The court found that use of information provided by an investigator to establish probable cause for a search warrant that yielded incriminating evidence did not violate the Due Process Clause. The court found the conduct was not particularly egregious. The only use of the evidence was to obtain a search warrant, and the authorities openly acknowledged the use of the information.<sup>203</sup>

When examined under the Due Process Clause, the primary concern is the degree and culpability of the government’s conduct in intruding into the protected attorney-client relationship. Only where the conduct is outrageous<sup>204</sup> and the suspect is prejudiced, whether that is by direct or derivative use, will a remedy be granted. The showing required to establish a constitutional violation is indeed demanding.<sup>205</sup> However, as with the cases decided under the Sixth Amendment, when alleged governmental misconduct is examined under the Due Process Clause, no distinction is drawn between direct and derivative use of the evidence.

---

201. *Id.* at 1069.

202. 815 F.2d 457 (7th Cir. 1987).

203. *Id.* at 465-66. Although the federal court did not rely upon the point that the investigator contacted the police with the information on his own rather than being encouraged to invade the confidential relationship, the state court relied on this fact in its ruling, *id.* at 462, and it may well have played a part in the federal court of appeals ruling with regard to due process.

204. *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), demonstrates that purposeful intrusion into a relationship protected by an evidentiary privilege and use of the information obtained are not always sufficient to warrant reversal. In that case, the government under an authorized wiretap intercepted protected conversations between a target of the investigation and her psychiatrist, and it used the information learned to fashion an effective ploy to have the target produce incriminating information. *Id.* at 550-51, 558-60. While ambiguous in its meaning, the court may have been suggesting that it believed the due process remedy was available only for violations of the attorney-client privilege. *See id.* at 560 n.8. It certainly did not find the government’s conduct outrageous. *Id.* For further discussion of *Squillacote*, see *infra* notes 214-23 and accompanying text.

205. Although a number of cases have recognized the possibility that the conviction would be reversed on the basis of a due process violation, no clear example could be found where that relief was actually granted.

## 2. *Lack of Meaningful Protection as a Part of the Privilege Against Compulsory Self-Incrimination*

The Fifth Amendment privilege against compulsory self-incrimination by itself provides only indirect support to protecting communications covered by evidentiary privileges. The Fifth Amendment is personal, and the lawyer asserts the client's self-incrimination privilege to avoid testifying.<sup>206</sup> The lawyer can assert the attorney-client privilege where the incriminating communication was made confidentially for the purpose of obtaining legal advice. Indeed, the Supreme Court stated in *Fisher v. United States*<sup>207</sup> that it is important that the attorney-client privilege be available to cover incriminating communications for "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."<sup>208</sup> Nevertheless, if information were obtained from the attorney without the client being compelled to provide it, the client's Fifth Amendment privilege against self-incrimination would not be violated.

Thus, if the government obtains the incriminating information from the attorney, it may undercut the privilege against compulsory self-incrimination, but it does not violate that constitutional prohibition. The government's actions in securing incriminating client information protected by the attorney-client privilege may be so contrary to fair play that they violate the Due Process Clause, but due process is the constitutional principle that must be invoked rather than the privilege against compulsory self-incrimination.

In summary, while a private violation of the privilege will exclude the privileged communication as a direct consequence of the evidentiary privilege itself in a criminal case, evidentiary privileges standing alone will not justify protection against derivative use. Where the Sixth Amendment right to counsel applies, protection is available against derivative use when the government purposefully or knowingly intrudes into the communication or acquires the confidential information and uses

---

206. *See, e.g., Bellis v. United States*, 417 U.S. 85, 90 (1974) (stating that "the Fifth Amendment privilege is a purely personal one"); *Couch v. United States*, 409 U.S. 322, 329 (1973) (ruling that documentary subpoena directed to taxpayer's accountant did not violate taxpayer's Fifth Amendment right because there was no compulsion on the taxpayer, the only person who could properly assert the privilege).

207. 425 U.S. 391 (1976).

208. *Id.* at 403.

it to the defendant's detriment. In the absence of Sixth Amendment protection, only where fundamental fairness of the trial is threatened by the intrusion will such a remedy be granted, and the showing of purposeful misconduct will have to be great to establish a due process violation.

#### *E. Concern About Remedy*

Courts find that some types of harms do not constitute prohibited indirect uses. If confidential material is used only at the investigatory stage and provides only reassurance to the government as to the strength of its case, courts conclude that such limited use is not constitutionally forbidden.<sup>209</sup> Thus, dismissal of an indictment is not required, and suppression of any improperly obtained evidence, whether direct or derivative, is a sufficient remedy.<sup>210</sup>

However, the major issues regarding remedies are not about harms too insignificant to justify any remedy, but rather concern about the far-reaching implications of a remedy that excludes derivative evidence. Judge Posner stated part of the concern explicitly: "Exclusionary remedies are strong medicine, normally reserved for constitutional violations and challenged even there . . . ."<sup>211</sup> In many of the criminal cases noted earlier, the defendant was seeking an extreme remedy as a consequence of exclusion of derivative evidence: the dismissal of the charges because of alleged irreparable taint. The extraordinary nature of that claim, although only occasionally discussed, plays a major role, I suspect, in the analysis.<sup>212</sup> Dismissal is a result that courts move to with great caution.

---

209. *United States v. (Daniel) White*, 970 F.2d 328, 336 (7th Cir. 1992); *see also United States v. Schwimmer*, 924 F.2d 443, 446 (2d Cir. 1991) (ruling that "confirmatory use" of documents at the investigative stage did not constitute prohibited derivative use).

210. *United States v. Rogers*, 751 F.2d 1074, 1079 (9th Cir. 1985). In *Rogers*, the defendant argued that the disclosures of privileged information solicited by government agents from his former attorney encouraged the IRS to continue its investigation of the defendant and ultimately to indict him. *Id.* at 1077-79. As a result, he argued that the appropriate remedy was dismissal. As noted in the text, the court rejected his argument, drawing a distinction between the use of privileged information during the investigative period and at trial. *Id.* at 1079 (citing *United States v. Calandra*, 414 U.S. 338, 349 (1974) (ruling that information obtained in violation of the Fourth Amendment may be presented to a grand jury)); *see also Chase v. State*, 706 A.2d 613, 616-17 (Md. Ct. Spec. App. 1998) (refusing to apply fruits rationale to confidential marital privilege used to provide probable cause for arrest and search).

211. *United States v. (Richard) White*, 879 F.2d 1509, 1513 (7th Cir. 1989).

212. In *People v. Burnidge*, 687 N.E.2d 813 (Ill. 1997), the court noted that, in arguing for dismissal of the case, defendant was seeking a remedy "more extensive in scope than the evil of which he complain[ed]." *Id.* at 818. The court believed an adequate remedy was the suppression of testimony and a report based on the defendant's statements to a minister about child sexual abuse. *Id.* These statements were covered by the clergyman privilege and were improperly disclosed to authorities. *Id.*

Since the outcome stops the prosecution, there are strong reasons to require both that the government have been in some measure in control of the violation and that it have been knowledgeable about the use of privileged information.<sup>213</sup>

In *United States v. Squillacote*,<sup>214</sup> the court of appeals discussed and applied these concerns about the extent of remedies and derivative evidence. Using an authorized wiretap, the government intercepted and transcribed two confidential communications between the defendant and her psychotherapist. The court acknowledged that the conversations were covered by the psychotherapist privilege<sup>215</sup> and that information was used to help develop an effective ruse that revealed the defendant's prior espionage activity.<sup>216</sup> The defendant contended that any evidence derived from the confidential information must be suppressed and that a hearing to determine whether any such evidence had been used at trial had to be conducted under the principles of *Kastigar v. United States*,<sup>217</sup> which as noted earlier is designed to guard against indirect use of information compelled under "use immunity."<sup>218</sup>

Although the court accepted that the defendant's conversations were in fact privileged and that the government intentionally and effectively used the information, the court nevertheless denied any remedy. It found that the *Kastigar* analysis is properly triggered only if the government through judicial action compels a witness to testify under a grant of immunity.<sup>219</sup> After stating that evidentiary privileges must be strictly construed because they "contravene the fundamental principle that the public . . . has a right

---

at 815-16. The court formally rested its decision on a concept of inevitable discovery, *id.* at 817 (citing *Nix v. Williams*, 467 U.S. 431 (1984)), which on the facts is debatable. *Id.* at 817-18. Throughout, the court's overriding concern about the extent of the remedy requested is clear.

213. The court in *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), suggested that a *per se* rule of reversal should apply to purposeful intrusion where the government's action is "ruthless beyond justification," and where such misconduct is a "corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others." *Id.* at 1227. While prejudice is clearly now required even for purposeful conduct, see *United States v. Morrison*, 449 U.S. 365 (1981), the sentiment expressed by *Rosner* regarding the degree of government misconduct remains accurate as to when dismissal may be considered an appropriate remedy, which was the remedy the defendant in *Rosner* was effectively requesting. *Rosner*, 485 F.2d at 1228.

214. 221 F.3d 542 (4th Cir. 2000).

215. *Id.* at 559 (citing *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996)).

216. *Id.* at 550-51, 558.

217. 406 U.S. 441 (1972)

218. For discussion of *Kastigar* and use-immunity, see *supra* note 186.

219. *Squillacote*, 221 F.3d at 559. The court stated that *Kastigar* protections could be based on a non-constitutional privilege but required as to those privileges that the testimony be compelled by a government promise that the privileged testimony would not be used in any way. *Id.* at 559-60.



to every man's evidence,"<sup>220</sup> and noting that other circuits had agreed that violation of evidentiary privileges did not require suppression of derivative evidence,<sup>221</sup> the court upheld the denial of a *Kastigar* hearing and the refusal to suppress any evidence derived from the government's interception of the defendant's conversations with her psychiatrist.<sup>222</sup> The court noted the possibility of suppression of derivative evidence "under extraordinary circumstances . . . in cases involving the attorney-client privilege," but found that possibility inapplicable to the case at hand.<sup>223</sup>

The court in *Squillacote* was unusual in explicitly discussing and rejecting a *Kastigar*-type remedy. Its concern with onerous procedures and extraordinary remedies was likely not far below the surface for other courts as they examined whether fruits of evidentiary violations should be excluded. In most cases, the implications for irrevocably tainting prosecutions before the responsible government officials even have knowledge of a private individual's violation of privileges is one concern.

---

220. *Id.* at 560 (quoting *Trammell v. United States*, 445 U.S. 40, 50 (1980)).

221. *Id.* at 560.

222. *Id.*

223. *Id.* at 560 n.8 (citing *United States v. (Daniel) White*, 970 F.2d 328 (7th Cir. 1992)).

There may indeed be a special/"privileged" place for the attorney-client privilege with respect to protection against derivative use when it comes to suppressing derivative use of evidence in criminal cases. *United States v. Ankeny*, 30 M.J. 10 (C.M.A. 1990), provides a unique fact pattern where a court suppressed derivative evidence and required dismissal of a charge relying upon the attorney-client privilege, without a constitutional backing. In *Ankeny*, the defendant's civilian counsel, without knowing the significance of his statement under military law, conveyed information about an unknown military offense to a military lawyer in the process of attempting to resolve a pending charge. *Id.* at 11-12. The Military Court of Appeals declined to rest its decision on ineffective assistance of counsel because it was either unavailable or questionable in that formal charges had not been filed and the government had not made an affirmative intrusion into the protected relationship. *Id.* at 12. In construing the attorney-client privilege to cover derivative evidence, the court relied on its prior precedent that prevented "the use 'in any way' of an improperly divulged communication." *Id.* at 15-16 (citations omitted).

The result in *Ankeny* is exceptional, perhaps explained—as the court asserted—as simply a matter of peculiar precedent. That explanation is possible, but this case may really be about the Fifth Amendment's self-incrimination clause providing protection to the attorney-client privilege in very limited situations. I think it is something like that, recognizing the central importance of an attorney acting on behalf of a criminal suspect as to the client's confidential communications outside the narrow confines of the Sixth Amendment.

It is also interesting to note that the court acknowledged the importance of party responsibility and the danger of collusive action. As to the latter, this was not a situation where the facts suggested "a Machiavellian effort by . . . counsel to engineer a breach of the attorney-client relationship for the purpose of preventing his client's prosecution." *Id.* at 17. The majority acknowledged the dissenting judge's position in the court below that "'loose lips' of the *defense* should not be permitted to sink the *Government's* ship" *id.* (quoting *United States v. Ankeny*, 28 M.J. 780, 788 (N-M.C.M.R. 1989), but found a suitable counterweight in the unfairness of deciding the defendant's fate based on the actions of inept defense counsel—describing the situation metaphorically as one in which "a military accused's 'ship' is accidentally scuttled by its captain." *Id.*

The impact a fruits rationale would have on the use of informants generally, who often act for their own motives and beyond the control of their “handlers,” might be substantial. Of particular concern would be the ability of apparent informants, acting as double agents eager to create such irrevocable taint, to infect the prosecution and thereby thwart justice.

## VI. CONCLUSION

The analysis of the case law in this Article has shown that evidentiary privileges as construed by the courts do not provide for the suppression of the fruits of erroneously disclosed confidences covered by such privileges. Protection for out-of-court disclosures was often not part of the common-law tradition of privileges that in a number of situations provided no protection when confidential information was conveyed to third parties outside judicial proceedings.

When derivative protection is granted to privileged communications, it must be justified by other doctrines that may overlap with the confidentiality policy interests protected by evidentiary privileges. Such suppression typically occurs when a privilege is violated by a party immediately involved in litigation and when the privilege at issue is the attorney-client privilege. When the courtroom is figuratively in sight, excluding fruits of a violation of protected confidences may be appropriate if exclusion is important to protect fairness in the litigation process.

The exclusion of fruits may be ordered in civil cases when parties secure confidential information through unauthorized practices that the trial court considers unfair and may even challenge its judicial authority. In criminal cases, exclusion of fruits may be authorized under the Sixth Amendment right to counsel, either through ineffective assistance or because the government intercepted or acquired and used confidential client communications. When a formal prosecution has not yet commenced, suppression potentially may be justified under the Due Process Clause if, through outrageous government intrusion, the fairness of the adversarial process is clearly undermined. Although privileges other than the attorney-client privilege conceptually could be protected in similar situations,<sup>224</sup> their violation is less likely to undercut adversarial fairness in litigation, the fundamental concern at work when fruits are excluded.

---

224. For example, see the discussion of *People v. Kaiser*, 606 N.E.2d 695 (Ill. App. Ct. 1992), which involved suppression of fruits of the violation through improper use of subpoenas of the doctor-patient privilege, *supra* note 91.

In all of these cases, the party against whom the fruits sanction is imposed must have engaged in at least knowing action. Party culpability is a necessary condition of excluding evidence derived from a protected confidential communication.

The reticence to impose a remedy that excludes derivative evidence in criminal cases springs from a number of concerns. One is that evidentiary privileges can easily be violated by private parties who have no formal connection to the government. Courts are reluctant to visit upon the public a powerful remedy that may loose a dangerous criminal when the person responsible for the breach is another private citizen.

Also, if violations of evidentiary privileges by private parties were routinely to necessitate a hearing to determine whether evidence had been tainted, prosecutions could be imperiled without any triggering governmental action, and thus without the notice that precautions should be taken to shield witnesses from taint and to place uncontaminated evidence on the record. The inability of the government to protect itself from irreparably tainted prosecutions is by itself almost enough to ensure that fruits protection cannot routinely result from private parties violating evidentiary privileges.

Of perhaps greatest concern to the government are violations of privileges where the government is not in full control of the person, typically an informant, who caused the breach. In such situations, the government might not have immediate knowledge that a breach occurred or accurate details about how it occurred. Evidence derived from the intrusion could easily seep so deeply into the prosecution's case that the taint could never be fully removed. Presently, even when confined to formal grants of immunity, prosecutors complain about the great difficulty of making the showing required in a *Kastigar*-type hearing. However, with regard to formal use immunity, prosecutors are able to control when such a showing must be made because the burden is only triggered by the formal step of granting use immunity,<sup>225</sup> but they would lack such a clear "trigger" when violations of evidentiary privileges were involved.

Nevertheless, to avoid making violations too tempting, some limitation must be imposed on the government's derivative use of its own violation

---

225. The unreliability and unpredictability of informants exacerbate the uncertainties and dangers for the government. Informants may go further than instructed in an effort to gain leverage for their future bargaining. They may lie about what they have done and the timing of their actions. They may even be acting as double agents, who by collusive action intended to aid the defendant, purposefully spreading tainted evidence throughout the government's case to thwart successful prosecution of an ally. Given these possibilities, an easily triggered *Kastigar*-type proceeding could pose a great threat to successful prosecutions.

of confidences for privileges in addition to the attorney-client privilege. The result in *Squillacote*, where the government listened to the confidential communications with a target's psychiatrist and used the insights learned from that interception to generate a successful sting operation,<sup>226</sup> is unacceptable. When instead of a professional such as a doctor or lawyer, who would likely be sensitive to civil penalties and disciplinary sanctions, it is a government official who commits the violation, as in *Squillacote*, an effective sanction must be available to prevent potentially expansive abuses, and suppression of all benefits gained from the government's violation is likely the only effective remedy. However, situations where such a remedy is necessary appear very rare.

Even where the government is the violator, one sees another reason for judicial reticence to impose a prohibition against derivative use. The remedy would likely be dismissal of the prosecution. Often the breach of the evidentiary privilege provides a critical element of the prosecution's case—sometimes its only knowledge of the crime. Whenever dismissal is the required remedy, courts are likely to act only reluctantly, and that pattern is borne out in the case law.

The general inference to be drawn from the case law is that the policy of protecting privileged conversations is not itself of sufficient strength to justify the far-reaching remedy of excluding fruits. It should come as no surprise that violations of evidentiary privileges do not produce strong remedies. As a general matter, evidentiary privileges are weak instruments to protect confidential communications.

Privileges sometimes perform a critical role in keeping the communication confidential at the most significant moment—in court so that the jury does not hear the communication—and when judicial compulsion would otherwise force the testimony. However, if the confidences are to remain secret, the major part of the effort to maintain the confidence must be done by the parties to the communication by protecting it from disclosure outside the courtroom.<sup>227</sup> Evidentiary privileges cannot be expected to restore confidentiality when it has been effectively lost through out-of-court disclosures. Outside the courtroom,

---

226. See discussion *supra* notes 214-23 and accompanying text.

227. Cf. Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 322-23 (2003) (observing that the focus of persons revealing confidences is on the immediate concern of whether the person receiving the information will protect it rather than on the potential of it being disclosed or protected in some later judicial proceeding).

privileges cannot even limit the damage. But, in the controlled setting of the courtroom, where the facts available to the jury are tightly and artificially limited, privileges can be effective. Thus, as trial approaches and a party takes actions that appear designed to thwart the limited, but critical, role of privileges, then broader remedies may be appropriate. In those situations, courts often exclude not only the confidential communication but also the evidence derived from it.

Obviously, this picture of limited protection for out-of-court communications could change or, more appropriately, could be changed. The concepts and case law discussed in this Article could provide a platform for changing the outcomes as privilege laws are further “codified”<sup>228</sup> and as established rules of privilege in many states are modified. Should those rules be written (or re-written) so that fruits of evidentiary privilege violations are uniformly excluded? While on first examination some of the results in the cases may “feel” a bit wrong, I do not believe there is a good case for protecting fruits of the violation of evidentiary privileges as a general matter.

That expansive remedy is appropriately saved for special cases. In the criminal context, those special cases, such as the government’s interception of confidential communications with a psychiatrist as happened in *Squillacote* or its acquiring of incriminating revelations made by a suspect to his or her attorney, are appropriately handled under the Due Process Clause. Courts should grant relief in those rare cases where governmental intrusion is purposeful, directly undermines important values, and threatens fairness. Recognizing and sanctioning the rare case should not and will not “open the floodgates” to a general protection of derivative evidence, and courts should not shy away from imposing a remedy that signals to law enforcement officials and prosecutors that limits do exist and that intentional violations have serious consequences.

For civil cases, the courts’ power to police violations of discovery rules and ethical principles should provide adequate authority to handle most meritorious cases. Admittedly, the results under this largely ad hoc system

---

228. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769 (2002) (arguing for need to create a set of federal rules of privilege); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 65 (2002) (advocating both creation of federal rules of privilege and federalizing the law of privilege). Some initial efforts were made to begin developing such rules, see *supra* notes 122-26 and accompanying text, but the effort is now directed to developing a survey that reflects the existing state of federal privilege law. Advisory Committee on Evidence Rules, Minutes of the Meeting of October 18, 2002, at 14-15; Advisory Committee on Evidence Rules, Minutes of the Meeting of April 25, 2003, at 18-19.

will not be perfect, but they are preferable to a system where routine violations of privileges result in suppression of fruits.

Thus, my proposal for rules drafting is that no additional protection be provided either generally or, as discussed earlier,<sup>229</sup> in the area of inadvertent disclosures. Clarification of the state of the law would be helpful, however. It would be helpful if, in the text of some general rule on administration of privilege rules or in official commentary, rule drafters make explicit that evidentiary privileges do not on their own require exclusion of derivative use of improper disclosures. Such protection is not prohibited and is possible but must be obtained through other legal tools and principles.

I move now to a slightly different area. A number of the cases that are discussed in this Article arose in the context of child abuse and were influenced by mandatory reporting laws for such abuse. This Article is not about those laws nor is the subject of derivative use inherently linked to reporting laws. However, the subjects intersect because of the close connection between the protection of confidences and evidentiary privileges. Moreover, reporting laws do raise the largely unresolved question of when, if ever, privileges cover and protect out-of-court disclosure of confidences.

I believe that clarification of the law is needed and that some change in the generally accepted law is warranted with respect to mandatory reporting laws for child abuse and related reporting laws as well. Some years ago, I wrote that whether reporting laws were intended to honor or to abrogate various evidentiary privileges needed clarification.<sup>230</sup> Because the responsibility to report occurs entirely outside a courtroom context, a person who receives a confidential communication containing information otherwise subject to reporting laws is often uncertain, absent explicit guidance, whether failing to report the suspected abuse violates mandatory legal duties that may result in criminal penalties,<sup>231</sup> or whether reporting it instead violates professional obligations of confidentiality that may entail professional discipline and civil liability. I strongly suggest explicit resolution of both the basic issue of whether privileges apply to reporting obligations and the specific question of whether child abuse reporting

---

229. *See supra* Part IV.

230. Mosteller, *supra* note 53, at 273-74.

231. *Id.* at 241-43 (discussing the procedural difficulty of determining whether an attorney has an obligation to report suspected abuse within the period of time set in reporting statutes, when a legal obligation will be violated, if that information is protected by the attorney-client privilege).

requirements are intended to override some evidentiary privileges, or all of them.

I propose that privilege rules include a provision that extends the scope of the protection to legal obligations to report. Privileges are designed generally to provide legal justification to refuse to provide testimony—to resist disclosure under compulsion in a judicial setting.<sup>232</sup> As noted earlier,<sup>233</sup> rarely in American law are legal obligations imposed to provide confidential information other than through some type of testimony. In situations where an obligation to disclose confidential information has been imposed through the coercive force of reporting laws, privilege rules should be extended to cover this type of legal compulsion just as they cover compulsion through courtroom testimony. The issue of coverage should be resolved. Reporting requirements, like testimony, should be covered, and coverage should mean protection of the confidential communication.<sup>234</sup>

At the same time that I advocate a default rule of coverage and protection, I recognize that reporting requirements may be determined by legislatures to rest on stronger policy grounds than some or all evidentiary

---

232. Professor Imwinkelried succinctly and accurately describes the reasons why ordinarily out-of-court disclosures do not violate evidentiary privileges as follows: “[T]he privilege applies only to compelled disclosure in a legal proceeding. Because the attorney does not make the statement in a court subject to compulsory process, the privilege itself is inapplicable.” 1 IMWINKELRIED, *supra* note 51, § 6.6.6, at 618.

The explanation has two components. The first is a requirement of legal compulsion. The second is that the statement occurs in court. While reporting laws do not require in-court testimony, which means that they are not currently covered by privilege laws that follow formal definitions, they do involve what I believe is the more important component of the normal two-part requirement—legal compulsion. Here, indeed, the holder of the privilege is not the subject of the legal compulsion and as a result cannot willingly accept a real, but relatively minor, penalty with the prospects that later litigation will vindicate the assertion. Unlike the situation in *Maness v. Meyers*, 419 U.S. 449 (1975), where the Supreme Court held: (1) that an attorney could not be punished for contempt for producing his or her client’s refusal to comply with an order as a method of litigating a claim; and (2) that a lawyer is presumptively guilty of a completed crime when the time period for reporting expires. There is no settled case law that good faith questions about the application of the privilege or professional responsibility rules regarding client confidences constitute a defense to a failure to make the required report.

I contend that legislatures should resolve the uncertainty of application and determine substantively when reporting laws should override privilege laws. My argument is not that privilege laws or reporting laws should always prevail but rather that the uncertainty should be removed. I believe the general policies supporting privilege laws should protect against the penalties of reporting requirements, except when the legislature determines that the policies behind privileges are predominant. Legislative judgment should resolve the conflict rather than uncertainty and fear of criminal sanctions.

233. See *supra* note 53 and accompanying text.

234. I have argued previously that, while the state of the law is far from clear, good arguments can be made for applying the attorney-client privilege to reporting laws. Mosteller, *supra* note 53, at 224-37.

privileges. However, the decision of which, if any, privileges should continue to shield disclosure should be made with reference to particular reporting obligations involved, such as the requirement to report suspected child abuse. Thus, it is most sensible for the reporting law to specify which if any privileges are over-riden by that particular reporting law. In doing so, the legislature can make judgments as to whether particular evidentiary privileges—attorney-client privilege, psychotherapist-patient privilege, the clergy privilege, and husband-wife confidential communications privilege—should give way or be maintained as to that particular reporting requirement. In this process, the legislature resolves explicitly and particularly which sets of policies and laws are preeminent. The weighing of interests can be accomplished more precisely in the context of the reporting law than as a provision of a particular privilege.<sup>235</sup>

For the strongest proponents of evidentiary privileges, particularly for advocates of the attorney-client privilege, not requiring the exclusion of the fruits of improper out-of-court disclosures of protected confidential information must be disappointing. However, this limitation is both well established in the case law and, in my judgment, generally justified. While neither elegant nor simple, protection for fruits is theoretically available for many of the situations where need and justification are greatest. Finally, under the existing legal structure, the exclusion of derivative evidence does not pose a frequent threat to immunize guilty criminals.

---

235. I am here taking issue with the approach adopted by the Uniform Rules of Evidence in Rule 503, the Psychotherapist/Physician/Mental Health Provider-Patient Privilege. UNIF. RULES OF EVIDENCE R. 503 (amended 1999), 13A U.L.A. 69-71 (Supp. 2003-2004). In paragraph (d)(8), the rule proposes an exception for a communication “that is subject to a duty to disclose under [statutory law].” R. 503(d)(8). This result is better handled by a provision in the reporting law declaring that the privilege is overcome as to the reporting duty.

As Rule 503 stands, it raises a number of questions that are nowhere answered. First, it suggests that absent the exception, this privilege and presumably all other evidentiary privileges would apply to reporting obligations, which is not clear as to this or other privileges. Second, the exception is not contained directly in the attorney-client privilege, R. 502, or the clergy privilege, R. 505. Moreover, although indirectly covered for spousal privileges, R. 504, for some victims, is not included as a general exception for reporting laws in this area where the need is generally perceived as the greatest. *See* R. 504(c)(3). Third, while presumably the exception was drafted to cover reporting laws for child abuse and neglect and the abuse of others who are disadvantaged, such as mental patients, the handicapped, and the elderly, who are all mentioned in the commentary, the exception is not so limited. Reporting laws are generally excepted without regard to the balancing of interests between those of the particular reporting law and the value of the privilege. At least with respect to where to locate the exception, I am supportive of the approach taken by Oregon, North Carolina, Oklahoma, and Rhode Island in locating the exceptions for certain privileges, which are quite detailed and varied, within the child abuse reporting laws. *See supra* note 55. Connecticut, which follows the approach of the Uniform Rules, makes the exception part of privilege law as to the psychotherapist privilege. However, it accomplishes largely the same result I suggest by exclusively limiting the exception to the privilege to child abuse reporting. *See id.*