"Show and Tell": An Analysis of the Scope of the Attorney-Client Waiver Standards

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“Show and Tell”:
An Analysis of the Scope
of the Attorney-Client Waiver Standards

Roberta M. Harding*

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I. Introduction

As today's society becomes increasingly litigious, document productions, a major discovery tool, are growing larger. One inevitable consequence of this phenomenon is the increased risk

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1. See Fed. R. Civ. P. 34. The recent amendments to the Federal Rules of Civil Procedure that became effective on December 1, 1993, should not alter the fact that document productions are a key discovery tool. In fact, if anything, the revisions reinforce the importance of document productions as the amendments to Rule 26 include a mandatory initial disclosure of unprotected discoverable information. See Fed. R. Civ. P. 26(a).


3. In addressing the heightened risk that results from this phenomenon, one court observed that "it cannot be doubted that this was a large document production carrying with it a substantial risk that privileged documents might be inadvertently disclosed." Marine Midland, 138 F.R.D. at 483; see also Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co., 109 F.R.D 12, 21 (D. Neb. 1988) (revealing that privileged documents can "slip through the cracks" in large document productions). Similarly, another court noted that in large document productions "[m]istakes of this type [the inadvertent waiver of the attorney-client privilege in cases with voluminous discovery] are likely to occur . . . ." United States v. Pepper's Steel & Alloys, Inc., 742 F. Supp. 641, 645 (S.D. Fla. 1990) (emphasis added). See generally CHARLES T. McCORMICK ET AL., MCCORMICK ON EVIDENCE § 93, at 131 (John W. Strong ed., 4th ed. 1992) (discussing whether voluntary, but inadvertent disclosure should result in waiver); 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, 467 n.3 (1993) (listing cases in which courts cite an increased risk of inadvertently disclosing privileged documents).
that communications protected by the attorney-client privilege may be inadvertently disclosed. Privileged communications may also be

4. As a general rule, information protected by the attorney-client privilege is excluded from the realm of discoverable information. Fed. R. Civ. P. 26(b)(1). To aid in the identification of those communications protected by the privilege, the privilege is usually described in the following manner:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.


5. The following litany of cases illustrates the frequency with which privileged communications are inadvertently produced: In re Sealed Case, 877 F.2d 976, 977 (D.C. Cir. 1989) (revealing that only one privileged memorandum was produced out of many documents); Pepper’s Steel & Alloys, 742 F. Supp. at 643 (disclosing that of the more than 100,000 pages produced during a document production, four pages contained privileged information); Bud Antle, 131 F.R.D. at 181 (stating that plaintiff’s counsel reviewed approximately 6000 documents in preparation for defendant’s inspection, between 2500 and 3000 pages of non-privileged documents were made available for review, and only one privileged document was disclosed); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1990) (finding that of the 90,000 documents examined and of the 14,000 documents produced, only one privileged letter was produced); Monarch Cement Co. v. Lone Star Indus., Inc., 132 F.R.D. 558, 560 (D. Kan. 1990) (revealing that from the more than 9000 pages of documents produced only eight pages of privileged material was produced), summary judgment granted, No. 88-2431-V, 1991 U.S. Dist. LEXIS 18669 (D. Kan. Dec. 19, 1991), aff’d, 982 F.2d 1448 (10th Cir. 1992); Kansas City Power & Light Co. v. Pittsburgh & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989) (identifying three privileged documents produced in a document production totalling 500,000 pages); Fidelity Bank, N.A. v. Bass, No. CIV.A.88-5257, 1989 WL 9354, at *1 (E.D. Pa. Feb. 8, 1989) (discussing a situation in which 11 privileged documents were produced in a document request requiring the production of numerous documents); International Digital Sys. Corp. v. Digital Equip.
disclosed to an adversary under more questionable circumstances: specifically, the intentional, strategic disclosure of privileged information favorable to the disclosing party's position.

In any case involving the disclosure of privileged information, the court must initially decide whether the privilege is waived. To resolve this threshold issue courts apply one of the three waiver tests. If a court decides that the disclosure waives the attorney-client privilege, it must then decide whether the waiver occurs automatically because the documents disclosed were produced during the course of litigation. [See, e.g., *Mendenhall*, 531 F. Supp. at 954-55 (discussing the middle test).] Under the strict test, the waiver occurs automatically because the disclosure of documents protected by the attorney-client privilege . . . operates as a waiver of the attorney-client privilege [even as to any documents disclosed by inadvertence.]'*

International Digital, 120 F.R.D. at 450 (footnote omitted).

The middle test does not automatically permit or prevent the waiver of the privilege. *Bud Antle*, 131 F.R.D. at 183; [see, e.g., *Golden Valley*, 132 F.R.D. at 208 (determining that a party waived its privilege because it failed to take precautions or rectify the error after producing the document).] Instead the following five factors are analyzed to decide whether the privilege is waived:

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Corp., 120 F.R.D. 445, 446 (D. Mass. 1988) (revealing that when the lawyers perused 500,000 documents in response to the document request, 20 privileged documents were included in those selected for production); *Kansas-Nebraska Natural Gas*, 109 F.R.D. at 21 (finding only one privileged document included in the more than "75,000 documents . . . produced in response to Marathon's first request for the production of documents"); *In re Consolidated Litig. Concerning Int'l. Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1154 (N.D. Ill. 1987) (demonstrating that the production of 100,000 documents included more than one privileged document); Baxter Travenol Lab., Inc. v. Abbott Lab., 117 F.R.D. 119, 121 (N.D. Ill. 1987) (recognizing that Baxter included one privileged document in the eight boxes of documents produced); *Lois Sportswear*, 104 F.R.D. at 104 (stating that out of 30,000 pages of documents reviewed, approximately 16,000 pages were produced and twenty-two of these documents were privileged); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982) (highlighting that defendant included four privileged letters in the production of materials from 28 business files).

6. The three tests used to determine this preliminary issue are the lenient test, the strict test, and the middle test. *See, e.g.*, *Mendenhall*, 531 F. Supp. at 954-55 (restating the lenient test); Rockland Indus., Inc. v. Frank Kasmir Assocs., 470 F. Supp. 1176, 1181 (N.D. Tex. 1979) (formulating the strict test); *Bud Antle*, 131 F.R.D. at 182-84 (discussing the middle test). *See generally Harding, supra* note 3, at 469-74 (highlighting the problems that arise from having three different approaches which deal with the issue of whether the inadvertent production of a privileged document waives the attorney-client privilege).

The lenient test states that the "mere inadvertent production [of privileged documents] does not waive the [attorney-client] privilege." *Mendenhall*, 531 F. Supp. at 954; *see also Golden Valley*, 132 F.R.D. at 208 (stating that the court could find no cases in which unintentional or inadvertent disclosure of a privileged document resulted in waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter).
client privilege, then it must address a second, critical issue—the proper scope, or extent, of the waiver. Currently, courts use four standards to determine the appropriate scope of the waiver of the attorney-client privilege. These standards are as follows: (1) the scope of the waiver only extends to the specific document(s) produced; (2) the scope of the waiver encompasses all privileged

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

Bud Antle, 131 F.R.D. at 183.


8. See In Re Sealed Case, 877 F.2d at 980 (stating that after determining that a waiver occurred, the court must proceed to decide the "question as to the scope of the waiver"); Wigmore, supra note 4, § 2327 (urging that implied intention, fairness, and consistency should be weighed in determining the extent of waiver by implication so that one cannot disclose "as much as he pleases" and then "withhold the remainder"); Robert J. Franco & Michael E. Prangle, The Inadvertent Waiver of Privilege, 26 TORTS & INS. L.J. 637, 658-61 (1991) (asserting that waiver extends to the same subject matter of privileged attorney-client communications made prior to disclosure, so that a party may not "exploit selective disclosures for tactical advantage"); see also Note, Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege, 82 MICH. L. REV. 598, 603 n.26 (1983) (discussing the different possibilities for the extent of waiver by implication, including a waiver for all privileged documents and a waiver limited to those documents inadvertently disclosed). See generally Harding, supra note 3, at 468 n.8 (summarizing the scope of the standards courts currently use).

This issue does not exist in jurisdictions applying the lenient test, see supra note 6 (describing the lenient test), because a waiver of the privilege never occurs and, therefore, the scope-of-the-waiver issue is moot.

materials on the same subject matter as the produced documents;10 (3) the scope of the waiver includes all privileged documents relating to the same subject matter as the produced document(s);11 and (4) the scope of the waiver requires the production of all other privileged documents on the same general subject matter.12

This Article analyzes how courts use these four standards to resolve the scope-of-the-waiver issue and proposes new rules that courts should prospectively apply when selecting the appropriate scope-of-the-waiver standard. Parts II through V of this Article discuss the standards presently in use. This discussion includes a brief description of the scope-of-the-waiver test being assessed, followed by an examination of the factors that are key to the selection of that standard. These considerations include classifying the disclosure as inadvertent or voluntary, determining whether the disclosing party has engaged in selective disclosure, assessing whether the disclosure negatively impacts the integrity of the litigation process, and examining whether the consequences of the disclosure are unfair to the nondisclosing party. This Article also explores the administrative aspects of each standard and highlights the inherent administrative burdens experienced by courts in implementing some of the standards. The Article then assesses each standard by focusing on how the standard furthers several important and competing values: protecting the attorney-client privilege; fostering the liberal discovery policy of the Federal Rules of Civil Procedure; ensuring fairness to the litigants; and deterring standard and spurious behavior by attorneys, as measured by the penalty imposed on the disclosing party through the court's selection of a particular standard. Part VI compares the standards, presents a proposal for a revised approach for courts to use when resolving the scope-of-the-waiver question, and advises attorneys about how to

11. In re Sealed Case, 877 F.2d at 980-81.
avoid the imposition of the broader scope-of-the-waiver standards. The Conclusion provides a brief summary of the highlights pertaining to the extent of the waiver issue.

II. The Specific Document Standard

A. Description of the Scope of the Waiver

The specific document standard is one of the four scope-of-the-waiver standards used by courts. This standard limits the extent of the waiver of the attorney-client privilege to the specific privileged communications disclosed.\(^{13}\) Thus, it is a narrow standard because it prevents the nondisclosing party from obtaining access to additional privileged material.

B. Factors Influencing the Selection of this Standard

Several key factors influence a court’s decision to select the specific document standard. These factors include whether the disclosure is classified as inadvertent or voluntary and whether the circumstances surrounding the disclosure provide evidence that the disclosing party engaged in behavior that mocks the litigation process and is inherently unfair to the nondisclosing party.

1. Classification of the Disclosure.—Perhaps the single most important factor the court considers is how to categorize the disclosure of the privileged material. If the court concludes that the disclosure of the privileged material was inadvertent,\(^{14}\) rather than

\(^{13}\) See Parkway Gallery, 116 F.R.D. at 52 (holding that in a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue); see also Turner & Newall, 137 F.R.D. at 182-83 (limiting the scope of the waiver to the specific documents disclosed); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207-09 (N.D. Ind. 1990) (holding that waiver of the attorney-client privilege was limited to the specific letter disclosed).

intentional or voluntary, then the court is very likely to select this narrow standard.\textsuperscript{15}

The critical role played by classifying the disclosure as inadvertent is aptly illustrated in Parkway Gallery,\textsuperscript{16} a case in which several privileged documents were included with other nonprivileged documents in a large document production.\textsuperscript{17} While the court found that the disclosure of the privileged items waived the attorney-client privilege,\textsuperscript{18} it refused to grant plaintiffs' request that "the [scope of the] waiver should cover all communications of the same subject matter."\textsuperscript{19} Instead, relying upon the fact that the disclosure was inadvertent, the court selected the narrower specific document standard.\textsuperscript{20} In doing so, the court noted the pivotal role inadvertent disclosure plays in the decision to select the narrowest scope-of-the-waiver standard:

When a document is inadvertently produced it necessarily loses its actual confidentiality and, therefore, only in special cases should a court attempt to somehow resurrect the secret by a court order limiting further exposure. The same is not true for related but still confidential matters. A ruling of

\textsuperscript{15} See, e.g., Turner & Newall, 137 F.R.D. at 182 (holding that while the plaintiff waived any privilege as to documents inadvertently disclosed, the waiver did not extend beyond the documents actually disclosed); Golden Valley, 132 F.R.D. at 207-08 (explaining that while voluntary disclosure waives the privilege as to related documents, "the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter"); International Digital, 120 F.R.D. at 450 (holding that inadvertent disclosure operates as a waiver of the privilege "as to any documents disclosed"); Parkway Gallery, 116 F.R.D. at 52 (holding that in a case of inadvertent disclosure, waiver should cover only the specific documents in issue, "unless it is obvious that a party is attempting to gain an advantage or make offensive or unfair use of the disclosure"); First Wis. Mortgage v. First Wis. Corp., 86 F.R.D. 160, 172-75 (E.D. Wis. 1980) (holding that defendant's inadvertent disclosure of certain documents for which attorney-client privilege was claimed did not result in waiver); see also Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1333 (N.D. Ga. 1980) (holding that inadvertent disclosure of a minimal amount of privileged material does not constitute a waiver of other privileged material).


17. Id. at 48.

18. Id. at 51-52.

19. Id. at 52 (emphasis added). For a detailed discussion of the same-subject-matter standard, see infra Part III.

no waiver will maintain confidentiality which is the main purpose of the privilege. Therefore, a party attempting to show inadvertent disclosure faces a reduced standard when the issue is whether communications related to the disclosed document should be deemed waived as well. The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure . . . . In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.21

Additional support for the significance of this factor is found in Champion International Corp.22 In that case, a party, responding to a massive request for the production of documents, included a few privileged communications with the nonprivileged materials produced.23 As a result of this disclosure, the defendant contended that the plaintiff should be compelled to produce additional privileged information.24 The court, however, rejected defendant’s contention.25 It not only refused to hold that the plaintiff waived the attorney-client privilege, but also, in dicta, the court expressed its view that even if the privilege had been waived, the scope of the waiver should be limited to the specific documents disclosed because the documents were inadvertently revealed.26 Thus, the initial step of categorizing the disclosure, and the resulting waiver, as inadvertent occupies a powerful and influential position in the decision to select the specific document standard.

Although inadvertence alone might suffice to persuade a court to select the specific document standard, inadvertence coupled with a document production possessing certain compelling attributes can improve a litigant’s chances of having the court select the document-only standard. The attributes that appear to be most influential are as follows: (1) if responding to the document request required producing a substantial number of documents; and (2) if relatively few privileged documents were inadvertently included in the large

23. Id. at 1333.
24. Id.
25. Id.
26. Id.
production. The impact these attributes can have on the decision to select this standard is evident in the Parkway Gallery case. In Parkway Gallery, the producing party copied 12,000 pages of discoverable material in response to its opponent's request for the production of documents. The 12,000 pages included twenty documents protected by the attorney-client privilege. The court held that the inclusion of these protected documents in the response waived the attorney-client privilege. The court, however, selected the narrower specific document standard because the disclosure of the privileged documents was inadvertent and relatively few privileged documents were produced in what was characterized as a massive document production.

_Bud Antle_ provides another example of how combining the inadvertent disclosure component with the magnitude of the document production component can lead to a successful argument that the specific document standard is the appropriate measure. In _Bud Antle_, "[b]etween 2500 and 3000 pages of nonprivileged documents were made available for [the nondisclosing party's] review." One privileged letter was unintentionally included in the

27. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 50 (M.D.N.C. 1987) (stating that these two factors were important and instrumental in selecting the specific document standard); see also Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207-08 (N.D. Ind. 1990) (finding no cases in which unintentional or inadvertent disclosure of a privileged document resulted in a broad waiver of the attorney-client privilege); International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 447-48 (D. Mass. 1988) (stating that 20 privileged documents were unintentionally included in a document request that resulted in the production of 90 cases of documents); Champion Int'l, 486 F. Supp. at 1333 (revealing that a minimal amount of privileged material was disclosed during "the course of exhaustive discovery").

29. _Id._ at 48.
30. _Id._ at 52.
31. _Id._
32. _Id._ These same factors were relied upon in another case in which a court adopted the specific document standard in a situation when the producing party produced 90 cases of documents, excluding 2600 documents withheld on the grounds of privilege, and accidentally produced 20 privileged documents. International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 446-48 (D. Mass. 1988).
34. _Id._ at 181.
documents reviewed by the requesting party. Although the Bud Antle court held that the privilege was waived because a privileged document was disclosed, it limited the scope of the waiver to that specific document. While the court did not expressly state its rationales supporting the selection of this standard, it is fair to surmise that the court's references to the enormity of the document production and the fact that only one privileged item was produced creates a reasonable inference that the size of the document production, in relation to the one privileged document produced, was a critical factor in the court's scope-of-the-waiver assessment. In short, when deciding this issue, it appears that courts may determine that the specific document standard is appropriate if the document production is sufficiently large and relatively few privileged communications are inadvertently disclosed.

(a) The Integrity of the Litigation Process.—Although a conclusion of inadvertent disclosure is necessary to trigger the application of the narrowest standard, inadvertence alone or inadvertence and compelling production circumstances might ultimately be insufficient to guarantee the application of the document-only standard. For example, a court might decide to opt for a broader waiver standard based on its perception of the actions taken by the disclosing party during the course of the document production. Accordingly, if a court concludes that, although inadvertent, the disclosing party's actions are indicative of a failure to fulfill the obligation to ensure the integrity of the litigation process, then the court would be more likely to refrain from

35. Id.
36. Id. at 183-84.
37. First Wisconsin presents a situation in which this factor also was considered and played a pivotal role in a court's selection of this limited measure. First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160 (E.D. Wis. 1980). In this case, the producing party produced in "excess of 150,000 pages of documents." Id. at 169. Twenty-one privileged documents were unintentionally included with the 150,000 pages. Because privileged communications had been disclosed, the nonproducing party requested that the court order the producing party to surrender all additional privileged materials that "relate to the same subject matter" as those initially produced. Id. at 172-73. In refusing to grant this request, the enormity of the document production coupled with the inclusion of relatively few privileged documents seems to have influenced the court's decision that the specific document standard was the appropriate standard to apply. Id. at 169.
applying the specific document standard, notwithstanding that the disclosure was, in fact, inadvertent.\textsuperscript{38} One example of how this consideration might effect the application of the specific document standard is found in Parkway Gallery.\textsuperscript{39} In that case, the nondisclosing party argued that the "defendant was trying to overwhelm them by using a document dump," which warranted the imposition of a standard broader than the specific document standard.\textsuperscript{40} The court, however, rejected the nondisclosing party's contention and found that the disclosure of the privileged material was not indicative of any effort to abuse the discovery process.\textsuperscript{41} In doing so, the court specifically noted that the defendant's decision to "produc[e] virtually all [of] its files for inspection was not a tactic designed to overwhelm plaintiffs but rather serves to reduce discovery disputes . . . ."\textsuperscript{42} Therefore, something more than a mere inadvertent disclosure might be necessary for a court to adopt the narrowest scope-of-the-waiver standard: The disclosing party must refrain from taking any actions that indicate a lack of respect for the litigation process and the discovery system.

Additional acceptance of this modification of the role played by disclosure due to inadvertence and the resulting impact on the selection of the specific document standard is evident in Golden Valley.\textsuperscript{43} In that case, the court noted that, with respect to the production and retention of documents involved in the case, "counsel have been scrupulous in their filings to reflect the protective nature

\textsuperscript{38} In Parkway Gallery, the court noted that "unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure," the inadvertent disclosure of documents supports the application of the specific document standard. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987); see also First Wisconsin, 86 F.R.D. at 174 (adopting the specific document standard, partially because the disclosing party did not gain any advantage from the inadvertent disclosure of privileged documents).

\textsuperscript{39} Parkway Gallery, 116 F.R.D. at 52.

\textsuperscript{40} Id. at 51.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 50-51.

of the information submitted." The court's statement indicates that the disclosing party's inadvertent disclosure did not reflect a disregard for the adjudication process and, consequently, the court opted not to adopt the opponent's suggestion to impose a broad standard but instead determined that the situation warranted the use of the narrow specific document standard. Thus, the inadvertent disclosure of protected material may ultimately be insufficient to support the application of the specific document standard if the court concludes that the disclosing party has little or no respect for the litigation process.

(b) Fairness to the Litigants.—Although classifying the disclosure as inadvertent is generally a variable needed to obtain the limited specific document standard, it remains possible that, despite refusing to definitively classify the disclosure as inadvertent, a court might still decide that the specific document standard is appropriate. For example, some courts have not expressly designated the disclosure as inadvertent or voluntary, but nonetheless selected the specific document standard when addressing the scope-of-the-waiver issue. In other instances, such as International Digital Systems, the court uses the specific document standard, but the classification of the disclosure remains ambiguous. In International Digital, the court apparently treated the situation as one involving a voluntary disclosure, but adopted terminology associated with inadvertently disclosed privileged material. One interpretation of this decision is that the court purposefully used obtuse language in its discussion of the classification of the waiver because it wanted the disclosure issue to remain ambiguous. Another interpretation is that the court developed a definition of "inadvertent" that is akin to "voluntary." Regardless of which view is adopted, it is undisputed that the court left the classification of the waiver unresolved.

44. Id. at 207; see also Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1333 (N.D. Ga. 1980) (stating that counsel was cooperative in an "exhaustive" discovery situation).

45. See Prudential Ins. Co. v. Turner & Newall, PLC, 137 F.R.D. 178, 182-83 (D. Mass. 1991) (holding that plaintiff waived any privilege to disclosed information, without specifying whether the waiver was inadvertent or unintentional).


47. Id. at 448-50.
Nonetheless, the court selected the specific document standard for a situation that the court apparently viewed as being tantamount to a voluntary disclosure situation. Unfortunately, courts that deviate from the strict inadvertent-versus-voluntary disclosure factor and conclude that the specific document standard is appropriate typically fail to provide detailed rationales for these decisions. However, it appears that notions of fairness and justice can be the prime motivators for a court opting to select the specific document standard when the disclosure has not been definitively defined as inadvertent.

2. The Selective Disclosure Factor.—As previously noted, the decision to select this narrow standard does not solely rest on whether the court opts to classify the disclosure as inadvertent, but is also tied to judicial concerns that the disclosure not reflect an effort to compromise the integrity of the litigation process and, specifically, the discovery process. In addition, the decision to select this standard may reflect a court’s interest in ensuring that the proceedings are fair to the litigants. Typically, these dual concerns are evident in disclosure situations in which it is clear that the disclosing party has engaged in selective disclosure. Selective disclosure occurs if a party discloses favorable privileged material

48. Id. at 450.

49. Id.; see also Bud Antle, Inc., v. Grow-Tech, Inc., 131 F.R.D. 179, 184 (N.D. Cal. 1990) (finding that fairness demands that the disclosing party waived the attorney-client privilege regardless of whether disclosure was inadvertent).

50. “Truth-garbling” is an alternative term for this practice. The phrase “truth-garbling” was coined because the resolution of a legal dispute requires a determination of the “truth.” The “truth” has a greater risk of being “garbled” if parties, by alleging inadvertent disclosure, are able to decide which information will be available to be considered by those involved in the resolution of the matter. See Golden Valley Microwave Foods, Inc., v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1980) (discussing indices that the court can consider to determine whether a disclosure is truly inadvertent); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161 (D.S.C. 1974) (providing a definition of selective disclosure); International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (holding that a party could not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because such conduct was self-serving). See generally Richard L. Marcus, The Perils of Privilege: Waiver and the Litigator, 84 MICH. L. REV. 1605, 1607 (1986) (arguing that waiver should be dependent on whether the party made selective use of privileged material to “garble” the truth).
on a particular issue and subsequently attempts to use the attorney-client privilege as "a shield" in order to avoid disclosing unfavorable privileged material on the same issue. Thus, a court will more likely forego applying the narrowest standard as the scope of the waiver if the disclosing party engaged in acts disruptive to the discovery and litigation processes.

Selective disclosure is unacceptable to the courts because it would provide the producing party with the power to decide which privileged communications it wants to disclose and which it wants to retain. Consequently, the disclosing party would be in a better position to unilaterally dictate the course of the litigation to some degree, which is in direct contravention with the adversarial posture of present day litigation. Perhaps more importantly, selective disclosure indicates that the court has before it a litigant who refuses to "play by the rules" and whose actions express little, if any, interest in achieving the broader goal of maintaining the integrity of the adjudication process. Thus, if the disclosing party did strategically disclose favorable documents and the court applies the specific document standard, then the court would, in essence, be rewarding the disclosing party for its malfeasance by exhibiting behavior that is contrary to upholding the integrity of the litigation process.

Selective disclosure also allows one party to have an unfair use of the protected material by allowing it to gain an advantage over the


Typically, if it appears that the party deliberately and consciously decided to produce certain privileged materials, and subsequently refused to disclose other privileged documents in an effort to gain an advantage, then courts are more likely to refuse to apply the limited specific-document-waiver standard. However, it is not clear what burden of proof the court would require in order to establish that the disclosing party had engaged in selective disclosure. In one case, the court established a fairly stringent burden of proof standard by holding that "it [must appear] obvious a party is attempting to . . . make offensive or unfair use of the disclosure." Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D.46, 52 (M.D.N.C. 1987). Since the Parkway Gallery court used the specific document measure, it is fair to surmise that the court did not find it "obvious" that the disclosing party was involved in strategically disclosing privileged communications.
nondisclosing party.52 The Duplan Corp. court elucidated this point when it noted that "[w]here a party has produced nonincriminating privileged attorney-client documents and withheld other incriminating documents, an adversary may rightfully assert the doctrine of subject matter waiver."53 Thus, when a court confronts a situation that has evidence of selective disclosure activity, in order to equalize the parties' positions or to neutralize the advantage gained by the disclosing party, the court might be more likely to refrain from selecting the specific document standard.

Equally important is that the issue pertaining to the classification of the disclosure as inadvertent or intentional is inherent in situations when there is evidence of selective disclosure. For example, in some situations it might be difficult to determine whether the disclosure was inadvertent or voluntary and the court, in selecting a scope-of-the-waiver standard, may decide that regardless of whether the disclosure occurred54 inadvertently or intentionally, the production of favorable privileged material and the disclosing party’s subsequent request for the application of the specific document standard suggests that selective disclosure occurred and, thus, the situation does not support the use of the narrower specific document standard.55

52. See Parkway Gallery, 116 F.R.D. at 52 (stating that a general waiver of the attorney-client privilege is not appropriate in the case of inadvertent disclosure unless it is obvious that a party is attempting to make unfair use of the disclosure).

53. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1191 (D.S.C. 1974). The Parkway Gallery court recognized the relationships among selective disclosure, unfairness to the nondisclosing party, and the selection of the specific document standard: "The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage." Parkway Gallery, 116 F.R.D. at 52; cf. First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 174 (E.D. Wis 1980) (stating that the disclosure was unfair because the disclosing party did not benefit from the disclosure; thus, the narrower specific document standard was selected).

54. See Golden Valley, 132 F.R.D. at 207 (accepting description of the disclosure as truly inadvertent and noting that there was not "a sly attempt to . . . use truth garbling tactics").

55. Cf. Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983) (stating that mere inadvertent production does not automatically waive the privilege); Western Union, 26 F.2d at 56-57 (finding intentional disclosure waived the privilege).
In sum, several factors may be relevant to determining whether the specific document standard is applicable. After a court resolves that issue, it must then delve into the administration of the standard.

C. Administering the Specific Document Standard

The mechanics of the specific document standard are simple. Once there is a disclosure of protected communications and the court finds waiver of the attorney-client privilege, then the waiver extends only to the specific privileged information disclosed. Thus, as previously noted, this standard is a narrow and limited scope-of-the-waiver measure.

This standard’s simple mechanics enhances the ease with which it can be administered. As a result, it is unlikely that courts will encounter any difficulty in determining which communications have lost their protection due to the waiver of the attorney-client privilege because the scope of the waiver does not extend beyond the privileged materials that were actually produced to the opponent. Therefore, the court’s primary administrative task is to determine which privileged materials were initially disclosed and to issue an order allowing the nondisclosing party to retain those communications.

D. The Standard’s Policy Considerations

Several critical policy considerations influence the selection of a scope-of-the-waiver measure. The policies at stake are (1) the preservation of the attorney-client privilege; (2) the implementation of the liberalized discovery policy; and (3) the imposition of a penalty to deter substandard litigation practices.

The limited specific document standard endorses the attorney-client privilege more than it does the liberal discovery policy.

56. The “purpose of the attorney-client privilege is to promote freedom of consultation between client and legal advisors without apprehension of subsequent compelled legal disclosure.” International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973); see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (explaining that the purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”); In Re Sealed Case, 877 F.2d 976, 979 (D.C. Cir. 1989) (explaining that the “raison d’etre of the hallowed attorney-client privilege” is to protect, and thereby
It does so because its narrow scope ensures that the disclosing party will have to surrender fewer privileged materials. Consequently, a court can salvage the attorney-client privilege to the greatest extent possible. The general endorsement of this policy is reflected in one court’s observation that “a ruling that no waiver has occurred as to the nondisclosed documents will maintain the confidentiality which is the main purpose of the attorney-client privilege.”

Thus, if a court views the preservation of the attorney-client privilege as the paramount policy consideration involved in resolving this issue, then the odds are in the disclosing party’s favor that the court will select the specific document standard because that standard embodies the importance placed on upholding the attorney-client privilege.

Although this standard’s primary emphasis is on preserving the attorney-client privilege, it does not necessarily follow that this standard is somehow inconsistent with the objectives of a liberal discovery policy. In fact, by prohibiting the disclosing party from regaining dominion over the disclosed privileged material, the court promulgates the exchange of information—a key purpose of the liberal discovery policy. Furthermore, the standard fosters the discovery of information by permitting the nondisclosing party to retain previously protected documents.

Adopting the specific document standard will necessarily penalize the disclosing party for disclosing privileged material, since every scope-of-the-waiver test contains a punitive component. However, the penalty is minimal because the disclosing party is only required to relinquish the attorney-client privilege protection for the

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57. Discovery has three main purposes: preserving relevant information that may be unavailable at the time of trial; ascertaining and refining the actual disputed issues; and enabling parties to obtain information that will lead to evidence admissible at trial. E.g., Jack H. Friedenthal et al., Civil Procedure § 7.1 (2d ed. 1993); Fed. R. Civ. P. 26(b)(1).

specific documents. More than likely, a court's decision to select this standard is influenced by the belief that, although the careless attorney must be chastised in some manner, the hapless client should not be overpenalized. This concern is apparent in the hypothetical case of a court soundly chastising the responsible attorney for failing to institute sufficient precautionary procedures, but applying the relatively protective specific document standard. In reaching this

59. A court may hold that the attorney-client privilege is waived and that the specific document scope-of-the-waiver measure will be used; however, while the nondisclosing party loses the protection afforded by the attorney-client privilege, it still might be able to seek a protective order to avoid public disclosure of the documents. See FED. R. CIV. P. 26(c).

60. Of course, there are alternatives to a court using the specific document standard to protect a client from its attorney's foibles: The court could impose a broader scope-of-the-waiver standard and the client could bring a legal malpractice action against the attorney for disclosing the privileged communication.

While this malpractice alternative is available to the disclosing party, it has several inherent problems. The most critical problems are associated with the difficulties in bringing such an action. When the alleged act of negligence consists of the inadvertent disclosure of privileged documents that resulted in the application of a particular waiver test, the client or claimant is likely to have difficulty establishing three of the malpractice elements. First, it will be difficult for the client to show that the attorney breached the duty to use reasonable care, which has been summarized as follows:

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

7 AM. JUR. 2D Attorneys at Law § 199 (1980) (footnotes omitted). Under such a definition, an attorney-defendant may be able to convince a jury that the duty was not breached despite the imposition of a particular waiver standard.

Second, even if a breach of duty can be shown, the client must shoulder an onerous burden to establish "but for" causation, especially because the alleged negligent act is the production of privileged materials that resulted in the application of a particular scope-of-the-waiver standard. Clients will essentially have to relitigate the underlying action as though the disclosure had never taken place and the scope-of-the-waiver standard had not been imposed, and then prove that, if the privileged materials had not been discovered, then the outcome would have been favorable to them.

Third, proximate cause will be difficult to establish. Many factors influence a jury's verdict or encourage the parties to reach a settlement; thus the attorney-defendant could argue that any number of these factors caused the client's loss. The
outcome, the court may balance its dissatisfaction with the attorney's substandard professional actions against the punitive impact of the specific document standard on the client. The punitive facet is also minimized because it is unlikely that the surrender of the specific documents will significantly impact the course of the parties' dispute: The disclosed documents are unlikely to be "smoking guns" that might affect settlement options and litigation strategy.

The magnitude of the punitive facet of the specific document standard also relates to risk-benefit considerations. The specific document scope-of-the-waiver test enables the disclosing party to reap more benefits because a litigant who discloses privileged materials only runs the risk of forfeiting the protection in those specific communications. Thus, the party waiving the privilege relinquishes solely the right to continue shielding particular privileged communications and does not risk the disclosure of additional documents. Unfortunately, this standard only slightly deters the negligent production of documents by lawyers, who need to be careful not to disclose confidential communications in the atypical situation when the production includes a "smoking gun" adverse to the disclosing party's position. Of course, such documents should receive the closest scrutiny before production and are, accordingly, less likely to be inadvertently disclosed. If such a damaging disclosure were to occur, however, there is a greater possibility of negatively affecting the terms of a settlement as well as any strategic advantages the disclosing party had before the disclosure. Attorneys may also fear that the court might misinterpret an advantageous opponent's investigation, the skill of the opponent's attorney, or the client's own failures on the witness stand could be cited as more direct causes of the client's disappointment than the scope-of-the-waiver standard applied because of the attorney's negligent disclosure.

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

61. See Parkway Gallery, 116 F.R.D. at 52 (explaining that the specific document standard "limits the risk to parties in major discovery cases").
inadvertent disclosure and compel a broader disclosure of confidential matters to eliminate the advantage.

E. Conclusion

In sum, the specific document standard is a narrow test that imposes a minimal penalty on the party who loses the protection of the attorney-client privilege. It is also easy to administer, because the court needs to determine only which privileged documents were disclosed. Because it provides a limited waiver, this standard conforms to the principles embodied in the attorney-client privilege doctrine more than to those of the liberalized discovery policy.

III. The Same-Subject-Matter Standard

A. Description of the Scope of the Waiver

The same-subject-matter standard is the second of the four scope-of-the-waiver tests used by courts dealing with confidential material disclosed through discovery. This standard requires the disclosing party to surrender all additional privileged documents on the same subject matter as those privileged documents actually revealed. Many consider this test a relatively narrow measure because the subsequent compelled disclosure is "limited to [documents on] that specific subject."

62. Standard Chartered Bank, PLC v. Ayala Int'l Holdings, Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986) (explaining that privilege is waived as to all communications on the same subject matter); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1191 (D.S.C. 1974) (stating that this standard waives the privilege "as to all communications between the same attorney and the same client on the same subject"); Bierman v. Marcus, 122 F. Supp. 250, 252 (D.N.J. 1954) (stating that the scope of the waiver in this case extends "to all other communications to the attorney on the same matter"); In Re Associated Gas & Elec. Co., 59 F. Supp. 743, 744 (S.D.N.Y. 1944) (explaining that the waiver encompasses "all the privileged correspondence between [the client] and its attorney on that specific subject").

63. Goldman, Sachs & Co. v. Blondis, M.D., 412 F. Supp.286, 289 (N.D. Ill. 1976) (noting that this is a narrow standard); see also Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 461 (N.D. Cal. 1978) (stating that the scope of the waiver must be "strictly construed" to the same subject matter).
B. Factors Influencing the Selection of this Standard

Several factors play a major role in influencing a judicial body's decision to select the same-subject-matter standard: the manner in which the waiver is classified; a concern for ensuring that the underlying judicial proceeding is fair to the nondisclosing litigant; and a desire to encourage litigation practices that are consistent with upholding the integrity of the litigation process.

1. Classification of the Disclosure.—Perhaps the most important factor in selecting this standard is how the court classifies the waiver. Not surprisingly, a court is more likely to select this broader, although still fairly narrow, scope-of-the-waiver standard if the disclosure was voluntary, rather than inadvertent. "The general rule [is] that a [voluntary] disclosure waives not only the specific communication but also the subject matter of it in other communications."64 Consequently, if the nondisclosing party can establish that the disclosure was voluntary, then the court is likely to apply the same-subject-matter standard.

The Perrignon65 decision illustrates how voluntariness is one of "[t]he key"66 variables in the selection of this standard. In Perrignon, the plaintiffs, at a deposition, attempted to question the defendants' former in-house counsel about alleged payments made

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64. Parkway Gallery, 116 F.R.D. at 52; see Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981) (finding that "it has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject"); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co. 132 F.R.D. 204, 207-08 (N.D. Ind. 1990) (stating that "[v]oluntary disclosure, as opposed to inadvertent disclosure, waives the privilege as to remaining documents of that subject matter"); Standard Chartered Bank, 111 F.R.D. at 85 (explaining that "the voluntary production of a privileged document effects a waiver of the privilege as to all other privileged communications concerning the same subject matter"); Duplan, 397 F. Supp. at 1191 (explaining that a voluntary waiver of the attorney-client privilege results in a same-subject-matter waiver); see also Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 548 (D.D.C. 1970) (noting the importance of the voluntariness of the disclosure in the decision as to which scope-of-the-waiver standard to apply); In Re Associated Gas, 59 F. Supp. at 744 (deciding that the same-subject-matter standard was appropriate for the intentional waiver standard).


by the corporate defendant to a state official. The defendants objected to this line of questioning and the deponent refused to respond on the basis that the communications were protected by the attorney-client privilege. At a later date, the plaintiffs deposed the defendant corporation's former president and asked him "about conversations he had with Nielsen [the former in-house counsel] concerning payments made by" the corporation to the state official. Although the defendants objected to this line of questioning, claiming the protection of the attorney-client privilege, counsel for the defendants ultimately permitted the deponent to "describe a conversation he had with Nielsen concerning payments made" to the state official. Consequently, the plaintiffs moved to compel the first deponent, who previously had asserted the attorney-client privilege when refusing to answer the same questions at his initial deposition, to answer questions regarding his conversations with the second deponent about the alleged payments. The defendants' objected to this request on the grounds that there was no waiver of the attorney-client privilege because they registered this precise objection at the second deponent's deposition. The court, however, disagreed and held that the disclosure of the privileged communication by the second deponent was voluntary and effectively waived the privilege so that "defendants cannot now claim the privilege to prevent [another witness] from answering questions about these same conversations." Thus, the voluntary disclosure of privileged information can provide a court with strong grounds for adopting the same-subject-matter standard.

Although courts are usually more comfortable applying this standard in situations involving the voluntary disclosure of protected communications, an exception can arise if an inadvertent disclosure was due to the attorney's carelessness or lack of diligence in the performance of professional duties associated with the disclosure of

68. Id.
69. Id.
70. Id.
71. Id.
73. Id. at 461.
the confidential material.\textsuperscript{74} For example, in one case the attorney responsible for inadvertently disclosing privileged material was found to have been careless "on a large scale,"\textsuperscript{75} so the court proceeded to impose the same-subject-matter disclosure standard. Thus, although courts are reluctant to impose a substantial penalty on the disclosing party if the disclosure resulted from a minimal amount of carelessness, they will not automatically refuse to apply the same-subject-matter standard if the attorney’s degree of care fails to reach the minimal, acceptable professional level for the performance of the task at hand.

2. The Selective Disclosure Factor.—The selective disclosure factor that is related to voluntary disclosure is another variable that courts frequently include in the same-subject-matter calculation. Because courts abhor this practice,\textsuperscript{76} litigants who utilize selective disclosure will most likely, at best, encounter the same-subject-matter standard. Courts are not the least bit hesitant in voicing their displeasure with this tactic:

A party cannot waive such a privilege partially. He cannot remove the seal of secrecy from so much of the privileged communication as makes for his advantage, and insist that it shall not be removed as to so much as makes to the advantage of his adversary, or may neutralize the effect of such as has been introduced.\textsuperscript{77}

The \textit{Perrignon}\textsuperscript{78} case, which was discussed above,\textsuperscript{79} also provides a discussion of the merit of selecting the same-subject-matter standard in selective disclosure situations. In \textit{Perrignon}, the court ultimately acknowledged that "[u]nder these circumstances


\textsuperscript{75} Duplan, 397 F. Supp. at 1191.

\textsuperscript{76} Displeasure with this activity was noted by the Standard Chartered Bank court in the following manner: "[W]e cannot permit a party to selectively choose to produce only those communications which may be favorable to him and withhold on grounds of privilege others which may be favorable to his adversary." Standard Chartered Bank, PLC, v. Ayala Int’l Holdings, Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986).

\textsuperscript{77} Western Union Tel. Co. v. Baltimore & Ohio Tel. Co., 26 F. 55, 57 (S.D.N.Y. 1885).

\textsuperscript{78} Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978).

\textsuperscript{79} Supra notes 65-73 and accompanying text.
defendants had much to gain by allowing Abrams to answer plaintiffs' questions so long as they could preserve [defendants'] privilege so as to keep Nielsen from having to give his version of the same conversation." 80 In fact, the court expressly and accurately recognized defendants' actions as a tactical decision to strategically select certain privileged information for disclosure:

The instant case is more analogous to a situation where the holder of a privilege lets in part of a privileged communication and then seeks to keep the remainder of the communication out. . . . [A] party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving. 81

Thus, the court's decision that the defendants' actions suggested that they engaged in selective disclosure warranted the application of the same-subject-matter standard. 82

Displeasure with selective disclosure is also present in Western Union Telegraph Co. 83 In that case, a party seeking a preliminary injunction utilized what the court considered to be dilatory "truth-garbling" tactics. 84 In denouncing the party's actions and finding that the same-subject-matter scope-of-the-waiver standard was appropriate, the court made the following observation: "The question, then, is whether the complainant can [seek] shelter behind its privilege . . . when it has itself produced fragmentary parts of them, and sought to use them as a weapon against the defendant." 85

In each of these cases, the court reached the sensible conclusion that for parties engaging in selective disclosure, considerations of fairness and deterrence require the selection and implementation of the same-subject-matter standard.

82. Perrignon, 77 F.R.D. at 460-62.
84. Id.
85. Id.
3. Fairness to the Litigants and Respect for the Litigation Process.—A consideration that is related to the strategic disclosure factor is whether the disclosure of the privileged communications might violate notions of fairness to the nondisclosing opponent or undermine the integrity of the litigation process, particularly the discovery process. These dual concerns are interrelated because a party engaging in the strategic disclosure of privileged material necessarily reveals its minimal respect for the fair use of the mechanism used to adjudicate the parties’ dispute.

If the disclosure of the privileged materials confers a benefit on the disclosing party and thereby creates unfairness for a litigant, then courts are more receptive to using the same subject standard as a tool for neutralizing the disclosing party’s advantage. One court has described the impact of the fairness concern: “It is true that the voluntary production of a privileged document effects a waiver of the privilege as to all other privileged communications concerning the same subject matter. This is so because fairness... cannot permit a party to selectively choose [documents].”

Concerns for fairness to the nondisclosing party considered in the application of this standard also manifest the belief that if the disclosure is unfair to the nondisclosing party, then the nondisclosing party holds something that is akin to a right to this specific remedy: Namely, the imposition of the same-subject-matter standard. As

86. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987) (stating that same-subject-matter standard can be appropriate if the disclosure is unfair to the nondisclosing party); Standard Chartered Bank, PLC, v. Ayala Int’l Holdings, Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986) (also emphasizing fairness); Champion Int’l Corp. v. Int’l Paper Co., 486 F. Supp. 1329, 1333 (N.D. Ga. 1980) (noting the role that fairness to the nondisclosing party plays in the decision to apply the same-subject-matter standard); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1191 (D.S.C. 1975) (noting that concerns for fairness to the nondisclosing party can justify imposing the same-subject-matter scope-of-the-waiver standard); Western Union, 26 F. at 57 (stating that disclosing party cannot have partial waiver at the expense of nondisclosing party); see also Golden Valley Microwave Foods, Inc., v. Weaver Popcorn Co., Inc., 132 F.R.D. 204, 208 (N.D. Ind. 1990) (determining that disclosing party cannot use waiver to gain an advantage); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (noting that fairness is an important consideration in evaluating the issue of waiver).


88. Id.
a court has written, "Where a party has produced nonincriminating privileged attorney-client documents and withheld other incriminating documents, an adversary may rightfully assert the doctrine of subject matter waiver." Another court noted that it would be patently unfair to the nondisclosing party if the disclosing party could benefit from disclosed privileged material and avoid the imposition of the broader, same-subject-matter standard.

There is also a relationship between the selection of this standard and the court's perception of how, if at all, the disclosing party's actions undermine or jeopardize the respect that should be accorded to the litigation process. This variable is infrequently given as a rationale for selecting the same-subject-matter standard. Nonetheless, it is evident that courts implicitly include this variable in the calculations they make when determining whether the same-subject-matter standard is appropriate. For example, the Standard Chartered Bank court noted in dicta that if the circumstances of the disclosure threatened the integrity of the litigation system in some manner, then the court would be justified in applying the same-subject-matter standard. As a further example, the harsh tone adopted by the Western Union court in describing the disclosing party's actions that warranted selecting the same-subject-matter standard makes it clear that those actions compromised the integrity of the adjudication process. As a final example, the Bierman court apparently was suspicious about the truthfulness or accuracy of the disclosing party's assertions that the attorney-client privilege was applicable. The integrity of the litigation process is, of course, dependent on good-faith assertions of the privilege. The court ruled that the same-subject-matter waiver was the appropriate standard because "most of the claims of privilege seem specious and dilatory." Thus, if the circumstances of the disclosure, such as false assertions of the validity of the attorney-client privilege, suggest that the disclosing party acted in a manner that undermines

91. Standard Chartered Bank, 111 F.R.D. at 85.
94. Id.
the integrity of the litigation process, the court might adopt the same-subject-matter standard.

C. Administering the Same-Subject-Matter Standard

The mechanics of this standard first require the court to define the precise subject matter of the specific documents disclosed. Then, following an in camera review of the confidential materials, the court must compel disclosure of additional privileged information that comports with that definition or, alternatively, the disclosing party can voluntarily relinquish the pertinent documents. These tasks appear simple, almost ministerial. However, attempting to define the subject matter of the disclosed privileged matter is frequently a key administrative difficulty. Thus, determining the precise parameters of the subject matter of the disclosed communications in order to determine which other privileged materials are on the same subject matter can be problematic. This potential stumbling block is best illustrated by examining several cases.

In Perrignon, the corporation’s president testified about statements made to him by the corporation’s in-house counsel regarding alleged payments by the corporation to a state official. The court, finding a same-subject-matter waiver, defined the same subject matter as conversations between Abrahms, the corporation’s former president, and Nielsen, the former in-house counsel, dealing with the payments made by the corporate defendants to a particular state official. This is a limited and narrow interpretation of the same subject matter. However, despite the imposition of the formally broader same-subject-matter standard, the court’s adoption of a relatively narrow definition actually reduced the amount of additional privileged material that defendants were compelled to disclose.

Alternatively, the court could have adopted a more expansive definition of the same subject matter. For example, the defendant might have been compelled to disclose all discussions and conversations between all individuals about the corporation’s payments to the identified state official. This more expansive interpretation of the same subject matter would have enhanced the plaintiffs’ ability to

96. Id. at 461-62.
obtain privileged information. Thus, although the Perrignon court adopted a definition of the same subject matter that was undoubtedly acceptable, the fact that the “same subject matter” can have different interpretations indicates that courts will find it more difficult to administer this standard.

The narrow scope identified by the court in Perrignon should be contrasted with the definition of the same subject matter adopted in Weil. In Weil, a defense witness testified that “the Fund had been advised by its Blue Sky counsel that ‘it would be best to register wherever the Fund had a single shareholder.’” The court deemed the contents of this statement privileged. The Fund, however, proceeded to disclose more information pertaining to the Blue Sky laws by releasing a letter written by “the Fund’s in-house counsel . . . to Blue Sky counsel, in which [he] suggested that the Fund only register its shares in certain states.” This interpretation broadened the meaning of the same subject matter because it did not limit the subject to communications on that topic between those previously identified individuals. Thus, it provides for the disclosure of more documents.

A shortcoming inherent in the administration of this standard is the potential for the absence of consistency and predictability. This problem is not insurmountable, however, and should not discourage a court from deeming this the appropriate standard.

D. The Standard’s Policy Considerations

Doctrinally, the same-subject-matter standard endorses the preservation of the attorney-client privilege slightly more than it does the liberalized discovery policy. Limiting the scope of the waiver to the same subject matter of the initial disclosure substantially salvages the attorney-client privilege because fewer documents will have to be disclosed. In addition, if the court narrowly defines the

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98. Id. at 23.
99. Id.
100. Id. (footnote omitted).
101. Id. at 25 (footnote omitted).
same subject matter, as the Perrignon court did, an additional reinforcement for the preservation of the attorney-client privilege is provided. The Goldman, Sachs court noted this tension that exists between preserving the attorney-client privilege and fostering a liberal discovery policy: "This narrow reading of the scope of the waiver will, in the court's judgment, promote the fairness which the partial disclosure qualification is designed to encourage while serving the compelling public policy considerations underlying the attorney-client privilege."\(^{102}\) Thus, the less expansive description of the same subject matter reflects the court's value judgment that retaining the attorney-client privilege to the greatest extent possible is to be given more weight than expanding the pool of discoverable information.

Although this test probably provides more protection for the confidentiality of communications between attorneys and their clients, it may also incorporate the liberal discovery policy. For example, in one case in which the court discussed the appropriateness of applying the same-subject-matter standard to a particular discovery situation, it noted that the use of this standard allows for "full disclosure"\(^{103}\) that is consistent with the liberal discovery rules. Presumably, the court believed that requiring the production of additional documents on a particular topic was more consistent with the disclosure objectives embodied in the liberal discovery policy.

In terms of meting out a penalty in order to deter substandard discovery practices, the same-subject-matter standard, like the specific document standard, is minimally punitive. The punitive component of this standard is found in its requirement that additional privileged material be released to the nondisclosing party. Unfortunately, the precise magnitude of the sanction is contingent upon how broadly or narrowly the court defines the same subject matter. Thus, the same-subject-matter standard is unlikely to be the most effective standard in terms of deterring sloppy discovery practices and improper motives. In other words, if a court adopts a narrow definition, the penalty imposed on the disclosing party is reduced and

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the effectiveness of any deterrence gained from imposing the standard is compromised. If a broader definition is adopted, then the punitive component increases and results in a more substantial penalty that should provide a greater deterrent to substandard and dilatory litigation practices. Despite the real potential in the reduction of this standard’s deterrent effect, the potency of the punitive component of this standard, however, may be revitalized to some degree because the disclosing party may not want to gamble about which standard a court will choose.

Since this standard theoretically allows for the potential disclosure of additional documents, there is always the chance that the litigation will be impacted in some manner. By improving the nondisclosing party’s odds of obtaining additional materials, the odds also increase that the compelled production may include a communication detrimental to the disclosing party’s position. Access to any supplemental materials could also impact settlement negotiations and could alter the course of the litigation. As a result, this standard possesses a greater potential for impacting the litigation process from the disclosing party’s perspective, which enhances the standard’s punitive component and bolsters the potential deterrent impact.

E. Conclusion

The same-subject-matter standard, like the specific document standard, is a relatively narrow scope-of-the-waiver standard. However, the principal administrative difficulty associated with the application of this measure—the problems encountered in defining the same subject matter—can also enable this standard to function as a broad scope-of-the-waiver test. Although the penalty embodied in the forced disclosure of additional documents can potentially be significant and act as an effective deterrent to inferior and questionable litigation practices, the standard continues to display a bias towards preserving the attorney-client privilege as opposed to promulgating a liberal discovery policy.
IV. The Related-to-the-Same-Subject-Matter Standard

A. Description of the Scope of the Waiver

The related-to-the-same-subject-matter standard requires producing all privileged communications relating to the subject of the privileged material originally produced. The scope of this third measure is fairly broad because the nondisclosing party not only retains the privileged documents actually produced, but also obtains additional privileged communications that relate to the subject matter of the specific documents produced.

B. Factors Influencing the Selection of the Standard

There are several principal variables that courts consider when deciding whether this scope-of-the-waiver test is appropriate.

1. Classification of the Disclosure.—One of the most significant factors influencing this decision is whether the court classifies the disclosure as voluntary. If the disclosure is voluntary, the court will be more inclined to apply this broader standard. As the Standard Chartered Bank court noted, in order to grant the nondisclosing party’s request for the application of the related-to-the-same-subject-matter standard, the disclosure should be voluntary. From this guidance, it is fair to conclude that the voluntary production of privileged communications is an initial prerequisite to the selection of the broader related-to-the-same-subject-matter
standard. Additional support for the importance of this factor is found in *First Wisconsin*, a case in which the court specifically noted that the absence of "clear evidence of an intentional waiver" supported the denial of the nondisclosing party's request for a related-to-the-same-subject-matter standard.\(^{108}\) However, in practically the same breath the court seemed to contradict itself by stating that "[e]ven an inadvertent waiver may extend to documents not produced which relate to the same subject matter as the documents for which the privilege was waived."\(^{109}\) Nonetheless, possibly because the waiver was inadvertent, the court limited the scope of the waiver to the specific privileged documents produced.\(^{110}\) The *First Wisconsin* court's analysis suggests that some degree of uncertainty exists about the propriety of using the related-to-the-same-subject-matter test in situations when the disclosure is inadvertent, or when it is unclear whether the waiver was inadvertent or voluntary. *Parkway Gallery* expounds on the confusion over the mode of disclosure necessary to apply the related-to-the-same-subject-matter standard.\(^{111}\) Although the *Parkway Gallery* court acknowledged that the related-to-the-same-subject-matter standard is probably unsuitable in inadvertent disclosure cases,\(^{112}\) it did recognize precisely what the *First Wisconsin* court did; namely, "a party attempting to show inadvertent disclosure faces a reduced standard when the issue is whether communications related to the disclosed document should be deemed waived as well."\(^{113}\) Thus, even in a situation involving the inadvertent production of privileged communications, the related-to-the-same-subject-matter test may be applicable.

Nonetheless, even the *Parkway Gallery* court ultimately seemed to believe that it is inappropriate to apply this standard in a nonvoluntary disclosure situation. As the court stated, "[i]n a proper case of inadvertent disclosure, the waiver should cover only the specific

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109. Id.
110. Id.
112. Id.
113. Id.
document in issue;"\textsuperscript{114} and although an inadvertent disclosure permits the nondisclosing party to retain the specific privileged documents produced, "[t]he same is not true for related but still confidential matters."\textsuperscript{115} Therefore, although a certain amount of uncertainty exists, it is fair to surmise that if the disclosure is voluntary, then the court will be more receptive to granting the nondisclosing party’s request for the imposition of the related-to-the-same-subject-matter test.

2. The Selective Disclosure Factor.—If the court is unable to decide whether the disclosure must be inadvertent or voluntary in order to support the selection of the broader related-to-the-same-subject-matter test, then evidence that the disclosing party engaged in the tactical disclosure of privileged material might influence the court’s decision to select this standard. This variable surfaced in Standard Chartered Bank, a case in which the court denied the nondisclosing party’s request that the related-to-the-same-subject-matter standard be imposed.\textsuperscript{116} In reaching this decision, the court observed that there was an absence of evidence indicating that the disclosing party engaged in selective disclosure.\textsuperscript{117} Therefore, the court’s rationale for refusing to impose the related-to-the-same-subject-matter standard supports the conclusion that if a case involves strategic disclosure, a court could justifiably select this standard.

3. Respect for the Litigation Process.—The disclosing party’s actions also influence whether a court will select this standard. Specifically, the court’s inquiry will focus on whether the disclosing party’s actions reflect the professionalism indicative of a proper respect for the litigation process. For example, if the disclosure resulted from gross carelessness or inexcusable neglect, a court might choose the related-to-the-same-subject-matter measure because the disclosing party’s actions indicate the absence of any concern for upholding the integrity of the litigation process. At least one court

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{117} Id. at 85.
\end{itemize}
found that if the facts surrounding the disclosure, regardless of whether it was inadvertent or voluntary, indicate "that procedures with regard to maintaining the confidentiality of the document were [] careless and indifferent to consequences," the court may apply the related-to-the-same-subject-matter standard.

However, if the circumstances surrounding the disclosure establish that the document production was large, that it included few privileged documents, and that counsel was diligent in satisfying its duties with respect to the document production, then a court will be less likely to impose the related-to-the-same-subject-matter standard. Such circumstances, while arguably involving some degree of negligence, are nonetheless indicative of the attorney's awareness that there is an obligation to uphold the integrity of the discovery process.

C. Administering the Related-To-The-Same-Subject-Matter Standard

The mechanics of the standard are fairly simple to master. After the court determines which privileged documents were produced, the court must view each document and define the subject matter of each privileged communication. Once this task is completed, the other privileged communications must be examined and a decision must be made as to which, if any, of these materials relate to the subject matter identified in the information actually disclosed. The disclosing party is then compelled to release these additional documents.

However, in applying this standard, courts frequently confuse the significant distinction that exists between the same-subject-matter standard and the related-to-the-same-subject-matter standard. In fact, courts sometimes espouse the position that the same-subject-matter standard is applicable but then actually apply a standard that functions in a manner identical to the related-to-the-same-subject-matter standard. However, these two standards are distinguishable. Therefore, the initial hurdle in the administration of this standard is to be certain that the court does not confuse the standards.

Once the court has made the threshold determination of the definition of the same subject matter, then it must determine which

118. Id.
119. Id.
communications "relate to" that subject matter.\textsuperscript{120} The complexity of this task was made clear when a trial court decided to apply the related-to-the-same-subject-matter standard and identified which additional documents had to be produced, but failed to "fully explain why the communications were related."\textsuperscript{121} The appellate court made the following observations in connection with the difficulty in executing this chore:

[T]he "subject matter" of the waiver could, nevertheless, be defined in a number of different ways. Did the district court mean, for instance, to define the "subject matter" as all communications "relating" to the adjustment entries . . . . Or, alternatively, was the waiver limited to those intra-Company communications revealing that Company's accounting adjustments were made upon the advice of counsel, in which case is it not clear whether the actual notes of the meeting must be disclosed? Given the potential implications of a broad definition of the subject matter of Company's waiver, we think it appropriate to remand to the district court for further consideration of that issue.\textsuperscript{122}

Thus, the difficulty associated with determining which additional communications are "related to the same subject matter" complicates the administration of this standard.

\textbf{D. The Standard's Policy Considerations}

Given that the attorney-client privilege is severely compromised if this test is utilized, it is accurate to conclude that the standard favors a liberalized discovery policy as opposed to the preservation of the attorney-client privilege.\textsuperscript{123} This doctrinal position simply reflects the notion that if the discovery practices of the disclosing party's lawyer were substandard, unconscionable, or manipulative, the disclosing party cannot complain\textsuperscript{124} if the court decides that the appropriate remedy is to apply a scope-of-the-waiver standard that

\begin{footnotesize}
\begin{enumerate}
  \item[120.] See Harding, \textit{supra} note 3, at 468 n.8 (noting the "obvious inherent difficulty" in determining what constitutes "relating to the same subject matter").
  \item[121.] \textit{In re Sealed Case}, 877 F.2d 976, 981 (D.C. Cir. 1989).
  \item[122.] \textit{Id.} (footnote omitted).
  \item[123.] The \textit{In re Sealed Case} court noted that "the attorney-client privilege is of ancient lineage and of continuing importance," but the privilege must fall to the wayside if the related-to-the-same-subject-matter test is used. \textit{Id.} at 980.
  \item[124.] Of course, theoretically the client has recourse against the attorney. See \textit{supra} note 60 (discussing the possibilities of a malpractice lawsuit in such circumstances).
\end{enumerate}
\end{footnotesize}
makes preserving the attorney-client privilege less important than expanding the body of discoverable information.\textsuperscript{125}

Since upholding the protections afforded by the attorney-client privilege is given less emphasis under this standard, the punitive consequence of this standard is more pronounced. The disclosing party receives a greater penalty because of the requirement that it release all documents related to the subject matter of the initially disclosed privileged communications.\textsuperscript{126} The obvious result of this remedy is the heightened possibility that the disclosing party will experience some degree of adverse exposure\textsuperscript{127} because of the disclosure of more privileged material. The threat of a substantial supplemental disclosure should deter inferior discovery practices.\textsuperscript{128}

While the broader standard ideally punishes the disclosing party, the nondisclosing party stands to reap a benefit from the punitive function of this test because it gains access to additional privileged documents. In terms of the impact on the litigation process, at least one court has noted that this broad standard can significantly impact the adjudication of a case.\textsuperscript{129} Thus, the penalty facet of the test can place the disclosing party at an extreme disadvantage if, due to the broader scope of the waiver, it finds itself in the unenviable position of being compelled to produce "smoking guns." Clearly, when a party produces a previously confidential, "smoking gun" document, it is less likely that the disclosing party will be able to

\textsuperscript{125} See \textit{In re Sealed Case}, 877 F.2d at 980 (noting that "[n]ormally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege").

\textsuperscript{126} Id.

\textsuperscript{127} See id. (noting that the related-to-the-same-subject-matter standard can cause grave injury to the disclosing party).

\textsuperscript{128} The court in \textit{In re Sealed Case} acknowledged the link between the production of additional documents and the carelessness reflected in the initial disclosure by making the following observation:

[There is] the danger that the "waiver" will extend to all related matters, perhaps causing grave injury to the organization. But that is as it should be. . . . In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels.

\textit{Id.}

\textsuperscript{129} Id. at 981.
negotiate a favorable settlement. In contrast, if the party does not have to produce additional materials, its settlement position would be less likely to be altered. By being forced to surrender additional privileged communications, the producing party is less likely to improve or stabilize its previous position on the contested issues. However, one could certainly argue that if the disclosing party had not been so careless or had refrained from engaging in selective disclosure, then it would not have been subjected to this stringent sanction. Again, this is an instance where the totality of the punitive aspects of the standard could improve the effectiveness of this standard as a deterrent to inappropriate discovery practices.

E. Conclusion

In sum, the related-to-the-same-subject-matter standard is one of the broader scope-of-the-waiver tests. Although the application of this standard can potentially have far-reaching effects on the litigation process and severely damage the litigating position of the disclosing party, courts may choose this broader standard because it is more likely to deter unacceptable litigation practices such as selective disclosure or sloppy document production. Furthermore, doctrinally, the endorsement of a liberal discovery policy can be seen as a natural consequence flowing from the decision to forsake the attorney-client privilege by the refusal to adopt a narrower standard.

V. The General Subject Matter Standard

A. Description of the Scope of the Waiver

The final and broadest scope-of-the-waiver standard, the general subject matter measure, requires the disclosing party to supplement the initial disclosure by producing not only all communications related to the subject matter but also all privileged documents that refer to or mention in whole or in part the general topic of the subject matter of the specific communications originally pro-
duced. Obviously, this standard is extremely broad, as the offending party not only forfeits the privilege with respect to the original privileged information, but must supplement the release of information with a voluminous amount of additional privileged materials on the general topic of the specific documents disclosed. Thus, the scope of this standard operates as a wholesale cancellation of the right to protect an entire category of information.

B. The Key Factor Influencing the Selection of this Standard

In order to determine whether this standard is proper, the egregiousness of the disclosing party’s behavior occupies a position of paramount importance. In a case adopting this measure of the extent of the waiver, the court scrutinized the actions of the disclosing party that resulted in the revelation of privileged material. The disclosing party’s actions were spurious, possessed the indicia of bad faith, reflected efforts to stymie discovery, and undermined the fair operation of the adjudicatory process. The court was clearly aware of the deliberateness of the disclosing party’s dilatory maneuvers; it noted that the disclosing party had “engaged in a calculated effort to delay compliance with the Department’s request by a variety of tactics, in the main related to claims of privilege.”

In addition, the court noted that when the nondisclosing party reasonably requested more information on the existence of the claims of privilege in order to assess the veracity of these claims, the disclosing party “failed to cooperate even in a minimally appropriate manner.” It also became apparent to the court that some of the disclosing party’s claims of privilege were baseless. The court

131. Id. at 1-3; cf. Champion Int’l Corp. v. International Paper Co., 486 F. Supp. 1328, 1333 (N.D. Ga. 1980) (theorizing that if the court had found a waiver, it would have applied the specific document standard given the disclosing party’s cooperativeness).
133. Id.
134. Id.
135. Id. at 1-2.
136. Id. at 2.
made the following observation about the totality of the disclosing party's behavior in its quest to prevent certain information from being discoverable: "It is inescapable from this almost three-year history that US West has been engaged in a systematic and calculated effort to frustrate the Department's legitimate demands for information, frequently by patently frivolous and usually dilatory maneuvers."\(^\text{137}\) Not surprisingly, the court held that the disclosing party had waived the attorney-client privilege\(^\text{138}\) and declared that the scope of the waiver extended to "any and all communications addressing those topics, in whole or in part."\(^\text{139}\) As indicated above, the principal factor relied upon by the court in reaching the decision to choose this standard was the disclosing party's horrendous behavior.\(^\text{140}\) In fact, the court even stated that the classification of the disclosure of the privileged information as inadvertent or voluntary was an irrelevant factor in the decision as to whether the general subject matter standard should have been selected.\(^\text{141}\) Apparently, the deliberateness and culpability of the disclosing party's antics surpassed any weight the court might have given to other factors, such as classification of the waiver or the presence of a strategic disclosure.

C. Administering the General Subject Matter Standard

Once the court determines that this is the appropriate measure, then it must examine the specific communications disclosed, define the general subject matter of those materials, and compel disclosure of all other privileged communications that refer to or mention, in whole or in part, the general subject matter of the disclosed documents. Then, the offending party must produce all privileged communications that satisfy this designation.

An initial obstacle in the administration of this measure exists when the court must define the general subject matter of the specific documents revealed by the disclosing party. Given the magnitude of the court's disgust at the offending party's actions, it is not inconceivable that courts would likely adopt an expansive definition of the

\(^{137}\) Western Electric, 132 F.2d at 2.
\(^{138}\) Id. at 3.
\(^{139}\) Id. (citation and footnote omitted).
\(^{140}\) Id.
\(^{141}\) Id. at 2.
general subject matter of the initially disclosed documents. Likewise, the court is likely to construe broadly which additional documents a party must produce.

An important consideration in the administration of this standard is that courts occasionally confuse the related-to-the-same-subject-matter standard and the general subject matter standard. Any confusion arising in this area is understandable because, at first glance, the two standards appear to be remarkably similar. However, important distinctions exist between the two standards. First, the related-to-the-same-subject-matter standard requires the court to select for production certain documents that have a closer nexus to the topic of the specific documents disclosed. The general subject matter standard, however, compels disclosure even when there is a more tenuous link to the initially disclosed document and, thus, mandates the wholesale cancellation of the right to use the attorney-client privilege to protect an entire body of documents that mention or make any partial or complete reference to the general subject matter of the documents specifically disclosed.

D. The Standard's Policy Considerations

On the doctrinal plane, the general subject matter standard eliminates the attorney-client privilege with respect to an entire parcel of information pertaining to a particular subject, thereby promulgating a liberal discovery policy. However, it is doubtful that a court's general preference for liberalized discovery over the preservation of the attorney-client privilege is the sole or primary policy consideration that motivates a court to adopt this measure. Instead, the decision to adopt this standard more likely reflects the court's strong annoyance and disgust with the disclosing party's actions.

Because the standard requires the production of any information that mentions or refers to the general topic of the specifically disclosed documents, it possesses a tremendous punitive component: The offender relinquishes the right to prevent the discovery of what

142. See Western Electric, 132 F.2d at 2-3 (finding a waiver of the attorney-client privilege as to all communications on subjects covered by the attorney-client communications that were inadvertently or deliberately disclosed).

143. Id.
could be an enormous amount of material. In addition, the greater number of documents that this standard can potentially require to be produced significantly increases the chances that a party may produce an unfavorable document. Undoubtedly, such a disclosure would impede the offending party in its ability to obtain a favorable settlement. Additionally, the offending party may have to reorganize and revamp its prosecution or defense strategy given that its opponent possesses an extraordinary number of privileged documents and other materials that could give the opponent increased insight into the existing strategy. Ideally, the magnitude of the punitive consequences from the imposition of this standard will result in an effective deterrent to unprofessional practices that are unfair to the opponent and disrespectful of the litigation process.

E. Conclusion

The general subject matter standard is an extremely expansive measure. If a court imposes this test, the disclosing party confronts a situation that could have a far-reaching negative impact on its position in the resolution of the matter. The imposition of this standard may often have the effect of opening the flood gates of discovery, and it is primarily the disclosing party’s motives and actions that enable a court to feel no hesitancy in instituting this expansive test.

VI. A Proposal for a New Standard

Each of the four scope-of-the-waiver tests has its strengths and weaknesses. However, perhaps the most formidable obstacle in resolving the issue of how to decide the appropriate scope of the waiver is the present lack of consistency in the application of the critical factors for selecting one standard over another. The following proposal is aimed at simplifying the court’s task in selecting an appropriate scope-of-the-waiver standard and at improving the level of certainty for litigants.

The primary objective steering a court’s decision in resolving the extent of the waiver issue should be to accommodate both the attorney-client privilege policy and the liberal discovery policy. In most cases, this will require the court to balance the two principles with the goal of salvaging the attorney-client privilege to the greatest
extent possible as well as fairly determining what should appropriately be surrendered to the public domain.\textsuperscript{144}

In order to accomplish this goal, the courts should follow several rules. First, and perhaps most importantly, classifying the disclosure as inadvertent or voluntary should play no role in selecting the appropriate measure. Instead, the decisionmaking body will focus on the substance of the disclosed, privileged communications. Essentially, the court must determine whether, because of the disclosure of confidential information, the disclosing party is placed in a significantly better position than its opponent. The courts may accomplish this by examining the specific documents disclosed and then conducting an \textit{in camera} inspection of other privileged materials on the same subject matter as the specific communications revealed in order to determine whether there is an unfair disparity between what was disclosed and what was not disclosed. If the court decides that a disclosure resulted in unfairness, the court should apply the same-subject-matter standard. This facet of the proposed approach acknowledges that a disclosure occurred and that in order to equalize any advantage, intended or unintended, full discovery on the same subject matter is necessary. However, in order to accommodate the attorney-client privilege concern, the court should narrowly define the same subject matter. Furthermore, requiring the disclosing party to forfeit the privilege for an uncertain number of additional documents should function as a deterrent to substandard litigation practices. However, under this scenario, the primary objective of the test in resolving this issue is not to deter unruly litigation practices.

This new proposal can be applied to the situation in \textit{Parkway Gallery} where the court noted that if a disclosure places the disclosing party at an advantage or if the disclosing party is attempting to make some other improper use of the disclosure, then the same-subject-matter standard would apply.\textsuperscript{145} Likewise, under

\textsuperscript{144} This aspect of the overriding objective of the proposed test by no means prohibits a party from seeking a protective order to limit who can have access to the previously privileged communications. \textit{See}, \textit{e.g.}, \textit{Fed. R. Civ. P.} 26(c) (allowing a party from whom discovery has been requested protection from embarrassment, undue expense, or oppression).

this scheme, the same-subject-matter standard would be the appropriate scope-of-the-waiver standard because the disclosing party tried to gain an advantage. Similarly, in Perrignon a party tried to allow only one individual to testify and prohibit another individual from testifying about the same topic in an effort to gain an advantage over the adversary. Under this proposal, the fact that the disclosing party would gain an advantage if its efforts were successful supports the use of the same-subject-matter standard.

If after examining the disclosed documents, and those on the same subject matter, the court determines that the disclosure did not bestow a significant benefit upon the disclosing party, then the court should apply the narrow specific document standard. This portion of the proposed approach certainly endorses the attorney-client privilege more than liberal discovery policy, but it is warranted because the court is not presented with a situation in which the disclosing party benefited from the disclosure, or if there is any benefit, it is minuscule and will not have any significant impact on the parties' adversarial relationship. In other words, this is not a situation where the court must attempt to equalize the parties' positions in relation to each other; therefore, the court should protect the attorney-client privilege. Furthermore, this approach comports with the liberal discovery policy of the Federal Rules because it permits disclosure through the retention of the specific privileged communication. This portion of the proposed test can be easily applied in cases such as Turner & Newall, Bud Antle, and Champion International. For example, Champion International involved a situation where the disclosure was "a mere appendage to discoverable technical material" and, as such, did not place the disclosing party in a better position. Therefore, since the disclosing party did not benefit, the specific document standard would be the

146. Perrignon v. Berger Brunswig Corp., 77 F.R.D. 455, 461 (N.D. Ca. 1978) ("Under these circumstances defendants had much to gain by allowing Abrams to answer plaintiffs' questions so long as they could preserve HAS's privilege so as to keep Nielsen from having to give his version of the same [privileged] conversation.").
150. Id. at 1333.
appropriate measure. Similarly, in Bud Antle, while the court went to great lengths to explain why the disclosure of a privileged communication occurred and chastised the disclosing party for this indiscretion, the court never mentioned that the communication bestowed a benefit upon the disclosing party. As a result, adhering to the concept that there was an absence of any benefit to the disclosing party, the court selected the specific document scope-of-the-waiver standard. The Turner & Newall case presented a similar scenario—the disclosure of privileged documents that did not confer a benefit on the disclosing party or suggest that the disclosing party attempted to gain an advantage through the disclosure. Again, in accordance with the proposed approach for determining the appropriate scope-of-the-waiver test, the court limited the scope to the document-only standard.

The final component of the proposed approach focuses solely on the actions taken by the disclosing party in connection with the circumstances surrounding the disclosure and the discovery proceedings. If there is evidence to support the conclusion that the disclosing party is uncooperative and its actions are egregious, disrespectful of the litigation process, and unconcerned with operating at some level of parity against its adversary, then the court should impose the general subject matter waiver standard. Under this scenario, it is the disclosing party who creates a waiver of the general topic of the disclosed materials because its actions and attitude are inconsistent with any interest it might have in preserving its right to the confidences afforded by fair and professional litigation practices. Obviously, the application of this test inherently fits in with liberal discovery policy because of the compelled disclosure of every communication referring to or pertaining to the general topic of the disclosed documents. However, this is not the

152. Id.
154. Id.
155. For those who are concerned about the loss of the related-to-the-same-subject-matter's punitive component, which theoretically required the production of a greater number of privileged communications, the general subject matter standard can handle those cases when there is egregious behavior and the court might have previously used the related-to-the-same-subject-matter standard.
primary doctrinal concern of this portion of the proposed test. Instead, deterrence is the guiding principle when the court selects this standard. Awareness of this remedy should deter litigants from engaging in specious, egregious, and unprofessional behavior.

There are several examples when courts have resorted to more limited waiver scopes, but under the proposed test could have adopted the general subject matter standard. For example, in Bierman, in a rather sharp opinion, the court commented on how the disclosing party’s assertions of the privilege “seem[ed] specious and dilatory.”¹⁵⁶ Under the proposed test, this behavior would be unacceptable and, to deter and punish such incidents, the court would be free to apply the general subject matter standard. Duplan Corporation¹⁵⁷ is another case in which the application of the general subject matter standard would have been appropriate. In that case, an irate court noted that not only did the disclosing party reveal documents that were beneficial to its position and refused to produce other incriminating privileged materials on the same subject, but also acted with hostility and distrust towards the other attorney and asserted some doubtful claims of privilege.¹⁵⁸ Under the proposed approach, this case would be a prime candidate for the application of the general subject matter standard and the guaranteed relinquishment of an entire category of privileged communications on a general topic would likely be sufficient to punish this behavior and deter such behavior from occurring in the future.

Although the primary objective of the general subject matter scope-of-the-waiver standard is to penalize the disclosing party, one might ask why the disclosing party must lose the protection afforded to an entire group or category of documents rather than preserving the privilege and receiving sanctions under one of the existing rules when egregious conduct occurs during discovery proceedings.¹⁵⁹

¹⁵⁸. Id. at 1191-92.
¹⁵⁹. See Fed. R. Civ. P. 26(g)(3) (authorizing the court to impose an “appropriate sanction” on an attorney who violates the Rule); Fed. R. Civ. P. 37(a)(4), (c) (listing a variety of sanctions and remedies available to the court when one party fails to disclose information or cooperate in discovery).

It should be noted that the nondisclosing party can no longer use Rule 11 as a means of resolving the issue, because the latest amendments to the Federal Rules specifically exclude discovery proceedings from the ambit of Rule 11. Fed. R. Civ.
Nothing prohibits the nondisclosing party from moving to compel the production of additional documents pursuant to Rule 37(a) and, if the motion is granted, to seek reasonable expenses for the efforts of having to compel the disclosing party to release the additional privileged documents. The availability of sanctions under Rules 37(a)(4) and 26(g)(3), however, should not prohibit the existence of another sanction—the general subject matter standard scope-of-the-waiver test. In fact, the certainty and magnitude of the penalty created by this test might even have a greater deterrent effect than the other rules, because the disclosing party is acutely aware of the consequences of his or her actions. Therefore, the codified sanctions and the punitive aspect of the scope of the waiver can coexist. However, there might be a preference for the proposed test because it sets forth a remedial scheme that has less discretion, and, therefore, offers greater certainty and accountability, yet has enough flexibility to allow the court to decide if the focus should be to eliminate any unfairness in the proceedings or to significantly penalize a litigant.

It is necessary to note that this proposed test excludes using the related-to-the-same-subject-matter standard for several reasons. First, it is difficult to assess which documents are "related to" the same subject matter. This assessment creates a tremendous administrative burden on an already overly taxed court system and places an unnecessary burden on the litigants as they quibble about what is "related to" and what is not "related to." It will simply be easier for the court to declare what is the "same subject" and compel production of those documents. Secondly, the courts frequently confuse the related-to-the-same-subject-matter standard with the general subject matter standard. However, each standard serves a different and distinct goal in the litigation scheme. The goal of the related-to-the-same-subject-matter standard is more similar to the same-subject-matter standard—curbing substandard discovery practices that are unfair to the nondisclosing party and that adversely affect the integrity of the process of adjudication. Conversely, the general subject matter standard's primary function is punitive and its goal is more oriented toward ensuring that the system retains its

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P. 11(d).

160. In any event, under this scheme the objective will be achieved by retaining the same-subject-matter standard.
integrity. Furthermore, the confusion between the two existing standards could obviate the court’s motivation for selecting a particular standard. Thus, it would be prudent to eliminate the related-to-the-same-subject-matter standard from the new scope-of-the-waiver scheme.

In sum, the proposed test reorganizes the existing tests so that they will be more effective in achieving greater consistency in results, providing guidance on how parties should behave during discovery proceedings, and notifying litigants as to which remedial measures will be followed in a given disclosure and scope-of-the-waiver situation. This optimal balancing of the policy considerations, as embodied in the proposed resolution scheme, should provide a more equitable outcome for the parties and the litigation system. Thus, the end result will be a fairly easy and workable process that considers and properly incorporates the various policy considerations.

VII. Conclusion

Given the ever-increasing size of document productions and the importance they occupy in the discovery component of the adjudicatory process,161 it is inevitable that more cases will raise the scope-of-the-waiver issue. As discussed, there are different variables that affect the determination of the most appropriate standard to apply in a particular waiver situation. Several variables appear to carry greater weight in a court’s decision as to which of the four scope-of-the-waiver measures is most appropriate. These include the following: the classification of the disclosure as voluntary or inadvertent; evidence that the disclosure involves selective disclosure; the degree of unfairness to the nondisclosing party that results

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161. This position will probably be enhanced because the revised Federal Rules of Civil Procedure do not limit the number of Rule 34 requests that a litigant can make. FED. R. CIV. P. 34. This freedom should be contrasted with the situation involving other discovery devices, such as depositions and interrogatories, for which the revised Rules impose quantitative limitations. See FED. R. CIV. P. 30, 31, 33 (limiting each party to 10 depositions and 25 interrogatories, unless the parties enter into a stipulation or obtain leave of court).
from the disclosure; and the disclosing party's culpability in connection with the disclosure of the privileged communications, which can range from mere sloppiness to intentional dilatory tactics. In addition, each standard considers and accommodates one or more of the following policy concerns: the proper role that the attorney-client privilege should play in the case; the proper role that the liberal discovery policy should play in the case; how a particular test reinforces the integrity of the litigation process; and how the punitive function of a given test will deter unscrupulous attorney practices.

The standards vary in the ease or difficulty of their administration. The document-only standard is the simplest. The remaining standards can be problematic in their application because courts can find it difficult to define the subject matter of the specific documents disclosed. This consequence can jeopardize the effectiveness of the deterrent effect of these standards.

In order to remedy some of these shortcomings, a new approach is advocated. Under the proposed approach to determining which scope-of-the-waiver test to apply, the court will dispose of the present formal inadvertent-versus-voluntary distinction and instead will focus on the substance of the disclosure and the general deportment of the disclosing party. If the disclosure provides a significant benefit to the disclosing party, then the court will apply the same-subject-matter standard. On the other hand, if the disclosure confers no benefit or a minimum benefit, then the nondisclosing party will only be allowed to retain the specifically disclosed documents. If the disclosing party engages in unprofessional behavior that indicates improper motives—such as dilatory tactics or selective disclosure—and a general disregard for upholding the integrity of the adjudicatory process, then the general subject matter standard is applicable. This test is fairly easy to apply and balances the major policy considerations evident in scope-of-the-waiver inquiries.

Until the time that this test is adopted, the courts will continue to make their selection from the existing four standards. Therefore, to avoid the imposition of any of the more expansive scope-of-the-waiver standards, it would be prudent for attorneys to adhere to the following guidelines: Always act in good faith during discovery proceedings; if privileged communications are disclosed, then attempt to characterize the disclosure as inadvertent; refrain from
engaging in selective disclosure; and be cooperative when complying with discovery requests.