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Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502's Impact on Forfeiture of Legal Privilege Under Customary Waiver Doctrine

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FAILING TO KEEP THE CAT IN THE BAG: A DECENNIAL ASSESSMENT OF FEDERAL RULE OF EVIDENCE 502'S IMPACT ON FORFEITURE OF LEGAL PRIVILEGE UNDER CUSTOMARY WAIVER DOCTRINE

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ABSTRACT

Federal Rule of Evidence 502—providing certain exemptions from the surrender of attorney-client and work product privilege because a confidential item was disclosed—had great expectations to live up to after its enactment in 2008, as Congress and others heralded it as a panacea to litigation's woes in the face of bourgeoning discovery. The enacted rule was the subject of much skepticism by the academic punditocracy, however. Ten years later, this Article surveys the actual results and finds that, regrettably, pessimism has proven the better prediction. Percolation of debate over the rule's many ambiguities and courts' disparate approaches have not resolved initial critiques, but only diversified their targets and fostered new bubbles of confusion, conflict, and consternation. That said, FRE 502 has indeed improved some aspects of the state of the law of privilege—and may do more as consensus matures—but has still left jurisprudence well short of the ideals dreamt of under its framers' vision. Nonetheless, the game is worth the candle: The pursuit of a more perfect privilege vindicates the essential individual rights of Lockean society, and the ongoing quest thus reflects that of civilization itself.

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It bears remembering that the attorney-client privilege *belongs to the client*. That the client's representative has let the cat out of the bag, inadvertently and without authorization, should not entitle the adverse party to take the horse, the dog, the hamsters, and the goldfish too.[1]

As other courts have noted, "any order issued now by the court to attempt to redress these disclosures would be the equivalent of closing the barn door after the animals have already run away." Thus, while Rule 502(b) would in essence allow me to round up the animals and put them back in the barn, defendants have not provided any evidence that they took reasonable efforts to keep the barn door closed.[2]

The abiding principle should be the narrowest scope of waiver, which conforms to fairness to both parties and which, now that a portion of the cat

[1] Greenleaf Arms Realty Trust I, LLC v. New Bos. Fund, Inc., 30 Mass. L. Rptr. 477, at *4–5 (Mass. Super. Ct. 2012).

[2] Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 55 (D.D.C. 2009) (quoting Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008)).

> is out of the bag, is most likely to arrive at a clear notion of just what the contours of the cat are.[3]

INTRODUCTION

Federal Rule of Evidence 502 celebrated its tenth birthday on September 19, 2018.[4] One does not ordinarily commemorate the anniversary of federal rules, but so many had attended to its passage that the wishing of many happy returns seems apt.[5] Congressmen had verily proclaimed it the savior of modern litigation in approving the law![6] Yet unlike its senior antecedent codified at 501, FRE 502 addresses itself to a highly particularized aspect of privilege: certain exceptions to the waiving the attorney-client or work product privilege by virtue of disclosing the information so protected.[7] One might not think so narrow a subject to merit such august attention,[8] but questions of waiver are amongst the most thorny and debated areas of the law of evidence—and that jurisprudence is hardly one that suffers from simplicity generally.[9] One early celebrant of FRE 502 noted that "[m]uch of the dissatisfaction with the previous state of affairs focused on the question of waiver—when the protection would be waived and the scope of such a finding."[10] The most recent edition of Edna Selan Epstein's classic hornbook on privilege, now incorporating law under FRE 502, devotes no less than four hundred and forty-two pages—one quarter of the entire treatise—to the subject.[11] "No area of the law of privilege is more fraught with

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3 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 834 (6th ed. 2017).

4 Act of Sept. 19, 2008, Pub. L. No. 110-322, § 1(c), 122 Stat. 3538. Coincidentally, 2018 was also the seventy-fifth anniversary of the death of Dean John Henry Wigmore, a towering figure in the world of privilege who will figure prominently in this Article.

5 *See infra* note 16; *see also infra* Part III (describing how FRE 502 was formulated).

6 *See* Michael Correll, *The Troubling Ambition of Federal Rule of Evidence 502(d)*, 77 MO. L. REV. 1031, 1031–32 (2012).

7 FED. R. EVID. 502.

8 *Cf., e.g.*, Correll, *supra* note 6, at 1032 ("These claims may, at first blush, seem alarmist. After all, Rule 502(d)—a very brief, forty-six-word 'enabling' provision—sits at the end of a fairly narrow rule clearly targeted at issues regarding inadvertent disclosures and productions in government investigations.").

9 *See* Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 213–17 (2006); Roger P. Meyers, *An Analysis of Federal Rule of Evidence 502 and its Early Application*, 55 WAYNE L. REV. 1441, 1446–47 (2009).

10 Meyers, *supra* note 9, at 1446.

11 *See* EPSTEIN, *supra* note 3, at 508–835 (attorney-client); *id.* at 1279–1394 (work product).

complexity than the area of waivers," concludes Epstein, offering proof: "Witness the length of this chapter."[12]

This Article thus appropriates the decennial of FRE 502 as an opportunity to assess its real-world efficacy on the jurisprudence of waiver, both simpliciter and subject-matter, and, more broadly, how its treatment of waiver has affected the use of privilege, both attorney-client and work product. Part I describes the harsh standards imposed by earlier courts hewing to the progenitor of modern privilege law, Dean John Henry Wigmore. Those standards demanded near-perfection in protecting secrets against any conceivable threat in the first place, and demanded an almost reflexive finding of waiver, or even of a "subject matter waiver" over a broad swath of attorney communications or work product. The Article then, in Part II, explores mounting—if conflicting—countercurrents questioning traditional Wigmorean precedent around the turn of the millennium, and how bourgeoning discovery and concomitant costs accelerated change, segueing in the pivotal Part III to the briefest of discussions of the development and adoption of Federal Rule of Evidence 502 itself in 2008.

The Article thereupon leaps forward ten years to Part IV, scrutinizing, in depth, decisions under the new jurisprudential schema: in Section A, to detect any intimations of adherence to the *ancien régime* or revanchism and to explore the newly competing rules of decision that FRE 502(b) has engendered; in Section B, to consider how and whether modifications to subject-matter waiver continue to serve the tried and true doctrine that privilege may not be used as both sword and shield; in Section C, to compare the responsibilities of the producing and receiving parties in remediating inadvertent errors; and in Section D, to alight on the increasing use of bespoke interparty covenants regulating waiver. Part V then briefly reviews zones in which the rules of privilege and waiver by disclosure remain ostensibly unchanged, and yet seem to have been influenced by FRE 502 all the same. The Article describes throughout Part VI some structural and philosophical challenges to privilege in the era of FRE 502, narrating progress made thus far and some avenues for improvement, culminating in Part VII with proposed rules of interpretation for the various subparts of the Rule. A brief conclusion steps further from the fray of privilege to ask whence privilege has come, whither precedent on waiver may yet lead, and whether all of the opinions, litigation, scholarship, and general hand-wringing are effectual: is the game worth the candle—and does FRE 502 make it more or less so?[13]

No small number of assessments of FRE 502 were undertaken shortly after its enactment with varying emphases but oddly similar conclusions.[14] All noted as

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12 *Id.* at 834. So too, alas, of this Article.

13 *Cf.* Ashcroft v. ACLU, 542 U.S. 656, 684 (2004) (Breyer, J., dissenting) ("Rather, the question here is whether the Act, given its restrictions on adult access, significantly advances that interest. In other words, is the game worth the candle?").

14 *See, e.g.*, David D. Cross & Nathiya Nagendra, *The Demise of Subject Matter Waiver: Federal Rule of Evidence 502(a) Five Years Later*, BLOOMBERG BNA (2013); John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 FORDHAM L. REV. 1589 (2013); Jeffrey G. Close, *FRE 502, Inadvertence in Privilege Waiver, and Avoiding Malpractice*, 21 PRETRIAL PRAC. & DISCOVERY 22 (2013); James P. McLoughlin Jr. et al., *Navigating Implied Waiver of the Attorney-Client Privilege After Adoption of Federal Rule 502 of the Federal Rules of Evidence*, 67 N.Y.U. ANN. SURV. AM. L. 693 (2012); Correll, *supra* note 6; Paul W. Grimm et al., *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, XVII RICH. J.L. & TECH. 8 (2011); Ann M. Murphy, *Federal Rule of Evidence 502:*

premise that the revisions were timely (and indeed designed) to combat the ballooning scope of litigation discovery and costs in light of email and other sources of electronically stored information.[15] Yet even a year or two after FRE 502's promulgation, many were pessimistic about the rule's chances to achieve those goals,[16] or at best agnostic,[17] with few exceptions.[18] Critics dissected every aspect of the rule: its treatment of intentional[19] and inadvertent disclosures,[20] its interplay with

The Get Out of Jail Free Provision—Or Is It?, 41 N.M. L. REV. 193 (2011); John W. Gergacz, *Attorney-Client Privilege: Inadvertent Disclosure and a Proposed Construction of Federal Rule of Evidence* 502, 5 FED. CTS. L. REV. 1 (2011); Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195 (2010); Wayne Morse Jr., *Oops, It Happened Again: Inadvertent Disclosure Under New Federal Rules of Evidence 502*, 71 ALA. LAW. 65 (2010); Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673 (2009); Patrick M. Emery, *The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the Nationalization Debate*, 27 J.L. & COMM. 231 (2009); Jonathan M. Redgrave & Jennifer J. Kehoe, *New Federal Rule of Evidence 502: Privileges, Obligations, and Opportunities*, 56 FED. LAW. 34 (2009); Meyers, *supra* note 9; Jerry Cavaneau, *New Fed. R. Evid. 502—How Well Will It Work?*, 44 ARK. LAW. 10 (2009); Lucius T. Outlaw III, *The Reasonable Problem with FRE 502(b)*, Mealey's Litigation Report: Discovery, May 2009, at 1; *see also, e.g.*, Edward J. Imwinkelried, *Protecting the Attorney-Client Privilege in Business Negotiations: Would the Application of the Subject-Matter Waiver Doctrine Really Drive Attorneys from the Bargaining Table*, 51 DUQ. L. REV. 167 (2013) (touching on FRE 502 meaningfully but tangentially).

15 *See, e.g.*, Cross & Nagendra, *supra* note 14, at 1; Barkett, *supra* note 14, at 1589–90; Imwinkelried, *supra* note 14, at 169–170; Correll, *supra* note 6, at 1031–32, 1068–71; Grimm et al., *supra* note 14, at 4–6; Murphy, *supra* note 14, at 195–96; Gergacz, *supra* note 14, at 6–9, 17; Schaefer, *supra* note 14, at 199–200; Morse, *supra* note 14, at 66; Noyes, *supra* note 14, at 675, 684–87; Emery, *supra* note 14, at 242–43; Redgrave & Kehoe, *supra* note 14, at 34; Meyers, *supra* note 9, at 1449; Cavaneau, *supra* note 14, at 10; Outlaw III, *supra* note 14, at 1, 7.

16 *See, e.g.*, McLoughlin et al., *supra* note 14, at 751–52; Correll, *supra* note 6, at 1070–71; Grimm et al., *supra* note 14, at 19, 79; Gergacz, *supra* note 14, at 7; Schaefer, *supra* note 14, at 201–02; Noyes, *supra* note 14, at 759–61; Outlaw III, *supra* note 14.

17 *See, e.g.*, Cross & Nagendra, *supra* note 14, at 1–2; Barkett, *supra* note 14, at 1619–20; Murphy, *supra* note 14, at 231; Gergacz, *supra* note 14, at 17; Emery, *supra* note 14, at 297–98; Meyers, *supra* note 9, at 1485; Cavaneau, *supra* note 14, at 10.

18 *See, e.g.*, Morse, *supra* note 14, at 67 ("However, thoughtful, well-informed practice under Rule 502 should help control costly electronic discovery and privilege reviews meant to protect against inadvertent disclosure.").

19 *See, e.g.*, Cross & Nagendra, *supra* note 14, at 3–4; McLoughlin et al., *supra* note 14; Grimm et al., *supra* note 14, at 19–27.

20 *See, e.g.*, Barkett, *supra* note 14, at 1595; Gergacz, *supra* note 14; Grimm et al., *supra* note 14, at 27–55; Schaefer, *supra* note 14; Meyers, *supra* note 9, at 1457–58; Outlaw III, *supra* note 14.

state privilege law,[21] and its provisions for interparty agreements and court orders.[22] Some, indeed, thought the rule overall would be downright counterproductive:[23] one author, only eight months after the rule was enacted, predicted that its unintended consequences "will not only undermine the very purpose of the rule, but will drastically increase the costs and burdens of discovery."[24]

The last of this initial spate of articles undertook a brief review at the law's quinquennial in late 2013.[25] As is often the case, scholarly interest waned after the new rule's birthing pangs, and the passage of over a decade has now multiplied decisions applying the new rule many times over and allowed ambit for divisions and distinctions to percolate and meander towards resolution.[26] A renewed examination of whether the pessimism has been borne out is timely.[27] Regrettably, percolation has not resolved many initial critiques, but only diversified their targets and fostered new bubbles of confusion, conflict, and consternation. Some problems of privilege are closer to resolution, but those very solutions have engendered yet more ramifications in the law of waiver, insinuating a distressingly nihilist conclusion that the nuances of privilege are too delicate to address in gross. Measured thus far,[28] FRE 502 may well have improved some aspects of the law of privilege, but has still left jurisprudence well short of the ideals envisioned by its framers.[29] Indeed, a decade into the latest phase of the perennial project to improve privilege, one wonders if that glorious vision of a fair, efficient, and predictable privilege may ever be realized.[30]

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21 *See, e.g.*, Noyes, *supra* note 14, at 679–83; Emery, *supra* note 14, at 294; Meyers, *supra* note 9, at 1465–67; Cavaneau, *supra* note 14, at 11.

22 *See, e.g.*, Barkett, *supra* note 14; Correll, *supra* note 6; Grimm et al., *supra* note 14; Murphy, *supra* note 14; Schaefer, *supra* note 14, Noyes, *supra* note 14; Emery, *supra* note 14, at 295–96.

23 *See, e.g.*, Correll, *supra* note 6, at 1070–71; Noyes, *supra* note 14, at 760–61; Outlaw III, *supra* note 14, at 8.

24 Outlaw III, *supra* note 14, at 8 (emphasis added).

25 Cross & Nagendra, *supra* note 14, at 1.

26 *See* Correll, *supra* note 6, at 1054 ("Those controversies, while too new and undeveloped to offer reliable instruction, illustrate a number of potential roadblocks, judicial preferences, and unanticipated issues that may guide the future development of other aspects of the rule."); Redgrave & Kehoe, *supra* note 14, at 37 ("Counsel can expect courts to begin issuing opinions that address some of the questions about the effects of Rule 502 and how it is applied in the real world."); *cf.* Meyers, *supra* note 9, at 1468 (noting the paucity of cases in 2009 and noting certain provisions had occasioned no decisions yet).

27 *Cf.* Cross & Nagendra, *supra* note 14, at 1 (noting the need for reassessment after five years).

28 As its title suggests, this Article largely restricts itself to cases from the ten years following the passage of FRE 502.

29 *See* Grimm et al., *supra* note 14, at 79; Murphy, *supra* note 14, at 238; Schaefer, *supra* note 14, at 233–34; Meyers, *supra* note 9, at 1485–86; Cavaneau, *supra* note 14, at 12.

30 *See* Broun & Capra, *supra* note 9, at 271–73 (explaining the rulemakers' vision).

The World of Waiver That Was

I. THE PERILOUS SCYLLA AND CHARYBDIS OF CUSTOMARY WAIVER DOCTRINE

"Earlier cases," observes Epstein, "seemingly enlarged on the scope of the waiver more than would be likely today."[31] This observation might seem odd, given that whatever was waived would assumptively be defined by what was divulged—but for the judicial invention of the "subject-matter waiver doctrine," under which compromise of one secret might jeopardize them all.[32] Thus, the Second Circuit could find in the 1923 case, *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, that all privilege in communications with counsel was waived after a single specimen had been introduced to prove a point,[33] just as the Supreme Court had held in 1888 that where the "client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."[34] Prior to further disturbing this bizarre and ornery creature of jurisprudence, however, perhaps it is best to begin at the beginning.

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31 EPSTEIN, *supra* note 3, at 787.

32 *See generally* Meyers, *supra* note 9; *see* cases cited *infra* note 99.

33 *See* Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d 195, 201 (2d Cir. 1929).

34 *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

A. Wigmore on Waiver, or, "Letting the Cat Out of the Bag"[35]

Before there can be subject-matter waiver of privilege, there must be waiver simpliciter. Attorney-client and work-product privilege are so familiar to practitioners that little further elaboration is needed here where so much has gone before.[36] As for waiver, similarly to many more-or-less counterintuitive features of the privilege, the concept arises from the nominal requirement of strict confidentiality for privilege to be preserved.[37] To again recite the oft-recited formulation of 1904 by the legendary Dean John Henry Wigmore, attorney-client privilege applied when eight elements are satisfied:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance

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[35] Needless to say, the idiom of "letting the cat out of the bag" is profoundly odd; were cats so frequently secreted in sacks that an aphorism might emerge to record their release? Academia, of course, has an answer: "*letting the cat out of the bag* originally referred to a way of avoiding the common fraud in 16th century markets of selling a cheap substitute—a cat hidden in a bag, instead of a pricier piglet. Similar expressions exist in Spanish 'to sell cat for rabbit' and German 'to buy a cat in a bag.'" JAG BHALLA, I'M NOT HANGING NOODLES ON YOUR EARS AND OTHER INTRIGUING IDIOMS FROM AROUND THE WORLD 15–16 (Nat'l Geo. Books 2009). When one recognizes "poke" to be dialectical term for a bag, the reference in English to "buying a pig in a poke," *e.g.*, Indiana Protection & Advocacy Servs., v. Indiana Family & Soc. Servs. Admin., 603 F.3d 365, 389 (7th Cir. 2010), reinforces that the Renaissance society whence these idioms derive suffered from a disturbing preoccupation with containerized farmyard animals in commerce. Were fraud so prevalent, one wonders why anyone bothered to offer or considered purchasing a pig in a poke, a cat in a sack, or any other bagged livestock. What kind of merchant tenders payment for a (hopefully) living, breathing creature allegedly ensconced in a sack, sight unseen? Academia again has a response at the ready. "Back in the Middle Ages, when the Muslims invaded Southern Europe, suddenly pork was declared unclean, and thus became a premium on the open market. Because of strict laws forbidding such, pigs were sold undercover, stashed in bags." KARLEN EVINS, I DIDN'T KNOW THAT: FROM "ANTS IN THE PANTS" TO "WET BEHIND THE EARS"–THE UNUSUAL ORIGINS OF THE THINGS WE SAY 70 (Simon & Schuster 2007). Although one must accept this implausible etymology as the only explanation on offer for these idioms, the entire business registers as rather ridiculous and more suited to an antique world of fairy tales featuring magical beans proffered to artless bumpkins. *See* JOSEPH JACOBS, *Jack and the Beanstalk*, *in* ENGLISH FAIRY TALES 59 (David Nutt publ. 1890).

[36] *See* Jared S. Sunshine, *Clients, Counsel, and Spouses: Case Studies at the Uncertain Junction of the Attorney-Client and Marital Privileges*, 81 ALB. L. REV. 489, 493 (2018) [hereinafter Sunshine, *Uncertain Junction*] (citing Teri J. Dobbins, *Great (and Reasonable) Expectations: Fourth Amendment Protection for Attorney-Client Communications*, 32 SEATTLE U. L. REV. 35, 41 (2008)); *see also, e.g.*, McLoughlin et al., *supra* note 14, at 711–24 (discussing privilege); Grimm et al., *supra* note 14, at 13–19 (same); Murphy, *supra* note 14, at 205–07 (same); Gergacz, *supra* note 14, at 2–5 (same).

[37] *See generally* Correll, *supra* note 6, at 1033–38; Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 CATH. U. L. REV. 833, 834–36 (2016) [hereinafter Sunshine, *Common Interest*].

> permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[38]

Yet the provenance of that most thorny condition for privilege—confidentiality—is decidedly obscure prior to Wigmore.[39] What historical evidence exists anent confidentiality in attorney-client communications suggests it was a weapon in the hands of clients, intended to allow them to compel counsel to protect their secrets, rather than a latent landmine waiting to obliterate their privilege at the casual slip of the tongue.[40] No less an authority than Paul R. Rice has observed that it seems to have sprung Athena-like, fully formed[41] from the head of Dean Wigmore himself, establishing itself by virtue of the Dean's preeminence rather than doctrinal underpinnings or legal precedent.[42] This is consistent with the 1924 observation that "[w]hen the first edition was published, it was only possible to judge of Mr. Wigmore's book as a statement of the law. During the intervening years it has become something greater. It has created law."[43] Indeed, "once he had perpetrated a doctrine on the basis of little or no authority, precedents would soon follow to fill the gap."[44] Thus by the latter half of the twentieth century, the requirement of confidentiality was

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38 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton rev. 1961); *see* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (quoting *id.*); *accord, e.g.*, Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002); United States v. Rockwell Int'l, 897 F. 2d 1255, 1264 (3d Cir. 1990); NLRB v. Harvey, 349 F. 2d 900, 904 (4th Cir. 1965); United States v. El Paso Co., 682 F. 2d 530, 538 n.9 (5th Cir. 1982); United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir. 1964); United States v. Lawless, 709 F. 2d 485, 487 (7th Cir. 1977); Simon v. GD Searle & Co., 816 F. 2d 397, 403 n.7 (8th Cir. 1987); United States v. Martin, 278 F. 3d 988, 999 (9th Cir. 2002).

39 *See* Correll, *supra* note 6, at 1034–35; Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 968 nn.2–5 (1999) [hereinafter Rice, *Continuing Confusion*]; PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:3 (Thomson Reuters ed., 2018) [hereinafter RICE, *ACPITUS*].

40 Paul R. Rice, *Attorney Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 868–72 (1998) [hereinafter Rice, *Eroding Concept*]; *see* Sunshine, *Uncertain Junction*, *supra* note 36, at 547–48 (first citing Geoffrey C. Hazard Jr., *An Historical Perspective on the Lawyer-Client Privilege*, 66 CAL. L. REV. 1061, 1071–72 (1978); and then citing Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 487 (1928)); Sunshine, *Common Interest*, *supra* note 37, at 834–35 (discussing Hazard and Radin articles at length); Correll, *supra* note 6, at 1035–37; Rice, *Continuing Confusion*, *supra* note 39, at 968.

41 *See* THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 7, 107 (1913).

42 *See* Rice, *Continuing Confusion*, *supra* note 39, at 968 n.5 ("The concept of confidentiality and secrecy was literally made up by Wigmore in the first edition of his treatise."); Rice, *Eroding Concept*, *supra* note 40, at 859–61; RICE, *ACPITUS*, *supra* note 39; *see also* Sunshine, *Uncertain Junction*, *supra* note 36, at 547; Correll, *supra* note 6, at 1035–36.

43 Zechariah Chafee Jr., Book Review, 37 HARV. L. REV. 513, 521 (1924).

44 WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 111 (1985).

well established as a prerequisite for privilege.[45] And under the sternest definitions of waiver, any compromise of confidentiality ended privilege in the communications.[46]

Where a communication involving client and counsel was not confidential *ab initio*—for example, a colloquy on the record between a client, his counsel, their opponents, and the court—it would be strange to suggest privilege could (or should) later sequester what had been offered to opponents and ombudsman in its utterance.[47] The more fiddly question arose when a communication was manifestly confidential in the making but was later disclosed outside the attorney-client relationship—whether by express design, inadvertence, or utter misadventure.[48] Three instances may illustrate these situations. The first might occur should a client wish to argue as a defense that she relied on advice of counsel in acting; once evidence of that advice is offered in that character, it would no longer be held privileged.[49] The last imagines unforeseeable circumstances: a burglar, perhaps, breaking and entering counsel's offices and publishing their client files.[50] The intermediate situation then falls somewhere between: imagine a client tasked with preparing documents for transfer to court inadvertently included amongst them a privileged matter,[51] or, for that matter, counsel doing so in the midst of a production to regulators.[52] Or a cooperative client

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[45] Correll, *supra* note 6, at 1037–38; RICE, *ACPITUS*, *supra* note 39 ("By 1950 Wigmore's rule on confidentiality appears to have taken hold.").

[46] RICE, *ACPITUS*, *supra* note 39; Jenkins v. Bartlett, 487 F.3d 482, 490 (7th Cir. 2007); Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991) (citing United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980)); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 141 (D. Del. 1982) ("The presence of nonessential third parties not needed for the transmittal of the information will negate the privilege."); EPSTEIN, *supra* note 3, at 335–44; WIGMORE, *supra* note 38, § 2311 ("One of the circumstances by which it is commonly apparent that the communication is not confidential is the *presence of a third person* . . . ."); Sunshine, *Uncertain Junction*, *supra* note 36, at 493–94, 497, 546–47; Sunshine, *Common Interest*, *supra* note 37, at 834–36; Jared S. Sunshine, *The Part & Parcel Principle: Applying the Attorney-Client Privilege to Email Attachments*, 8 J. MARSHALL L.J. 47, 74–75 (2014) [hereinafter Sunshine, *Part & Parcel*].

[47] *See* United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359–61 (D. Mass. 1950); Correll, *supra* note 6, at 1036–37; EPSTEIN, *supra* note 3, at 508–09.

[48] *See generally* EPSTEIN, *supra* note 3, at 508–835 (exploring such situations for over three hundred pages); *cf.*, *e.g.*, Sunshine, *Uncertain Junction*, *supra* note 36, at 524–38 (discussing varying results in cases in which attorney-client confidences were later transmitted to a spouse).

[49] *E.g.*, Technitrol, Inc. v. Digital Equipment Corp., 18 Fed. R. Serv. 2d 561, 561 (N.D. Ill. 1974).

[50] *See* Smith v. Armour Pharm. Co., 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) (discussing such a scenario) (quoting *infra* note 275).

[51] *E.g.*, Underwater Storage, Inc. v. U.S. Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) ("The plaintiff turned over to his attorney the documents to be produced. This letter was among them. The Court will not look behind this objective fact to determine whether the plaintiff really intended to have the letter examined.").

[52] *E.g.*, *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 674 (D.C. Cir. 1979) (per curiam).

might allow the government free access to a voluminous set of internal files without realizing privileged material lay within.[53] Unlike intentional disclosure, whether an incident of the latter varieties constitutes misadventure, negligence, or recklessness may be difficult to discern.

To most early and even pre-modern courts, however, such distinctions were beside the point.[54] They would see all three as circumstances covered under Wigmore's terse final caveat, "unless the privilege be waived."[55] Wigmore himself expounded further:

> All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take the measures of caution sufficient to prevent being overheard by third parties. The risk of insufficient precautions is upon the client. This principle applies equally to documents.[56]

Whether disclosure was intentional or not, all that mattered was that the proverbial "cat is out of the bag."[57] This principle could prove quite punitive for well-intentioned parties, as in the 1950s case *United States v. Kelsey-Hayes Wheel Co.*,[58] where the target of a governmental antitrust investigation agreed to provide access to its general files, which invitation investigators eagerly accepted, ultimately photocopying a thousand germane to the case.[59] The company later discovered that, unbeknownst to it at the time, some twenty-nine privileged documents had been inadvertently stored

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53 *E.g.*, United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464–65 (E.D. Mich. 1954).

54 *See, e.g.*, Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995); *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989); Weil v. Inv./Indicators, Research and Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981) ("'[I]nadvertence' of disclosure does not as a matter of law prevent the occurrence of waiver."); *Ocean Transp.*, 604 F.2d at 675 ("An intent to waive one's privilege is not necessary for such a waiver to occur."); Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d 195, 201–02 (2d Cir. 1929); Data Gen. Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556, 558–561 (D. Mass. 1991); Prudential Ins. Co. v. Turner & Newall, P.L.C., 137 F.R.D. 178, 182 (D. Mass. 1991); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc. 91 F.R.D. 254, 260 (N.D. Ill. 1981); *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979), *aff'd*, 629 F.2d 548 (8th Cir. 1980); *Underwater Storage*, 314 F.Supp. at 549; *Kelsey-Hayes*, 15 F.R.D. at 465.

55 *Compare supra* note 38 *with supra* note 54.

56 WIGMORE, *supra* note 39, § 2325, at 631.

57 Gambale v. Deutsche Bank AG, 377 F. 3d 133, 144 n.11 (2nd Cir. 2004) ("'Once the cat is out of the bag, the ball game is over.' *Calabrian Co. v. Bangkok Bank Ltd.*, 55 F.R.D. 82 (S.D.N.Y. 1972) (addressing the use at trial of privileged documents when the privileged nature of the documents, which had not been maintained in confidence, was first asserted during the relevant witness's cross-examination in open court)"); *see* cases cited *supra* note 54.

58 15 F.R.D. at 461.

59 *Id.* at 464.

amongst those the government accessed, and sought them excluded.[60] In demurring, the court made much of the cat's baglessness: "Plaintiff now knows the contents of the documents and has photostatic copies of each of them," and as such applying the rule of privilege would be mere "mechanical obedience to a formula."[61] Citing Wigmore, the court continued in condemning the company's practices:

> Nor is this result affected by [defendant]'s assertion that the privileged documents were inadvertently handed over to the Government's representatives; that the mass of documents in its files were so voluminous that it did not know nor did it have time to discover that privileged ones were among them. It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made. One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege.[62]

Engendering rather less sympathy are those proponing privilege where they knew full well they were exposing specifically privileged records to view outside of discovery, even if they did not really wish to waive their privilege.[63] Such was the case when documents intended for counsel were abandoned in a hallway outside his office: "If the cleaning woman, the watchman or any casual visitor might have rummaged through these documents, apparently with the consent of those being investigated, I assume that the Grand Jury is also entitled to rummage through the documents."[64] Likewise waiver ensued as to documents that a defendant had lodged with his accountant in an effort to conceal them from investigators;[65] because the accountant had evidently been granted plenary access in service of the deceit, any privilege to the items within was waived.[66]

More surprising, the result does not differ even if the once-bagged cat were kidnapped rather than set free: in *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc.*, plaintiffs alleging antitrust violations "developed a practice of searching the trash dumpster located in the parking lot of the office building where [one defendant] rented

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60 *Id.*

61 *Id.* at 464–65.

62 *Id.* at 465.

63 *See, e.g.*, *In re* Grand Jury Subpoena Served Upon Horowitz, 482 F.2d 72, 74–75 (2d Cir. 1973); *In re* Grand Jury Subpoena Served Upon Victor, 422 F. Supp. 475, 476 (S.D.N.Y. 1976).

64 *Victor*, 422 F. Supp. at 476.

65 *Horowitz*, 482 F.2d at 74–75.

66 *Id.* at 82 ("If Kasser had not wished to keep the communications between himself and his lawyers with him, he could have returned them to the lawyers. At the very least he could have directed Horowitz not to look at them. In contrast he treated the communications between himself and counsel on the same basis as all other records, with Horowitz, who was an independent contractor and not a servant, having a free run to look at what he pleased.").

offices. This search for and retrieval of documents began in August of 1977 and continued for over two years. Hundreds of relevant documents were obtained."[67] The court found privilege forfeited even as to letters from the defendant's president to its corporate counsel, despite the concededly slight "likelihood that third parties will have the interest, ingenuity, perseverance and stamina, as well as risk possible criminal and civil sanctions, to search through mounds of garbage in hopes of finding privileged communications."[68] Faulting the defendants' diligence instead, the court held that "if the client or attorney fear such disclosure, it may be prevented by destroying the documents or rendering them unintelligible before placing them in a trash dumpster," even whilst acknowledging such a course "may seem extreme."[69]

The court also noted that a "purloined letter [or] a stolen document . . . are not privileged"[70]—the subject of another case, in Minnesota.[71] There, the court distinguished between documents lawfully seized by the government pursuant to a warrant, and those that had apparently been stolen by a disgruntled former employee and provided to the government.[72] Counterintuitively, however, the court found privilege available to shield those qualifying from the lawfully acquired set, but categorically denied privilege to any documents that had been *unlawfully* taken, citing Wigmore's insistence that the proponent of privilege do whatever is necessary to prevent even criminal malefactors from getting their documents.[73] Yet this was as the Second Circuit had written half a century before in *Kunglig Jarnvagsstyrelsen* (also citing Wigmore).[74] It must be noted that not *every* early decision was prepared to credit Wigmore's reflexive denunciation of the victims of malfeasance.[75] An Ohio district court in 1984, for example, found that a closely-protected diary of communications pertaining to active litigation had been somehow obtained and

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67 Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc. 91 F.R.D. 254, 255–56 (N.D. Ill. 1981).

68 *Id.* at 260.

69 *Id.* at 260–61.

70 *Id.* at 259.

71 *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 865 (D. Minn. 1979), *aff'd*, 629 F.2d 548 (8th Cir. 1980).

72 *Id.* at 868.

73 *Id.*

74 *See* Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d 195, 202 (2d Cir. 1929) ("Even evidence obtained by theft or other illegal means is admissible. While the federal courts hold that the use of evidence illegally obtained by federal officers violates the constitutional rights of a defendant in a criminal proceeding, the rule is not extended to illegal seizures by private persons, nor to civil suits.") (citations omitted).

75 *See, e.g.*, United States *ex rel.* Mayman v. Martin Marietta Corp., 886 F. Supp. 1243, 1246 (D. Md. 1995) ("outright theft"); Dyer v. William S. Bergman & Assocs., 657 A.2d 1132, 1138 (D.C. 1995); *In re* Dayco Corp. Sec. Litig., 102 F.R.D. 468, 470 (S.D. Ohio 1984).

published by a local newspaper.[76] Suggesting the company's protections were reasonable, the court rejected the Wigmore approach and found the diary privileged, given it had been misappropriated without authorization.[77]

Desultory mercies aside, the prevalent doctrinal approach in these stricter, early courts worked considerable violence to the ordinary meaning of waiver, which involves a reasonable degree of volition in effecting a waiver.[78] Many other areas of the law, indeed, mandate that waivers be knowing, intentional, and voluntary, which is quite the antithesis of misadventure, and well beyond mere negligence as well.[79] That a company's susceptibility to "dumpster diving,"[80] or its offices' burglarization,[81] could constitute such an intentional act defies logic, equity, and decency; yet so it was with attorney-client privilege[82] and work product.[83] The proper term for such situations is forfeiture, not waiver.[84] (Despite some authorities insisting

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76 *Dayco Corp.*, 102 F.R.D. at 469.

77 *Id.* at 470 (citing JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 503(a)(4)[01] (1982)).

78 EPSTEIN, *supra* note 3, at 508 ("The term 'waiver' used to describe by what means the privilege has been lost is singularly infelicitous."); *see, e.g.*, Sunshine, *Common Interest*, *supra* note 37, at 834.

79 *See* Edwards v. Arizona, 451 U.S. 477, 483–84 (1981) ("The Court specifically noted that the right to counsel was a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard…."); Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Pate v. Robinson, 383 U.S. 375, 384 (1966); *see also* EPSTEIN, *supra* note 3, at 508 ("In other domains of the law waiver entails a knowing, voluntary, conscious and intentional relinquishment of that right by the holder thereof.").

80 *See* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc., 91 F.R.D. 254, 260–61 (N.D. Ill. 1981).

81 *Id.* at 259; *see In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863 (D. Minn. 1979), *aff'd*, 629 F.2d 548 (8th Cir. 1980).

82 EPSTEIN, *supra* note 3, at 508 (observing that in the attorney-client context, "[w]aiver can and does occur by operation of law, despite the fact that the waiver may have been unknowing, involuntary, and unintentional.").

83 *See* Data Gen. Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556, 558–61 (D. Mass. 1991); Prudential Ins. Co. v. Turner & Newall, P.L.C., 137 F.R.D. 178 (D. Mass. 1991).

84 *See* EPSTEIN, *supra* note 3, at 508–09; McLoughlin et al., *supra* note 14, at 725 n.128; Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advs., Inc., 266 F.R.D. 1, 11 (D.D.C. 2010); *e.g.*, Hamer v. Neighborhood Housing Servs. of Chi., 138 S. Ct. 13, 17 n.1 (2017) (first quoting United States v. Olano, 507 U.S. 725, 733 (1993); and then quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'")); United States v. Wesley, 422 F.3d 509, 520 (7th Cir. 2005) ("A forfeiture is basically an oversight; a waiver is a deliberate decision"); *see also* Sunshine, *Common Interest*, *supra* note 37, at 834–35 n.11 (discussing same).

on a shift in nomenclature,[85] this Article adheres to traditional terminology.) Such compelled waiver bears with it the unseemly intimation of the state forcibly extracting confessions[86]—à la the abuses of the infamous Star Chamber that gave rise to such protections as are found in the Fifth and Sixth Amendments, guarding against compelled self-incrimination,[87] and guaranteeing the right to public trial and counsel,[88] respectively. These norms are fundamental to the very system of Anglo-American criminal law.[89]

Courts understandably retreated from the disturbing notion of returning to the Stuarts' abuse of sequestered and coercive justice.[90] Instead, they strove energetically to explain how forfeiture is really a voluntary waiver remaining within the control of the holder of the privilege, generally via the conceit that those who act negligently have constructively assented to waiver in deciding against affording privileged documents the necessary security to avoid disclosure.[91] Absent a requirement of the most punctilious care, they reasoned, the temptation to shepherd documents under the

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85 *E.g.*, EPSTEIN, *supra* note 3, at 508–09; *In re* Grand Jury John Doe Co., 350 F.3d 299, 302 (2d Cir. 2003).

86 *See* Doe v. United States, 487 U.S. 201, 212 (1988) ("Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source."); *accord* Pennsylvania v. Muniz, 496 U.S. 582, 595–96 (1990).

87 *See Muniz*, 496 U.S. at 595–96; *Doe*, 487 U.S. at 212; Andresen v. Maryland, 427 U.S. 463, 470–71 (1976); Michigan v. Tucker, 417 U.S. 433, 439–40 (1974); Ullmann v. United States, 350 U.S. 422, 428 (1956); Brown v. Mississippi, 297 U.S. 278, 287 (1936).

88 *See* Estes v. Texas, 381 U.S. 532, 538–39 (1965); Watts v. Indiana, 338 U.S. 49, 54 (1949); *In re* Oliver, 33 U.S. 257, 268–70 (1948).

89 *See Watts*, 338 U.S. at 54 ("Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end.").

90 *See* Kitchen v. Corizon Health Inc., No. 1:16-cv-1068, 2017 WL 5099892, at *3 (W.D. Mich. Nov. 5, 2017); Martis v. Dish Network, No. 1:13-cv-1106, 2013 WL 6002208, at *2–3 (W.D. Mich. Nov. 12, 2013) (citing Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177–79 (6th Cir. 1983)); State v. Deatore, 358 A.2d 163, 170 n.8 (N.J. 1975).

91 *See, e.g.*, F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 79 (D. Md. 1998) ("Moreover, this follows logically from a finding of unexcused inadvertence under the customary five factor test. As courts have suggested, the five factor test determines the 'constructive' voluntariness or intentionality of the production from all the circumstances of its production."); W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8–9 (D.D.C. 1991); Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991) ("Inadvertent disclosures are, by definition, unintentional acts, but disclosures may occur under circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure intentional."); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc. 91 F.R.D. 254, 260–61 (N.D. Ill. 1981); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954); *see also In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

moniker of privilege would face little restraint.[92] By this logic, anything short of court-compelled disgorgement of information thus entailed waiver.[93] Tautologically, if due diligence had been taken, the documents would not have been divulged; the proof is in the pudding.[94] The D.C. Circuit summarized this primordial view in its hugely influential decision in *In re Sealed Case* in 1989:[95]

> Even assuming Company's disclosure was due to "bureaucratic error," which we take to be a euphemism that necessarily implies human error, that unfortunate lapse simply reveals that someone in the company and thereby Company itself (since it can only act through its employees) was careless with the confidentiality of its privileged communications. Normally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege. To hold, as we do, that an inadvertent disclosure will waive the privilege imposes a self-governing restraint on the freedom with which organizations such as corporations, unions, and the like label documents related to communications with counsel as privileged. To readily do so creates a greater risk of "inadvertent" disclosure by someone and thereby 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. Otherwise, there is a temptation to seek artificially to expand the content of privileged matter. 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. Short of court-compelled disclosure, or other equally extraordinary circumstances, we will not distinguish between various degrees of "voluntariness" in waivers of the attorney-client privilege.[96]

B. The Traditional Subject Matter Waiver Doctrine

Nor did such harsh constructions of forfeiture under the misnomer of waiver exhaust the stringencies imposed on those seeking to preserve their privilege, as adumbrated by the D.C. Circuit's reference to waiver extending to "all related matters."[97] The Ninth Circuit explained concisely in *Weil v. Investment/Indicators, Research & Management, Inc.* that "[b]ecause it impedes full and free discovery of

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92 *W. Trails*, 139 F.R.D. at 8–9; *Sealed Case*, 877 F.2d at 980.

93 *E.g.*, *W. Trails*, 139 F.R.D. at 8–9; *Sealed Case*, 877 F.2d at 980.

94 *See* Int'l Dig. Sys. v. Dig. Equip. Corp., 120 F.R.D. 445, 448 (D. Mass. 1988); *see* cases cited *supra* note 91; *see also* EPSTEIN, *supra* note 3, at 553–54; WIGMORE, *supra* note 38, § 2325, at 631.

95 Given the profusion of cases on privilege captioned as *In re Sealed Case*, this Article will limit references to the moniker in the main text to this epochal decision to avoid confusion. *See* Sunshine, *Common Interest*, *supra* note 37, at 860 n.189 (collecting such cases from the D.C. Circuit and opting for similar choice to avoid confusion).

96 *Sealed Case*, 877 F.2d at 980.

97 *Id.*

the truth, the attorney-client privilege is strictly construed," and therefore "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."[98] Other circuits agreed in the era of Wigmore[99]—indeed, nigh unto the eve of FRE 502.[100] Nor was this subject matter waiver strictly limited to intentional disclosures: "Even 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."[101] A number of other courts have agreed that whilst the circumstances of a disclosure bear upon the scope of the waiver, there was no categorical exemption to subject-matter waiver for unintentionality,[102] often looking to the omnipresent Wigmore as justification:[103] "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation."[104]

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98 Weil v. Inv./Indicators, Research & Mgt., Inc., 647 F.2d 18, 24 (9th Cir. 1981).

99 *See* WIGMORE, *supra* note 38, § 2327, at 638 ("The client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter."); *e.g.*, *In re* Grand Jury Proceedings, 219 F.3d 175, 183 n.4 (2d Cir. 2000); Genentech, Inc. v. U.S. Int'l Trade Comm'n, 122 F.3d 1409, 1416 (Fed. Cir.1997); *In re* Grand Jury Proceedings, 78 F.3d 251, 255 (6th Cir. 1996); *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1314 n. 18 (7th Cir. 1984); United States v. Jones, 696 F.2d 1069, 1073 (4th Cir. 1982) (per curiam); United States v. Cote, 456 F.2d 142, 144–45 (8th Cir. 1972); United States v. Nobles, 422 U.S. 225, 239–40 (1975).

100 *See* Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349 (Fed. Cir. 2005) ("The widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter.").

101 First Wisc. Mortg. Trust v. First Wisc. Corp., 86 F.R.D. 160, 173 (1980) (nonetheless finding against subject matter waiver whilst quoting Wigmore).

102 *E.g.*, *In re* Grand Jury, 475 F.3d 1299, 1305 (D.C. Cir. 2007); Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995); *Sealed Case*, 877 F.2d at 980; Elkins v. D.C., 250 F.R.D. 20, 25–26 (D.D.C. 2008); Gen. Elec. Co. v. Johnson, No. Civ.A.00-2855, 2006 WL 2616187, at *18–20 (D.D.C. Sept. 12, 2006); Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005); *In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 309 (D.D.C. 1994); Mergentime Corp. v. Wash. Metro. Area Transit Auth., 761 F. Supp. 1, 1–2, 2 n.2 (D.D.C. 1991); W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 7–8 (D.D.C. 1991); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161–62 (D.S.C. 1974); *see also* F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 75–80 (D. Md. 1998) (ordering subject matter waiver); Santrade, Ltd. v. Gen. Electric Co., 150 F.R.D. 539, 543 (E.D.N.C. 1993) ("To the extent that [the plaintiff] has inadvertently or deliberately disclosed attorney client communications, it has waived attorney client privilege as to all communications on all subjects covered by these communications").

103 *E.g.*, *W. Trails*, 139 F.R.D. at 8; *Sealed Case*, 877 F.2d at 979–80; *Duplan*, 397 F. Supp. at 1162.

104 WIGMORE, *supra* note 38, § 2327, at 636.

1. Related Documents Ordered Produced

The rationale for the subject matter waiver doctrine has thus always turned on notions of equity and fair play.[105] When disclosure is tactical and intentional, courts quite sensibly admit the entirety of the subject matter to place the parties on a level playing field and to prevent one from trying to "hoodwink the other side."[106] Or as the Fifth Circuit said more formally, with a dutiful nod to Wigmore:

> [A] client's offer of his own or his attorney's testimony as to a specific communication constitutes a waiver as to all other communications on the same matter [because] "the privilege of secret communication is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former."[107]

So too for the production of documents.[108] In *Technitrol, Inc. v. Digital Equipment Corp.*, the Northern District of Illinois found subject matter waiver where the privilege's proponent had released a legal opinion favorable to its position whilst seeking to withhold the remainder of counsel's work on the subject.[109] Acknowledging the "attorney-client privilege is an important element of our system and should not be easily cast aside," nonetheless "parties should not be able to manipulate the privilege so as to release only favorable information and withhold anything else."[110] To do so would "kidnap the truth-seeking process" wholesale.[111] This principle is intuitively correct, has been adopted by innumerable courts,[112] and

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105 *See In re* Keeper of Records, 348 F.3d 16, 24–26 (1st Cir. 2003); Genentech, Inc. v. U.S. Int'l Trade Comm'n, 122 F.3d 1409, 1416 (Fed. Cir.1997); *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988); *see* Imwinkelried, *supra* note 14, at 172–74 (exploring rationale for subject matter waiver); Gergacz, *supra* note 14, at 5–6; *cf.* WIGMORE, *supra* note 38, § 2327, at 638.

106 EPSTEIN, *supra* note 3, at 533 ("A privilege holder may not pick and choose which privileged matters on a given subject matter it will voluntarily disclose without thereby waiving the privilege as to similar communications. If you are going to show your privilege cards, you will have to show them all, not just those that allow you to hoodwink the other side most credibly.").

107 United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc) (quoting WIGMORE, *supra* note 38, § 2327, at 638); *accord* Nguyen v. Excel Corp., 197 F.3d 200, 207–08, 208 n.19 (5th Cir. 1999).

108 *Cf.* WIGMORE, *supra* note 38, § 2325, at 633 ("This principle applies equally to documents.").

109 Technitrol, Inc. v. Dig. Equip. Corp., Nos. 70 C 2916, 71 C 1082, 1974 WL 20497, at *1 (N.D. Ill. Feb. 22, 1974).

110 *Id.*

111 *In re* Keeper of Records, 348 F.3d 16, 24 (1st Cir. 2003) ("Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.").

112 *See, e.g.*, Eco Mfg. LLC v. Honeywell Int'l., Inc., No. 1:03-CV-0170-DFH, 2003 WL 1888988, at *3–4 (S.D. Ind. Apr. 11, 2003); Brock Equities Ltd. v. Josephthal, Lyon & Ross,

was enunciated crisply as far back as the nineteenth century to support subject matter waiver consequent to intentional disclosure: "It would hardly be contended that the complainant could introduce extracts from these communications as evidence in its own behalf for the purposes of a final hearing, and yet withhold the other parts if their production were required by the defendant. A party cannot waive such a privilege partially."[113]

Subject matter waiver's fairness was more attenuated when the predicate disclosure was not tactical but inadvertent, yet courts unpredictably ordered it all the same.[114] The notion was that if the privilege's proponent did not care enough to safeguard its privilege on the matter, it was only proper that the privilege be lost wholesale rather than piecemeal, inadvertence notwithstanding, as a Maryland court explained in great detail in *F.C. Cycles International v. Fila Sport*.[115] After losing its argument that a key memorandum was not privileged at all,[116] Fila conceded the document had been divulged, but contended the disclosure was inadvertent, and thus there should be no waiver, or at least no subject matter waiver.[117] But given no showing of securing the document and unexplained delay in making the claim, Fila's "'Johnny come lately' assertion of inadvertence [was] simply not enough to convince this Court."[118] Nonetheless, assuming arguendo disclosure had been inadvertent,[119]

Inc., No. 92 Civ.8588, 1993 WL 350026, at *1 (S.D.N.Y. Sept. 9, 1993); Chinnici v. Cent. Dupage Ass'n, 136 F.R.D. 464, 465 (N.D. Ill. 1991); Abbott Labs. v. Baxter Travenol Labs., Inc., 676 F. Supp. 831, 832 (N.D. Ill. 1987); *In re* Int'l Harvester's Disposition of Wisconsin Steel, 666 F.Supp. 1148, 1153 (N.D. Ill. 1987); Nye v. Sage Prod., 98 F.R.D. 452, 453 (N.D. Ill. 1982); Cent. Soya Co. v. George A. Hormel & Co., 581 F. Supp. 51, 53 (W.D. Okla. 1982); Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981); First Wis. Mortg. Tr. v. First Wis. Corp., 86 F.R.D. 160, 174 (E.D. Wis. 1980); Ranney-Brown Distribs., Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3, 6 (S.D. Ohio 1977); Smith v. FTC, 403 F.Supp. 1000, 1018–1019 (D. Del. 1975); *Technitrol*, 1974 WL 20497, at *1.

113 W. Union Tel. Co. v. Balt. & Ohio Tel. Co., 26 F. 55, 56-57 (C.C.S.D.N.Y. 1885). The court continued: "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." *Id.*

114 *See, e.g.*, United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 478 (6th Cir. 2006) (Griffin, J., concurring); Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995); Bellsouth Advert. & Pub. Corp. v. Bus. Lists, Inc., No. 1:90-CV-149-JEC, 1992 WL 338392, at *8 (N.D. Ga. Sept. 8, 1992).

115 F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 75–80 (D. Md. 1998).

116 *Id.* at 71.

117 *Id.* at 72.

118 *Id.* at 73–74 ("In sum, there were never any efforts to retrieve the document and privilege was not asserted as to the document until the defendant filed a memorandum in opposition to the instant motion in September 1998.").

119 *Id.* at 75.

the court proceeded to consider the fairness of subject matter waiver.[120] The court reasoned that just as the memorandum's waiver was at least *constructively* intentional because it was occasioned by gross negligence, so too was subject-matter waiver appropriate: "it is highly apparent that there was little or no effort made by the defendant to maintain the confidentiality of this document," even if the actual divulgence was not intended.[121]

Somewhat more sympathy may be due the defendant in *Western Trails v. Camp Coast to Coast*, where Western Trails sought to extract further documents associated with a privileged report produced by Coast to Coast, reasoning the privilege had been waived by its disclosure.[122] Coast to Coast resisted on the basis that the production was inadvertent and represented merely one document out of many thousands, emphasizing the mistaken divulgence had been innocent and understandable given such volume.[123] The D.C. district court was unmoved, citing the strict rule that inadvertence is no defense to waiver, which thereupon "extends 'to all other communications relating to the same subject matter.'"[124] Although the court allowed it had "discretion to impose less than the full scope of waiver," it nonetheless ruled that the sought-for associated charts and reports ought to be disclosed notwithstanding the inadvertence.[125] Exercising this discretion, however, less directly related documents were found to be beyond the legitimate reach of the subject matter waiver.[126]

The district court for the District of Columbia would go on to embrace subject matter waiver warmly and recurrently, albeit with the same allowance in tailoring its

120 *Id.* at 79–80.

121 *Id.* at 80 (quoting Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991)).

122 W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 7 (D.D.C. 1991).

123 *Id.*

124 *Id.* at 8–9 (quoting *In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)); *id.* at 11–12.

125 *Id.* at 11–12.

126 *Id.* at 12–14.

extent.[127] The results may still seem harsh; as with waiver simpliciter,[128] the principle extends beyond recklessness and negligence even unto the victims of theft: in *Elkins v. District of Columbia*,[129] the District had argued in its defense that "it is possible that the documents were impermissibly provided to [Plaintiffs] by disgruntled former District employees."[130] The court found their provenance irrelevant, even if illegal, and imposed subject matter waiver: "The law in this Circuit is clear—even the inadvertent disclosure of privileged information results in the waiver of the privilege for that information and all documents and communications relating to the same subject matter."[131] The reference to the D.C. Circuit is telling; as will be discussed later, that circuit has always been amongst the most miserly with privilege and expansive with waiver.[132]

Is waiver fair if the lapse is not logistical but legal? This was the question answered in a federal case that eventuated after an earlier state proceeding had settled, in *Sinclair Oil Corp. v. Texaco Inc*.[133] The plaintiff's new attorneys proceeded to produce certain documents in discovery from the state counsel's litigation files, and upon receiving these, the defendants moved to compel disclosure of all attorney-client communications between the plaintiffs and his lawyers on the basis of subject matter waiver.[134] The new counsel argued that he had only disclosed the documents because they were not privileged at all, being only recitations of fact between attorney and client.[135] But such communications are the very epitome of privilege, notwithstanding

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127 *See, e.g.*, *In re* Grand Jury, 475 F.3d 1299, 1305 (D.C. Cir. 2007); Elkins v. D.C., 250 F.R.D. 20, 25–26 (D.D.C. 2008); Gen. Elec. Co. v. Johnson, No. Civ.A.00-2855, 2006 WL 2616187, at *18–20 (D.D.C. Sept. 12, 2006) ("'[T]he confidentiality of communications covered by the [attorney-client] privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.' Hence, a privilege holder's inadvertent disclosure of privileged materials will effect a waiver that "'extends to all other communications relating to the same subject matter.'" (quoting *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)); *In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 309 (D.D.C. 1994); *see also* Elliott v. Fed. Bureau of Prisons, 521 F. Supp. 2d 41, 57–58 (D.D.C. 2007) (reciting principle in apparent intentional disclosure case); Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005) (same).

128 *See, e.g.*, *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863 (D. Minn. 1979), *aff'd*, 629 F.2d 548 (8th Cir. 1980); *see also* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc. 91 F.R.D. 254, 259 (N.D. Ill. 1981).

129 *Elkins*, 250 F.R.D. at 25–26.

130 *Id.* at 26.

131 *Id.*

132 *See infra* Section II.A.1.

133 Sinclair Oil Corp. v. Texaco Inc., 208 F.R.D. 329, 331 (N.D. Okla. 2002).

134 *Id.* at 331.

135 *Id.* at 332.

counsel's misapprehension.[136] Despite the inadvertence involved in the mistake of law, the district court not only found privilege waived, but invoked subject matter waiver to order disclosure of "all attorney client communications in the prior state court lawsuit."[137] At least (for fairness's sake?) this was less than defendant's desired "blanket or complete waiver" of privilege in the instant federal suit.[138] Other helpful but mistaken disclosures of privileged material have yielded similar results.[139]

Of course, the produced items must actually be privileged to implicate waiver.[140] In a droll inversion of *Sinclair Oil*, the defendant in *Intervet, Inc. v. Merial Ltd.* claimed that the patent analyses it had received were privileged, and demanded all related subject matter be revealed.[141] Intervet objected that the analyses were not privileged, but its position was complicated by its inconsistent defensive tactic of clawing back the production and replacing the analyses with redacted versions.[142] The court found this mattered not a whit, for Intervet was correct that "the invocation of [subject matter waiver] requires that the document on which the waiver was based was privileged in the first place; it is non sequitur to deduce a waiver from the production of a document that is not privileged."[143] With evident irritation, the court denounced Merial's attempt to propone privilege over the holder's correct objections as "pure

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136 *Id.* ("Plaintiff maintains that some of the documents which were sent by Plaintiff's prior attorney to Plaintiff but which communicated purely 'factual information' are not attorney client communications. The Court disagrees. The Court understands, in principle, the distinction which Plaintiff's counsel is attempting to draw. And, in some respects, the Court applauds Plaintiff's counsel's efforts at attempting to provide as much factual information to Defendant in discovery as possible. However, factual information which is communicated by an attorney to a client within the context of the attorney client relationship is protected by the attorney client privilege.").

137 *Id.* at 333.

138 *Id.* at 332–33.

139 *See, e.g.*, United States v. Cote, 456 F.2d 142, 144–45 (8th Cir. 1972) (when accountant transcribed the results of workpapers prepared under attorney supervision and thus privileged, the resultant submission of those results waived privilege as to the underlying workpapers); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, 1995 WL 683777, at *3 (N.D. Ill. Nov. 16, 1995) (erroneous discrepancy in redactions yielded waiver).

140 *See* Gen. Elec. Co. v. Johnson, No. Civ.A.00-2855, 2006 WL 2616187, at *19–20 (D.D.C. Sept. 12, 2006) ("In the end, very little subject-matter waiver has occurred. This is a direct result of the fact that most of the waiver documents are not, as the Court has concluded, covered by the attorney-client privilege in the first instance.").

141 Intervet, Inc. v. Merial Ltd., 252 F.R.D. 47, 52 (D.D.C. 2008).

142 *Id.* ("Thus, in the perfect converse of the ordinary situation, the titular holder of the privilege, Intervet, is insisting that the documents are not privileged while Merial is insisting they are. . . . Intervet, claiming that Exhibits 64 and 67 are not privileged, nevertheless 'clawed them back' under a provision of a Protective Order, pertaining to the production of privileged material. It then produced them in a redacted form, even though Merial had already seen them in an unredacted form, and used them during the deposition.").

143 *Id.*

gamesmanship" and "pure gotcha," and its sought-after waiver utterly out of proportion to Intervet's arguably inconsistent assertions.[144]

2. Privilege in Related Documents Upheld

Fairness did not always mean more disclosure—even after the intentional variety. Deploying one of the most oft-conjured metaphors in jurisprudence,[145] the Second Circuit in *In re Von Bulow* reviewed a district court's finding that it was "unfair to permit a party to make use of privileged information as a sword with the public, and then as a shield in the courtroom. Thus, the trial judge found what is generally called a 'waiver by implication,' based on fairness considerations."[146] The case itself was of great notoriety: Claus Von Bulow had been convicted for the attempted murder of his wife, but the conviction was overturned and he was acquitted upon retrial.[147] His lawyer, Alan Dershowitz, then published a book detailing the trial, including communications between Dershowitz and Von Bulow; in the ensuing civil case against Von Bulow, plaintiffs accordingly sought to abrogate attorney-client privilege from the criminal trial.[148] The court of appeals, however, following its view of fairness (and invoking the by-now-familiar metaphorical cat), thought otherwise, having distinguished the Ninth Circuit's broader formulation:

> [W]here, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of legal prejudice until put at issue in the litigation by the privilege-holder.[149]

This represented a widely-held recognition that non-tactical disclosures long before litigation (or perhaps in attempt to avoid litigation entirely) were less blameworthy than those used during litigation to gain advantage.[150] Disclosures in a

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144 *Id.* at 52–53.

145 *See* Rice, *Continuing Confusion*, *supra* note 39, at 998.

146 *In re* von Bulow, 828 F.2d 94, 101 (2d Cir. 1987).

147 *Id.* at 96.

148 *Id.*

149 *Id.* at 103.

150 *In re* Keeper of Records, 348 F.3d 16, 24–26 (1st Cir. 2003); *accord* Electro Scientific Indus. v. Gen. Scanning, Inc., 175 F.R.D. 539, 543–44 (N.D. Cal. 1997).

lawsuit are different;[151] fifteen years after *Von Bulow*, the Second Circuit returned to the subject to reaffirm that "the attorney-client privilege cannot at once be used as a shield and a sword" and found that the defendant's aim to represent that he believed his actions to be legal would waive privilege as to any conversations with counsel bearing on that belief.[152] This made sense: to allow the defendant to testify in court as to what counsel had informed him whilst denying his adversary discovery into what counsel had in fact said would be the essence of unfair play.[153] Ultimately, however, the definition of subject matter remained circumscribed by such fairness, as in *United States v. Skeddle*, where the court declined to order plenary waiver of privilege as to an entire investigation on the basis of brief testimony by a company's general counsel.[154] Contrary to the *Sinclair Oil* court's reasoning, "[t]o use these limited, factual disclosures as a bootstrap to discover Miller's entire investigative file would run counter to the principles underlying the narrow waiver of the attorney-client privilege."[155]

Quite naturally, moreover, the majority of courts found fairness militates against subject matter waiver in cases of inadvertent disclosure. Though there may be no *categorical* exception,[156] the 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 that a party is attempting to gain an advantage or make offensive or unfair use of the disclosure."[157] Numerous judges over the decades adopted this principle together with its slender exception.[158] Such was the result in *Hercules, Inc. v. Exxon Corp.*, where any overlap

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151 *See Keeper of Records*, 348 F.3d at 24–26.

152 United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991).

153 *See id.* at 1293; *see also Keeper of Records*, 348 F.3d at 24–25 ("In the former setting [of offering testimony at trial], the likelihood of prejudice looms: once a litigant chooses to put privileged communications at issue, only the revelation of all related exchanges will allow the truth-seeking process to function unimpeded.").

154 United States v. Skeddle, 989 F. Supp. 917, 919–20 (N.D. Ohio 1997).

155 *Id.* at 920; *see also Keeper of Records*, 348 F.3d at 25 ("Where a party has not thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the attorney-client privilege.").

156 *See* First Wis. Mortg. Tr. v. First Wis. Corp., 86 F.R.D. 160, 174 (1980); *see also* cases cited *supra* note 102.

157 Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp. Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987) (citing cases).

158 *E.g.*, Blue Lake Forest Prods., Inc. v. United States, 75 Fed. Cl. 779, 798 (2007); Koch Materials Co. v. Schore Slurry Seal, Inc., 208 F.R.D. 109, 120 (D.N.J. 2002); Metzger v. City of Leawood, No. 00–2015–KHV, 2000 WL 1909637, at *3–4 (D. Kan. Dec. 20, 2000); Draus v. Healthtrust, Inc., 172 F.R.D. 384, 390 (S.D. Ind. 1997); Fidelity and Deposit Co. of Maryland v. McCulloch, 168 F.R.D. 516, 521 n. 7 (E.D. Pa. 1996); Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 484 (E.D. Va. 1991); *In re* Sause Bros. Ocean Towing, 144 F.R.D. 111, 115–16 (D. Ore. 1991); Prudential Ins. Co. v. Turner & Newall, 137 F.R.D. 178, 182–83 (D. Mass. 1991); Bud Antle, Inc. v. Grow-Tech, Inc., 131 F.R.D. 179, 183–84 (N.D. Cal. 1990); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D.

in subject matter with the inadvertently produced documents was general at best, and none would "unfairly deprive defendant of access to facts relevant to particular subject matter disclosed in already produced documents."[159] So too where a client had misunderstood his counsel's advice and made privileged documents available to his adversaries, a layperson's error "does not warrant a finding that [the party] has waived what would essentially be its entire world of privileged documents."[160] Another court explained colorfully that even if one party "opened the gate by inadvertently producing" a privileged document, "defendants are not entitled to drive a bulldozer through it."[161] And yet another announced emphatically in 1990 that it "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."[162]

As illustrated by the preceding Section, subsequent cases undid that last assertion. It is perhaps technically true that courts did not exercise the full ambit of their authority to impose waiver wholesale, whatever that means.[163] Citations to discretion and professions of judicial restraint abounded in subject matter waiver orders where inadvertence was alleged: "The Court finds the emails were more narrow" in topic than the challengers sought;[164] "the Court concludes that the scope of waiver urged . . . is unduly broad in the context of this case";[165] "limiting the scope of the alleged waiver to all other communications relating to the 'same specific subject matter,' as opposed to 'the same subject matter';[166] "the factual context of the disclosure supports

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204, 208 (N.D. Ind. 1990); Colt Indus., Inc. v. Aetna Cas. & Sur. Co., Civ. A. No. 87-4107, 1989 WL 46189, at *6 (E.D. Pa. Apr. 28, 1989); ICI Americas, Inc. v. John Wanamaker of Phila., No. 88–1346, 1989 WL 38647, at *6 (E.D. Pa. Apr. 18, 1989); Int'l Dig. Sys. v. Dig. Equip. Corp., 120 F.R.D. 445, 446–447 n.1 (D. Mass. 1988); Standard Chartered Bank, PLC v. Ayala Int'l. Holdings (U.S.), Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986).

159 Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156–57 (D. Del. 1977).

160 Wunderlich-Malec Sys., Inc. v. Eisenmann Corp., No. 05-C-04343, 2006 WL 3370700, at *10 (N.D. Ill. Nov. 7, 2006) (agreeing the "Wigmore doctrine of strict waiver is atavistic and generates harsh results") (quoting Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95-C-1303, 1995 WL 360590, at *7 (N.D. Ill. June 14, 1995)).

161 *In re* Herschinger Inv. Co. of Del., 303 B.R. 18, 26 (D. Del. 2003). In fairness, the context was the work production privilege, which implicates slightly different concerns as to subject matter waiver.

162 *Golden Valley Microwave Foods*, 132 F.R.D. at 207.

163 *See* Elkins v. D.C., 250 F.R.D. 20, 25–26 (D.D.C. 2008); Gen. Elec. Co. v. Johnson, No. Civ.A. 00-2855 (JDB), 2006 WL 2616187, at *19 (D.D.C. Sept. 12, 2006); Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005); *In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 309 (D.D.C. 1994); Mergentime Corp. v. Washington Metro. Area Transit Auth., 761 F. Supp. 1, 2 n.2 (D.D.C. 1991); W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 12–14 (D.D.C. 1991).

164 *Elkins*, 250 F.R.D. at 25–26.

165 *Gen. Elec.*, 2006 WL 2616187, at *19.

166 *United Mine Workers*, 159 F.R.D. at 309.

only a narrow waiver of the privilege."[167] Even the expansive *Sinclair Oil* court was careful to note it rejected the proposal of a "blanket or complete waiver."[168] When subject matter waiver was found, therefore, courts sought to protect the privilege remaining where they thought possible.[169] That a court could have been harsher but forbore, however, rarely gave great comfort to the party compelled to produce privileged documents against its own interests in a supposed spirit of fairness.

C. Scylla and Charybdis in the Narrow Straits of Privilege

Yet even this sort of Solomonic balancing of the equities in waiver may have been more a curse than a blessing, all things considered. Setting down the sword and shield, the Second Circuit invoked another popular metaphor for the all-or-nothing nature of privilege, compelling a decision whether to withhold useful information potentially subject to privilege, or to disclose it and jeopardize all related conversations with counsel: navigating "between a Scylla and Charybdis."[170] On one side lies the prospect of fighting a case with one arm tied behind one's back; on the other, that of doing so with one's own weapons in an adversary's hands—as another court observed unsympathetically in the context of Fifth Amendment privilege, employing the same metaphor.[171] Nor was the Tenth Circuit sensitive to the quandary:

> Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliché, the "Hobson's choice" argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.[172]

As has been seen, fairness swayed courts in every direction as to the scope of subject matter waiver: "subject matter can be defined narrowly or broadly" or

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167 *Mergentime*, 761 F. Supp. at 2.

168 Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 323–33 (N.D. Okla. 2002).

169 *See* cases cited *supra* note 163.

170 *In re* Steinhardt Partners, LP, 9 F.3d 230, 236 (2d Cir. 1993); *accord In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1200 (10th Cir. 2006); *cf.* THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 243–44 (1913).

171 *See* Blackburn v. Superior Court, 27 Cal. Rptr. 2d 204, 209 (Cal. Ct. App. 1993) (describing defendant's complaint of being forced "between the Scylla of providing testimony in his own defense that may be incriminatory and the Charybdis of losing the case by asserting his Constitutional rights and remaining silent"); *cf.* State v. Kaquatosh, 600 N.W.2d 153, 158 (Minn. Ct. App. 1999) (reversing in a Fifth Amendment context and using the same metaphor).

172 *Qwest*, 450 F.3d at 1200 (quoting *Steinhart*, 9 F.3d at 236) (rejecting the "culture of waiver" that "appears to be of relatively recent vintage" in corporate selective waiver cases). This Article does not grapple with the selective waiver doctrine at any length, as it represents a discrete jurisdprudence that FRE 502 quite consciously opted to leave unaddressed. *See generally* Emery, *supra* note 14 (also employing the metaphor of Scylla and Charybdis).

anywhere in-between.[173] Intentional disclosures, whether extrajudicial or in the midst of a trial, have been forgiven with no further waiver ordered.[174] Other premeditated divulgences have led to further compelled waiver of anything from the remainder of partially-produced documents[175] to closely related materials[176] to an entire course of negotiations,[177] or to any other legal correspondence relating to the litigation at bar.[178] Espousing a constancy (albeit a harsh one) that does not appear in the cases, the Federal Circuit opined that the default scope extended to "all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice."[179]

Courts regularly ordered a broader waiver absent any clear tactical intent or assessment of "sword and shield" concerns.[180] But other courts denied waiver based on the same "sword and shield" analysis,[181] even where the challenger complained that the privileged documents may well contradict those produced.[182] One court rather puzzlingly commented that a court need not ask or decide whether tactical advantage was at play in ordering subject matter waiver, but that such a question was nonetheless an important consideration.[183] Another remarked, more understandably, in 1992 that "[t]he way in which courts have dealt with this type of waiver has become inconsistent

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173 *In re* Grand Jury Proceedings, 219 F.3d 175, 190 (2d Cir. 2000) (quoting *In re* Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 255 (6th Cir. 1996)).

174 *See, e.g.*, *In re* von Bulow, 828 F.2d 94, 103 (2d Cir. 1987); United States v. Skeddle, 989 F. Supp. 917, 919–20 (N.D. Ohio 1997).

175 *E.g.*, Chinnici v. Cent. Dupage Ass'n, 136 F.R.D. 464, 465 (N.D. Ill. 1991); W. Union Tel. Co. v. Balt. & Ohio Tel. Co., 26 F. 55, 56–57 (C.C.S.D.N.Y. 1885).

176 *E.g.*, W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 11–14 (D.D.C. 1991); Technitrol, Inc. v. Dig. Equip. Corp., Nos. 70 C 2916, 71 C 1082, 1974 WL 20497, at *1 (N.D. Ill. Feb. 22, 1974).

177 *E.g.*, Murray v. Gemplus Int'l., S.A., 217 F.R.D. 362, 367 (E.D. Pa. 2003).

178 *E.g.*, Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 333 (N.D. Okla. 2002).

179 *In re* Pioneer Hi–Bred Int'l, Inc., 238 F.3d 1370, 1374–75 (Fed. Cir. 2001).

180 *See, e.g.*, Elliott v. Fed. Bureau of Prisons, 521 F. Supp. 2d 41, 57–58 (D.D.C. 2007); Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005); *Chinnici*, 136 F.R.D. at 465; *W. Trails*, 139 F.R.D. at 7.

181 *See, e.g.*, Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 315–16 (2002); Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95-C-1303, 1995 WL 360590, at *8–9 (N.D. Ill. June 14, 1995).

182 *See, e.g.*, N. River Ins. Co. v. Phila. Reinsurance Corp., 797 F. Supp. 363, 370–71 (D.N.J. 1992); Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 415–16 (D. Del. 1992).

183 *Graco*, 1995 WL 360590, at *8 ("When defining waiver, a court is not required to determine whether the party has gained a tactical advantage. However, determining whether a party has gained a tactical advantage is an important consideration.") (citing Nye v. Sage Prods., Inc., 98 F.R.D. 452, 453 (N.D. Ill.1982)).

and unnecessarily complicated."[184] The only real constant was courts' recurring mantra of judicial discretion in the service of just results, particularly when ordering subject matter waiver.[185] And yet the stakes of those results were high: "Obviously, the consequences of subject-matter waiver could be disastrous to a party."[186]

With due respect to judicial notions of fairness, such a system was profoundly indeterminate *a priori*, leaving parties without guidance on what effect disclosure will have.[187] This was perhaps by design: courts are supposed to evaluate privilege on a case-by-case basis.[188] Clients weighing the viability of asserting their privilege thus did so not against a reliable standard, but against the normative views of a future judge trying to plumb their motives from afar.[189] It is almost trite by now to invoke the many courts who have extolled the importance of privilege being applied in a consistent and predictable fashion.[190] The Supreme Court has certainly done so repeatedly, with vim: "Making the promise of confidentiality contingent upon a trial judge's later evaluation . . . would eviscerate the effectiveness of the privilege."[191] Perhaps the best thing that could be said for the case-by-case regime (besides the fact that Congress had ordained

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184 *Remington*, 142 F.R.D. at 415.

185 *See, e.g.*, cases cited *supra* notes 163–167.

186 Meyers, *supra* note 9, at 1447.

187 *See* Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 263 (D. Del. 1995); *see also* Rice, *Continuing Confusion*, *supra* note 39, at 998–99; *Graco*, 1995 WL 360590, at *8.

188 *See* Upjohn v. United States, 449 U.S. 383, 396–97 (1981) (citing Notes of Committee on the Judiciary to Fed. R. Evid. 501, Senate Report No. 93–1277 (describing its adoption of FRE 501 should be "understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."); and then citing Trammel v. United States, 445 U.S. 40, 47 (1980); and then citing United States v. Gillock, 445 U.S. 360, 367 (1980)); *Graco*, 1995 WL 360590, at *8 ("Courts should, consistent with principles of fundamental fairness, fashion their orders compelling document production on a case by case basis.").

189 *See Berg Elec.*, 875 F. Supp. at 261; *see also* Rice, *Continuing Confusion*, *supra* note 39, at 998–99.

190 *E.g.*, *In re* Lott, 139 F. App'x. 658, 662 (6th Cir. 2005) (first quoting Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862–63 (3d Cir. 1994; and then quoting *In re* Von Bulow, 828 F.2d 94, 100 (2d Cir. 1987)). Trite because it is so frequently done, not least by this author. *See, e.g.*, Sunshine, *Uncertain Junction*, *supra* note 36, at 563 nn.587–589, 564 n.594; Jared S. Sunshine, *The Secrets of Corporate Courtship and Marriage: Evaluating Common Interest Privilege When Companies Combine in Mergers*, 69 S.C. L. REV. 301, at 375 n.479 (2017); Sunshine, *Common Interest*, *supra* note 37, at 868 n.255.

191 Jaffee v. Redmond, 518 U.S. 1, 11 (1996); *accord* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998); Upjohn Co. v. United States, 449 U.S. 383, 392 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888). *But see Upjohn*, 449 U.S. at 396–97 ("While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.").

it)[192] was then that those who deliberately chose to weaponize privileged materials also chose to put themselves at the mercy of that later evaluation.[193] If they sought an absolute privilege, they might ensure the inviolability of their confidences by declining to disclose anything and asserting their privilege when solicited—at the cost of not being able to deploy such evidence.[194] That was all Wigmore asked, after all.[195]

But that was not actually true either: companies perforce confronted another Scylla and Charybdis in whether to incur the cost in coin and convenience of vaultlike security and punctilious supervision of discovery anent privileged materials, or to hazard them should lesser measures prove inadequate.[196] And once a waiver occurs (even athwart precautions, lesser or greater), a severer judge could expand the breach to related subject matter[197]—even if others might not.[198] As the First Circuit cautioned in ordering such an expansion, "it also must be recognized that inadvertent disclosures can have a significance that transcends the documents actually disclosed."[199] There, a broader swathe of critical materials was forfeited merely because counsel had overlooked a handful of privileged documents included in a teeming data room.[200] The trial court had described the situation unceremoniously:

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192 *See* Notes of Committee on the Judiciary to Fed. R. Evid. 501, Senate Report No. 93–1277; *see also Upjohn*, 449 U.S. at 396–97; FED R. EVID. 501.

193 *Compare, e.g.*, Murray v. Gemplus Int'l., S.A., 217 F.R.D. 362, 367 (E.D. Pa. 2003) (rejecting a more constrained scope, concluding that "Gemplus disclosed its documents in order to put in a positive light the motivation that went into the Gemplus–Hesta negotiations, namely Gemplus's desire to be 'squeaky clean.' By doing so, Gemplus waived its privilege with regard to these negotiations.") *with* Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95-C-1303, 1995 WL 360590, at *8–9 (N.D. Ill. June 14, 1995) (noting court had broad discretion to fashion subject matter waiver to the case at hand and thereby declining to order broader waiver).

194 *See, e.g.*, United States v. Schwimmer, 892 F.2d 237, 244–45 (2d Cir. 1989) (remanding for determination of whether government had violated privilege by obtaining documents from a third party despite the defendants' repeated assertions of privilege); United States v. Castellano, 610 F.Supp. 1137 (S.D.N.Y. 1985); *see also* Arista Records, LLC v. Lime Gp., LLC, No. 06 CV 5936, 2011 WL 1642434, at *1–2 (S.D.N.Y. Apr. 20, 2011); AG Equip. Co. v. AIG Life Ins. Co., 636 F. Supp. 2d 1210, 1227 (N.D. Okla. 2009).

195 *See* WIGMORE, *supra* note 38, § 2325, at 631, 638.

196 *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989); F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 75–80 (D. Md. 1998); Gen. Elec. Co. v. Johnson, No. 00-2855, 2006 WL 2616187, at *18–20 (D.D.C. Sept. 12, 2006); Emery, *supra* note 14, at 242 ("This leads to a thorny choice for corporations: expend energy and finances to scour all documents for privileged information or risk losing protection.").

197 *See, e.g.*, cases discussed *supra* notes 115–139; *see also* Schaefer, *supra* note 14, at 215 ("These concerns [about subject matter waiver] have led to costly preproduction privilege review that still may not detect every privileged document.").

198 *See, e.g.*, cases cited *supra* note 158.

199 Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995).

200 *Id.*

"You people told them, here is a room full of papers, you can take a look at them. They looked at them, they found them and then when you discovered that they had seen them and that they wanted copies of those, then you came running here seeking an order."[201]

Clarifying what standard it demanded, the D.C. Circuit had qualified in *Sealed Case* that it did "not face here any claim that the information was acquired by a third party despite *all possible precautions*, in which case there might be no waiver at all."[202] Its didactic simile that privileged materials must be treated like unto "crown jewels" to be preserved thus had teeth.[203] Individuals and small firms had not the wherewithal to devise schemes to protect their privilege against *all possible* contingencies;[204] conglomerates numbering in the myriads upon myriads faced an Augean task in corralling every piece of legal work their many subdivisions generated and ensuring access protections across their multitudes.[205] Companies subject to discovery could face tens of millions of pages, each of which could be a silver bullet to privilege.[206] One would have needed the clout of a kingdom to protect crown jewels such as these; those of the British crown may at least be locked away under guard in the Tower of London when not in use at the coronation of a new monarch.[207] Legal communications and analyses, however, would be of scant use if they could similarly be accessed only once in a lifetime.[208]

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201 *Id.* at 883 n.7.

202 *In re* Sealed Case, 877 F.2d 976, 980 n.5 (D.C. Cir. 1989) (emphasis added).

203 *Id.* at 980; *accord* Gen. Elec. Co. v. Johnson, No. 00-2855, 2006 WL 2616187, at *58–59 (D.D.C. Sept. 12, 2006); Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005); *accord also* Navajo Nation v. Peabody Holding Co., 255 F.R.D. 37, 45 (D.D.C. 2009) (not in subject matter waiver context).

204 *See, e.g.*, Johnson v. Sea-Land Serv., Inc., No. 99-CIV-9161, 2001 WL 897185, at *6–7 (S.D.N.Y. Aug. 9, 2001) (discussed *infra* notes 355-357); *see also* Schaefer, *supra* note 14, at 200 ("By one estimate, today's 'small' business likely has the equivalent of two thousand four-drawer file cabinets of records-all in the form of electronically stored information . . . . In only the past twenty years, inadvertent disclosure has evolved from the slim possibility of misaddressing an envelope, which seemed preventable, to a substantial risk faced by every practicing attorney regardless of the care taken to prevent it.").

205 *See, e.g.*, Transamerica Compt. Co. v. Int'l Bus. Mach. Corp., 573 F.2d 646, 650–51 (9th Cir. 1978) (discussed *infra* notes 345–352).

206 *Id.*; *see* Schaefer, *supra* note 14, at 200.

207 *See generally* SIR GEORGE YOUNGHUSBAND & CYRIL DAVENPORT, THE CROWN JEWELS OF ENGLAND (1919) (providing extensive discussion of the crown jewels and their use in coronations by Sir George, then Keeper of the Jewel House, Tower of London).

208 *See* Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996) ("The strict test sacrifices the value of protecting client confidences for the sake of certainty of results. Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993). There is an important societal need for people to be able to employ and fully consult with those trained in the law for advice and guidance. State ex rel. Great Am. Ins. Co., 574 S.W.2d at 383. The strict test would likely impede the ability of attorneys to fill this need by chilling communications between attorneys and clients. If, when a document stamped 'attorney-client privileged' is inadvertently released,

II. EVOLUTION IN THE LAW OF WAIVER AT THE TURN OF THE MILLENNIUM

Indeed, the whole Wigmorean concept of waiver sat rather uneasily with the philosophy underpinning privilege, which stressed its vitality to the law, and the importance of its certainty.[209] The Sixth Circuit panel considering the case leading to the epochal *Upjohn* decision rejected the premise of subject matter waiver entirely: even "voluntary disclosures . . . amount to a waiver of the privilege only with respect to the facts actually disclosed."[210] More fundamentally, the underlying presumption of waiver as to the document divulged raised judicial hackles in inadvertent cases, with an oft-quoted court[211] in *Mendenhall v. Barber-Green Co.* having sounded the charge in 1982 with the pronouncement that "if we are serious about the attorney client privilege and its relation to the client's welfare, we should require more than such negligence by *counsel* before the client can be deemed to have given up the privilege."[212] The Supreme Court itself had passed within spitting distance of the issue in *United States v. Zolin* in 1989 when it left undisturbed the Ninth Circuit's finding against waiver from a secretary's inadvertently divulging privileged tapes under the misimpression they were blank.[213] In the face of sundry and mounting concerns, waiver law evolved swiftly from primæval deference to the strictures of Wigmore into an increasing divergence ("trivergence" would be better, were it a word) of opinion.[214]

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it and all related documents lose their privileged status, then clients will have much greater hesitancy to fully inform their attorney."); *see also* Schaefer, *supra* note 14, at 236 ("While many would argue that too many confidential thoughts are put in writing today (particularly in e-mail), something is lost when attorneys and clients purposely avoid the written word."); Emery, *supra* note 14, at 274 ("[W]aivers will continue to undermine client confidentiality and candor. Lawyers will be excluded from operating in a preventative, rather than reactive manner. Worse, lawyers will take fewer notes in meetings for fear of privilege waiver and risk being called as a witness against their own corporation.").

209 *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998); Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996); Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

210 United States v. Upjohn Co., 600 F.2d 1223, 1227–28 n.12 (6th Cir. 1979), *rev'd on other grounds*, 449 U.S. 383 (1981).

211 *See* EPSTEIN, supra note 3, at 573; Broun & Capra, *supra* note 9, at 220 (calling it a "leading case"); *e.g.*, Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991).

212 Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (emphasis added).

213 *See* United States v. Zolin, 491 U.S. 554, 563 (1989), *aff'g in relevant part*, 809 F.2d 1411, 1417 (9th Cir. 1987); *cf. Georgetown Manor*, 753 F. Supp. at 939 (finding the *Zolin* decisions instructive as to waiver when read together).

214 *See* Murphy, *supra* note 14, at 207–08; Schaefer, *supra* note 14, at 213–14; Gergacz, *supra* note 14, at 7–8; Broun & Capra, *supra* note 9, at 220–24.

A. A Sharp Trifurcation in Approaches to Inadvertent Waiver

This trifurcation as to the result of inadvertent disclosure was well-recognized by the end of the twentieth century.[215] Consistent nomenclature for the split was more elusive. One of the earlier cases labelled these three jurisprudential lines as the objective analysis, subjective analysis, and the balancing test.[216] Another identified the same three more anecdotally as the Wigmore rule, the "no waiver" rule, and a "rule closer to some Aristotelian mean."[217] In 1996, the Eighth Circuit employed more philosophical terminology: the strict approach, the lenient approach, and the "middle of the road" approach, respectively.[218] Yet another borrowed from multiple systems with its strict liability approach, subjective intent approach, and skeptical balancing approach.[219] Law practicing no Linnaean adherence to the first published nomenclature,[220] this Article calls upon whichever of the labels is most apt.

1. An Objective Analysis: The Strict Approach of the Wigmore Rule

As Wigmore's view has already been much discussed, this Section is brief. The D.C. Circuit has long been recognized as a great champion of the strict approach to waiver, together with its sequelæ for related documents.[221] The infamous *In re Sealed*

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215 *See* EPSTEIN, supra note 3, at 565; Close, *supra* note 14, at 22; Murphy, *supra* note 14, at 207–08; Schaefer, *supra* note 14, at 213–14; Gergacz, *supra* note 14, at 7–8; Noyes, *supra* note 14, at 684–85; Meyers, *supra* note 9, at 1447; Broun & Capra, *supra* note 9, at 220–24; Shawn T. Gaither, *The Attorney-Client Privilege: An Analysis of Involuntary Waiver*, 48 CLEV. ST. L. REV. 311, 314–18 (2000); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.42[1]-[4] (2d ed. 1997); *e.g.*, Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290–92 (D. Mass. 2000); Draus v. Healthtrust, Inc., 172 F.R.D. 384, 386–87 (S.D. Ind. 1997); Briggs & Stratton Corp. v. Concrete Sales & Servs., Inc., 176 F.R.D. 695, 699 (M.D. Ga. 1997); Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 261–63 (D. Del. 1995).

216 Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208 (N.D. Ind. 1990).

217 Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 481–82 (E.D. Va. 1991).

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

219 Simon Prop. Grp. L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000); *accord* Jones v. Eagle-North Hills Shopping Ctr, L.P., 239 F.R.D. 684, 685 (E.D. Okla. 2007).

220 *Cf.* INT'L ASSOC. FOR PLANT TAXONOMY, INTERNATIONAL CODE OF NOMENCLATURE FOR ALGAE, FUNGI, AND PLANTS art. 11.3–11.5 (2018).

221 *See* Amobi v. D.C. Dep't of Corrs., 262 F.R.D. 45, 51 (D.D.C. 2009); *e.g.*, *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (quoting Permian Corp. v. United States, 665 F.2d 1214, 1222 (D.C. Cir. 1981)); United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1291 (D.C. Cir. 1980); *see also* Sunshine, *Common Interest*, *supra* note 37, at 865 ("The D.C. Circuit has often treated claims of privilege parsimoniously as compared to other jurisdictions."); Alec Koch, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 359 (1997); Raymond E. Watts Jr., *Reconciling Voluntary Disclosure with the Attorney-Corporate Client Privilege: A Move Toward a*

Case quoted at length above staked a powerful claim for severity, but it was not alone.[222] Its district courts loyally fell into line as they must,[223] reciting the canon of the crown jewels and applying an unforgiving standard of privilege under which "the party claiming privilege must prevent the introduction of privileged material into the public record" at all costs, whatever the provenance.[224] Beyond the victim of theft in *Elkins*,[225] the plaintiff in *The Navajo Nation v. Peabody Holding Co.* was seeking to recoup privileged documents divulged by the Hopi Nation to whom they had been produced under court order.[226] But even the court order could not save them.[227] Citing *Sealed Case*, the court found the Navajo did not "jealously guard" the documents by tarrying to demand their return, and faulted the Nation's "knowing, self-inflicted blindness [as] further evidence that the Navajo failed to treat its privileged materials like 'crown jewels.'"[228] Acting as a sort of neutral ombudsman in applying the law of her sister circuit, the Sixth Circuit elsewhere agreed privilege was waived even after a mistake was quickly detected, corrected, and the offending documents "secreted . . . from the production box" (a rather evocative turn of phrase).[229]

Only the court of appeals for the Federal Circuit aligned itself wholly, writing that excusing inadvertence would "do no more than seal the bag from which the cat has already escaped."[230] (The cat again!) The First Circuit was sympathetic as well, finding it "apodictic that inadvertent disclosure may work a waiver of the attorney-

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Comprehensive Limited Waiver Doctrine, 39 MERCER L. REV. 1341, 1344 (1988) ("The District of Columbia (D.C.) Circuit is the leader in finding a full and complete waiver of the attorney-client privilege following disclosure of confidential information to the government."). *But see* EPSTEIN, supra note 3, at 568 ("The Federal and First Circuits were the strongest proponents of the strict approach.").

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

223 *See* cases cited *supra* note 203.

224 Navajo Nation v. Peabody Holding Co., 255 F.R.D. 37, 45 (D.D.C. 2009).

225 Elkins v. D.C., 250 F.R.D. 20, 25–26 (D.D.C. 2008).

226 *Navajo Nation*, 255 F.R.D. at 42–43.

227 *But see Sealed Case*, 877 F.2d at 980 (allowing that production under court order would not constitute waiver).

228 *Id.* The decision issued shortly after the passage of FRE 502, but notably seemed oblivious to it. *See infra* notes 453–54.

229 United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 478 (6th Cir. 2006) (Griffin, J., concurring).

230 *See* Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990) ("It is irrelevant whether the attachment was inadvertent . . . . Voluntary disclosure of attorney work product to an adversary in the litigation for which the attorney produced that information defeats the policy underlying the privilege."); *Sealed Case*, 877 F.2d at 980; *see also* EPSTEIN, *supra* note 3, at 568.

client privilege"[231]; its district courts have indeed often imposed strict waiver.[232] For some courts, the strict rule's justification was to impose a "self-governing restraint" that corporations be parsimonious in their assertions of privilege.[233] Other courts hewed closer to the view of inadvertent waiver as constructively advertent by the very fact they were disclosed.[234] One explained: "Waiver does not require that the privilege holder 'intentionally relinquish a known right.' If he voluntarily undertakes actions that will predictably lead to the disclosure of the document, then waiver will follow."[235] Another detailed with more granularity how privileged documents were intermingled haphazardly with the mundane, how other documents were facsimiled without security to remote locations, and how yet others were given over in dusty boxes hinting at a lack of review.[236] The inferential step was straightforward: because defendants "failed to take reasonable steps to insure and maintain the confidentiality of privileged documents," they "did not intend them to remain confidential."[237]

As the Federal Circuit intimated, such accounts are beside the point under a truly objective test. The Massachusetts district court, in *International Digital Systems v. Digital Equipment Corp.*, criticized other opinions bandying justifications under the strict analysis, which "after a substantial amount of verbiage, can be reduced to a bottom line to the effect that the precautions were inadequate because they were not effective in preventing the disclosure of privileged documents. If the precautions had been adequate, the disclosure would not have occurred."[238] Kindlier attempts to judge the reasonableness of precautions would ignore the fact that the cat was already out of the bag and no judicial order could change that.[239] Parties that make mistakes or are negligent in their handling of documents must expect to bear the consequences,

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231 Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883 (1st Cir. 1995); *see* EPSTEIN, *supra* note 3, at 568.

232 *E.g.*, Ares–Serono, Inc. v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994); Fed. Deposit Ins. Corp. v. Singh, 140 F.R.D. 252 (D. Me. 1992); Int'l Dig. Sys. v. Dig. Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988).

233 *E.g.*, Bellsouth Advert. & Publ'g Corp. v. Am. Bus. Lists, Inc., No. 1:90-CV-149, 1992 WL 338392, at *8 (N.D. Ga. Sept. 8, 1992); W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8–9 (D.D.C. 1991).

234 *See* cases cited *supra* note 91.

235 Bowne of N.Y.C., Inc. v. AmBase Corp., 150 F.R.D. 465, 479 (S.D.N.Y. 1993) (internal citations omitted); *accord In re* Kidder Peabody Sec. Litig., 168 F.R.D. 459, 468 (S.D.N.Y. 1996) (quoting *Bowne*, 150 F.R.D. at 479).

236 Ray Larsen Assocs., Inc. v. Nikko Am., Inc., No. 89 CIV. 2809, 1993 WL 307905, at *7–9 (S.D.N.Y. Aug 11, 1993).

237 *Id.* at *9; *see also* Williams v. D. Richey Mgmt. Co., No. 87-C-6398, 1988 WL 79655, at *1 (N.D. Ill. July 22, 1988) (refusing to credit claim of inadvertence where deliberate actions belied mistake).

238 Int'l Dig. Sys. v. Dig. Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988).

239 *Id.* at 449.

rebutting the idea that an inadvertent discloser is blameless.[240] (The court did not address innocent victims of theft, but the same logic implies they ought to have safeguarded their valuables better.)[241] This left only the objective rule of Wigmore: neither the intention of the disclosing party nor the adequacy or inadequacy of any precautions mattered a whit, only the fact of disclosure.[242] Courts ought not squander their resources on nugatory analyses of the severity of a party's lapse or its motivation,[243] for "[i]t seems somehow fictional to confirm the adequacy of the discovery precautions taken when obviously (as manifested by the disclosure) the precautions, almost by definition, were inadequate."[244]

2. A Subjective Analysis: The Lenient Approach of a "No Waiver" Rule

The diametrically opposite view decried the Wigmore rule as "atavistic,"[245] taking up the cause of those who protested that a waiver could never be unintentional: subjective motivation controlled.[246] "We are taught from first year law school that waiver imports the 'intentional relinquishment or abandonment of a known right,'" lectured *Mendenhall*, continuing the lesson above as to the privilege belonging to the

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[240] *Id.* at 450 ("I also agree with the Bankruptcy Court in the case of *In Re Standard Financial Management Corp.* Despite theoretical arguments to the contrary, '. . . in the real world, unforced disclosure is disclosure and should support the waiver argument." 77 B.R. [324] at 330 [Bktcy. D. Mass 1987]. '[M]istake or inadvertence is, after all, merely a euphemism for negligence, and, certainly . . . one is expected to pay a price for one's negligence.' *Id.*").

[241] *See* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc. 91 F.R.D. 254, 260–61 (N.D. Ill. 1981).

[242] *Int'l Dig. Sys.*, 120 F.R.D. at 449–50 ("When confidentiality is lost through 'inadvertent' disclosure, the Court should not look at the intention of the disclosing party. It follows that the Court should not examine the adequacy of the precautions taken to avoid 'inadvertent' disclosure either.") (citations omitted); *see* Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 117 (N.D. Ill. 1996); Fed. Deposit Ins. Corp. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) (rejecting other approaches for the strict because when "persons not within the ambit of the confidential relationship have knowledge of the communication, that knowledge cannot be undone. One cannot 'unring' a bell.").

[243] *See* Draus v. Healthtrust, Inc., 172 F.R.D. 384, 386–87 (S.D. Ind. 1997) ("Courts taking this approach have noted that courts should not be consumed with searching for the true intention of the disclosing party nor in exercising 20–20 hindsight concerning the adequacy of the precautions taken."); *id.* at 388 ("The courts should not need to devote such efforts to protect clients from their own errors or those of their counsel."); *Int'l Dig. Sys.*, 120 F.R.D. at 449–50; *Harmony Gold*, 169 F.R.D. at 117; Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 209 (N.D. Ind. 1990) ("When 'inadvertent' disclosure occurs the court should not be consumed in searching for the true intention of the disclosing party nor should it utilize its crystal clear hindsight to determine the adequacy of the precautions taken."); *see also* Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290–91 (D. Mass. 2000) (discussing *Int'l Dig. Sys.*).

[244] *Golden Valley*, 132 F.R.D. at 207.

[245] Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982).

[246] *See supra* notes 78–87 and accompanying text.

client.[247] "Inadvertent production is the antithesis of that concept."[248] The case is particularly instructive because the privileged documents were interspersed amongst only twenty-eight total: counsel's failure to remove them, although inadvertent, "might well have been negligent."[249] *Mendenhall* provided a rule as simple and executory as Wigmore's, a perennial concern of courts looking for rules rather than philosophies: "mere inadvertent production by the attorney does not waive the client's privilege."[250] Two interwoven rationales have persuaded courts following the rule.[251] The first was that only clients have the power over their own privilege; attorneys' lapses accordingly could not rightly be imputed to those that retained them.[252] The second was that inadvertence by anyone (even if negligent) could not suffice for waiver, which requires intentional relinquishment.[253]

When these two underlying principles were in syzygy, of course, no waiver would be found by a "no waiver" jurisdiction, the foremost of which was *Mendenhall*'s own, the Northern District of Illinois.[254] Moreover, it seemed that the lenient rule would

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247 *Mendenhall*, 531 F. Supp. at 955 (quoting United States *ex rel.* Ross v. Franzen, 668 F.2d 933, 941 (1982) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

248 *Id.*

249 *Id.*

250 Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991).

251 Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) ("The rationale behind this view is twofold. First, these courts reason that the privilege belongs to the client, so an act of the attorney cannot effect a waiver. Second, a 'waiver' is by definition the intentional relinquishment of a known right, and the concept of an 'inadvertent waiver' is therefore inherently contradictory.") (citations omitted).

252 *See* Corey v. Norman, Hanson & DeTroy, 742 A.2d 933, 941 (Me. 1999) ("We agree with the Superior Court and its adoption of the common sense rule set out in *Mendenhall*. Underlying this rule is the notion that the client holds the privilege, and that only the client, or the client's attorney acting with the client's express authority, can waive the privilege.") (citations omitted); *Bank Brussels*, 160 F.R.D. at 442; Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990) ("The holder of the privilege is the client. It would fly in the face of the essential purpose of the attorney/client privilege to allow a truly inadvertent disclosure of a privileged communication by counsel to waive the client's privilege.") (citations omitted); Fidelity Bank, N.A. v. Bass, No. 88-5257, 1989 WL 9354, at *1 (E.D. Pa. 1989) ("The attorney-client privilege belongs to the client, not to the attorney, and the mere inadvertent production of documents by counsel does not waive an assertion of the privilege.").

253 *See Bank Brussels*, 160 F.R.D. at 442; Phillips Petroleum Co. v. N. Petrochem. Co., No. 84-C-2028, 1987 WL 10300, at *2 (N.D. Ill. Apr. 30, 1987); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105–06 (S.D.N.Y. 1985) (identifying intent as the crucial factor in determining waiver); Kansas-Nebraska Nat. Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983); Manfrs & Traders Tr. Co. v. Servotronics, Inc., 132 A.D.2d 392, 399 (N.Y. App. Div. 1987) ("Intent must be the primary component of any waiver test. The Supreme Court has defined waiver as an 'intentional relinquishment . . . of a known right'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

254 *E.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, 1995 WL 683777, at *3 (N.D. Ill. Nov. 16, 1995); *Phillips Petroleum*, 1987 WL 10300, at *2; Ziemack v. Centel Corp., No. 92-C-3551, 1995 WL 314526, at *2 n.8 (N.D. Ill. May 19, 1995); Wiebolt

generally excuse an inadvertent waiver by the client no less than counsel—its traditional formulation is best construed to mean that allowing counsel's inadvertence to waive would add insult to injury.[255] To this point spoke any number of cases that regurgitate the rule without reference to counsel: "The court in *Mendenhall* stated that a waiver constituted the intentional abandonment of a known right and that inadvertent disclosure, therefore, could not amount to a waiver of privilege."[256] Courts have accordingly excused acts of inadvertence by clients under such a rule.[257] Perhaps most emphatically, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.* found lack of intent wholly dispositive, dismissing the role of counsel in the waiver as unnecessary to review.[258] To be sure, one could find an occasional court imposing waiver upon a finding of client negligence, despite professing adherence to *Mendenhall*, but such eccentrics were a decided minority within the subjective school.[259]

It was less clear whether *counsel*'s deliberate rather than accidental disclosure—without client approval—could waive the *client*'s privilege, for it is difficult to conjure a scenario in which counsel could or would do so absent direction.[260] It seems obvious

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Stores, Inc. *ex rel.* Raleigh v. Schottenstein, No. 87-C-8111, 1991 WL 105633, at *4 (N.D. Ill. June 7, 1991); *In re* Sealed Case, 120 F.R.D. 66, 72 (N.D. Ill. 1988); Barr v. Safeco Ins. Co. of Am., No. 83-C-2711, 1987 WL 7466, at *1 (N.D. Ill. Mar. 3, 1987).

[255] *See* Conn. Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (D. Conn. 1955) ("Here there is no evidence that defendants intended to waive any privilege and no evidence even that their counsel so intended.").

[256] *Phillips Petroleum*, 1987 WL 10300, at *2; *accord Ziemack*, 1995 WL 314526, at *2 n.81 ("Under *Mendenhall*'s subjective approach, inadvertent disclosure never results in a waiver; waiver is an intentional relinquishment, and, thus, an inadvertent act lacks the requisite intent."); *Wiebolt Stores*, 1991 WL 105633, at *4 ("[M]ere inadvertent production does not waive the privilege."); *Sealed Case*, 120 F.R.D. at 72.

[257] *E.g.*, *Barr*, 1987 WL 7466, at *1; Dunn Chem. Co. v. Sybron Corp., No. 8-85, 1975 WL 970, at *4–6 (S.D.N.Y. Oct. 9, 1975); *see also* Oppliger v. United States, No. 8:06CV750, 2010 WL 503042, at *5–6 (D. Neb. Feb. 8, 2010) (common interest document produced by unrepresented third party did not cause waiver); State v. J.G., 619 A.2d 232, 235–38 (N.J. App. Div. 1993) (documents subject to victim-counselor privilege mistakenly produced by government clerk).

[258] *Lois Sportwear*, 104 F.R.D. at 106 ("The authority dispute, that is, whether the Deputy General Counsel had the authority to waive the privilege, need not be resolved in view of the conclusion reached that the disclosure was inadvertent. However, since she was the individual designated to exercise the privilege, a logical corollary would be that she also was thereby authorized to waive such exercise.").

[259] *E.g.*, Omega Elecs., S.A. v. Stewart-Warner Corp., 1988 WL 132133, at *4–5 (N.D. Ill. Dec. 2, 1988) ("A certain degree of negligence on the part of counsel is allowable in circumstances of the nature cited by Omega, because the client's welfare should be considered before counsel can be deemed to have effect a waiver of the privilege. In this case, however, the client's treatment of the document was also negligent insofar as the document was placed in a marketing file, rather than a confidential file.") (citing Mendenhall v. Barber-Green Co., 531 F. Supp. 951 (N.D. Ill. 1982)).

[260] *See* Cities Serv. Helex, Inc. v. United States, 214 Ct. Cl. 765, 768 (1977) ("We know of no case in which an attorney was held to have been able to waive the privilege of a client who

an attorney's flouting a client's direction to assert privilege could not work waiver for lack of authority,[261] but the law specializes in outré scenarios. By way of introduction, the court, in *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*,[262] faced the question of privilege in a document marked as an exhibit for trial; the defendant protested it was privileged and had been produced in error.[263] Rejecting the strict approach, the court was persuaded by *Mendenhall*'s rule, emphasizing the volume of documents produced (over 75,000) and the procedures employed by the defendant bolstered a claim of inadvertence, and no waiver had occurred.[264] This was perfectly in line with the typical analysis under the subjective view.[265] Only, explained the court, had the critical exhibit been intentionally included in the production might privilege be waived.[266] A number of other courts in due course looked to *Kansas-Nebraska* for this last proposition that inadvertence does not comprehend a "deliberate" act or, critically, "the result of a conscious but erroneous decision."[267]

But this latter category comfortably encompassed attorney mistakes of law as in *Sinclair Oil*, meaning such oversights would still result in waiver—and perhaps subject matter waiver—under even subjective analysis. This extrapolation was supported by the post-FRE-502 case, *Seger v. Ernest-Spencer Metals, Inc.*,[268] which cited *Kansas-Nebraska* in determining that "[r]eliance on a law firm to advise a client about privilege is an insufficient basis to find inadvertent disclosure," notwithstanding the volume of documents under consideration and numerous errors made.[269] Accordingly, the *Seger* court found the waiver was not properly viewed as inadvertent but knowing and intentional.[270] Likewise, in *In re Brand Name Prescription Drugs Antitrust Litigation*, different lawyers had reached different and erroneous conclusions on privilege redactions, with the result that production was found "conscious" enough

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had previously indicated that he wanted to assert the privilege."); *cf.* Corey v. Norman, Hanson & DeTroy, 742 A.2d 933, 941 (Me. 1999).

261 *Cities Service*, 214 Ct. Cl. at 768 (collecting cases).

262 Kansas-Nebraska Nat. Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 20–21 (D. Neb. 1983).

263 *Id.*

264 *Id.* at 21.

265 *Id.*

266 *Id.*

267 *Id.*; *see, e.g.*, *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, 1995 WL 683777, at *3 (N.D. Ill. Nov. 16, 1995) (quoting Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208 (N.D. Ind. 1990)) (citing *Kansas-Nebraska*, 109 F.R.D. at 21); Int'l Dig. Sys. v. Dig. Equip. Corp., 120 F.R.D. 445, 448 (D. Mass. 1988) (quoting *Kansas-Nebraska*, 109 F.R.D. at 21).

268 No. 8:08CV75, 2010 WL 378113 (D. Neb. Jan. 26, 2010).

269 *Id.* at *6.

270 *Id.*

for waiver.[271] Even a "no waiver" court may thus distinguish between mistakes of fact and law, invoking waiver for the latter.[272] Yet such a rule allows counsel's error to contravene the client's direction to assert privilege where possible.[273]

Mistakes of law aside, however, the "no waiver" approach avoided some of the most objectionable results of Wigmore's,[274] as for example in the event of theft:

> After all, what if a confidential memorandum is stolen from an attorney's office and subsequently published in newspapers across the country? Clearly, the client should not be held to have waived the attorney-client privilege. The fact that the contents of a privileged document have become widely known is insufficient by itself to eliminate the privilege that covers the document. Although in practical terms the document has lost any semblance of confidentiality, the Court in legal terms must recognize that the client has not intentionally waived the privilege. The law is clear; it is only the client who has the power to waive the attorney-client privilege. To hold that public circulation eliminates the privilege would, in effect, give any individual who secured a privileged document the power to waive the attorney-client privilege by simply having the contents widely recounted in newspaper reports.[275]

There was much to recommend a rule both predictable in application and forgiving of blameless clients who stood to lose the most important of evidentiary privileges, likely accounting for what popularity the anti-Wigmore approach enjoyed.[276]

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[271] *Brand Name Prescription Drugs*, 1995 WL 683777, at *3 ("Apparently, the right hand was not aware of what the left hand was doing. Though some of the disclosures were made in error, there was a 'conscious' decision behind each.").

[272] *Id.* (citations omitted) (first quoting Baxter Travenol Labs., Inc. v. Abbott Labs., 117 F.R.D. 119, 121 (N.D. Ill. 1987); and then quoting Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208 (N.D. Ind. 1990) (citing *Kansas-Nebraska*, 109 F.R.D. at 21)) ("A truly inadvertent disclosure is 'accidental,' and is 'not the product of some conscious but erroneous decision.'"); *see* Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 (D. Utah 1990) (citations omitted) ("This court has also drawn a distinction between inadvertent disclosure and disclosure which was advertent and intended where the person making discovery was merely unaware of the legal consequences or nature of the document produced.").

[273] *See* cases cited *supra* notes 267–72.

[274] *See* Berg Elec., Inc. v. Molex, Inc., 875 F. Supp. 261, 262 (D. Del. 1995) ("A disadvantage of this traditional approach is that it divests the client of the opportunity to protect communications he or she intended to maintain confidential. The privilege for confidential communications can be lost if papers are in a car that is stolen, a briefcase that is lost, a letter that is misdelivered, or in a facsimile that is missent. This approach takes from the client the ability to control when his or her privilege is waived, and is inconsistent with the Supreme Court's admonition that courts should apply the privilege to ensure a client remains free from apprehension that consultations with a legal advisor will be disclosed.").

[275] Smith v. Armour Pharm. Co., 838 F. Supp. 1573, 1577 (S.D. Fla. 1993).

[276] *See* Jones v. Eagle-North Hills Shopping Ctr., L.P., 239 F.R.D. 684, 685 (E.D. Okla. 2007) ("This Court would gravitate more to the side of the 'no waiver' approach, based on the

3. A Balancing Test: An Aristotelian "Middle of the Road" Approach

Nonetheless, courts by nature relish a good compromise,[277] and so it is unsurprising that the third approach alternately denominated as an Aristotelian mean, middle of the road, or balancing test accrued the majority's support in the grand trifurcation.[278] The essence of this approach was that waiver would turn on objectively discernable factors, not by subjective avowals of intent.[279] (There was an implicit nod to Wigmore in this emphasis, given his dictum that if waiver turned on intent, no self-interested party would profess to it.)[280] As early as 1988, just prior to the shot across the bow fired in *Sealed Case* by the D.C. Circuit, *Stewart v. General Motors Corp.* recognized that the "modern trend, which is apparently now followed by a majority of courts, is that inadvertent disclosure may result in waiver, but the inadvertence of the disclosure is just one of a number of factors to consider in determining if waiver occurred."[281] Six years later, another Illinois district court confirmed that the "trend

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idea that a waiver when the client is not aware of an inadvertent disclosure serves only to punish the innocent."); *Berg Elec.*, 875 F. Supp. at 263.

277 Gray v. Bicknell, 86 F.3d 1472, 1482–84 (8th Cir. 1996); *see, e.g.*, *In re* Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 386 (D. Mass. 2013) ("The Supreme Court did not go so far as to endorse K–Dur's strict, presumptively-unlawful test, however. Instead, it adopted a rule-of-reason standard as a middle-of-the-road compromise, the contours of which have been left to the lower courts to etch." (citations omitted)); Milk Train, Inc. v. Veneman, 167 F. Supp. 2d 20, 31 (D.D.C. 2001), *rev'd*, 310 F.3d 747 (D.C. Cir. 2002) (upholding under the APA the government's having "considered three options, and once again, selected the middle-of-the-road choice."); *see also* Jared S. Sunshine, *The Putative Problem of Pestersome Paupers: A Critique of the Supreme Court's Increasing Exercise of Its Power to Bar the Courthouse Doors against in Forma Pauperis Petitioners*, 46 HASTINGS CONST. L.Q. 57, 81 (2018) ("As is often the case, a middle-of-the-road approach is likely the best." (citing *Gray*, 86 F.3d at 1482)); *cf.* Certain Underwriters at Lloyd's v. S. Pride Trucking, Inc., No. 8:16-CV-116, 2018 WL 1392910, at *1 (D. Neb. Mar. 20, 2018) ("A good compromise leaves everybody mad." (quoting Bill Watterson, *Calvin and Hobbes*, GOCOMICS (May 1, 1993), http://www.gocomics.com/calvinandhobbes/1993/05/01)).

278 *See* cases cited *supra* notes 216–19.

279 Simon Prop. Grp. L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000) (rejecting subjective assessment in favor of the balancing test); Draus v. Healthtrust, Inc., 172 F.R.D. 384, 388 (S.D. Ind. 1997) ("This court will not follow the approach requiring an examination of the subjective intentions of the disclosing party."); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208–09 (N.D. Ind. 1990); *see also In re* Sause Bros. Ocean Towing, 144 F.R.D. 111, 114–15 (D. Or. 1991) (discussing holdings from the Ninth Circuit held the "the subjective intent of the privilege holder is merely one factor in determining whether waiver should be implied from disclosure").

280 *See* WIGMORE, *supra* note 38, § 2327, at 638.

281 Stewart v. Gen. Motors Corp., No. 86-C-4741, 1988 WL 6927, at *2 (N.D. Ill. Jan. 27, 1988); *see also* Allen-Bradley Co. v. Autotech Corp., No. 86-C-8514, 1989 WL 134500, at *3 (N.D. Ill. Oct. 11, 1989) ("Although there are numerous decisions adhering to a strict waiver rule, the trend of recent cases is in the other direction." (citations omitted)).

under federal common law appears to be towards an evaluation of circumstances."[282] And looking back in 2006—even as FRE 502 was being deliberated—a third concluded that a factor-based balancing test weighing actions, procedures, and context rather than a Platonic ideal of intent was entrenched as the majority view.[283]

The preponderance of circuits eventually embraced the multi-factor balancing test as the appropriate standard. In many cases, this was after grappling with the twin antipodes of the *Sealed Case* and *Mendenhall* rules and finding both extremities unpalatable: "Many courts faced with this issue have adopted a middle approach between these two polar opposites by examining several factors to determine if the privilege should be deemed waived under the particular circumstances presented. It is such a rule to which the Fourth Circuit subscribes."[284] So too was it in the Second,[285] Fifth,[286] and Ninth,[287] whilst the Eighth left no doubt it approved if not quite holding

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282 Cunningham v. Conn. Mut. Life Ins., 845 F. Supp. 1403, 1412 (S.D. Cal. 1994).

283 Tracey P. v. Sarasota Cty., No. 8:05-CV-927-T-27, 2006 WL 8440293, at *4 (S.D. Fla. Dec. 20, 2006).

284 Scott v. Glickman, 199 F.R.D. 174, 177 (E.D.N.C. 2001). *But see* F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 76 (D. Md. 1998) ("[I]t is not at all clear that the Fourth Circuit has adopted the balancing test. Under *Hawkins*, *Sheet Metal Workers*, *Duplan*, and *Harvey* it appears that there is more support for the theory that the Fourth Circuit favors the 'strict' or 'Wigmore' approach of full waiver upon disclosure—whether inadvertent, voluntary, or implied.").

285 Bus. Integration Servs., Inc. v. Am. Tel. & Tel. Corp., 251 F.R.D. 121, 129 (S.D.N.Y. 2008) ("In the Second Circuit, it appears that the 'middle-of-the-road approach' has been adopted.").

286 Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993).

287 United States *ex rel.* Bagley v. TRW, Inc., 204 F.R.D. 170, 177 (C.D. Cal. 2001) ("Like most courts elsewhere, courts within the Ninth Circuit have embraced the totality of the circumstances approach. In the Ninth Circuit, the inadvertent production of privileged documents is neither a necessary nor a sufficient condition for finding that the privilege was waived.").

so.[288] The Third, [289] Sixth,[290] and Eleventh[291] Circuits did not squarely endorse a standard, but most of their district courts fell in line with the balancing test, as did those of the Tenth Circuit on the rare occasions they confronted the issue.[292] There were even some devotees of the Aristotelian mean within the Chicagoan stronghold of *Mendenhall* in the Seventh Circuit.[293] On the other side of the debate, the First

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288 Gray v. Bicknell, 86 F.3d 1472, 1482–84 (8th Cir. 1996); *see also, e.g.*, Pucket v. Hot Springs School Dist. No. 23-2, 239 F.R.D. 572, 586 (D.S.D. 2006) ("Although the Eighth Circuit has not decided which approach applies to inadvertent disclosure of privileged documents in federal question cases, the court follows Judge Bennett's opinion in *Engineered Prods. Co. v. Donaldson Co.*, 313 F. Supp. 2d 951 (N.D. Iowa 2004), and applies the *Hydraflow* test here.").

289 *See* Jame Fine Chems., Inc. v. Hi-Tech Pharm. Co., No. 00-3545-AET, 2006 WL 2403941, at *2 (D.N.J. Aug. 18, 2006) ("Although the Third Circuit has not definitively addressed the issue of waiver by inadvertent disclosure, courts within this Circuit have generally utilized the" *Hydraflow* factors); Maldonado v. New Jersey *ex rel.* Admin. Office of Courts, 225 F.R.D. 120, 128 (D.N.J. 2004) (noting the Third Circuit Court of Appeals has implied it would use the balancing test); Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 411 n.13 (D.N.J. 1995) (same).

290 *See* Evenflo Co. v. Hantec Agents Ltd., No. 3:05-CV-346, 2006 WL 2945440, at *5 (S.D. Ohio Oct. 13, 2006) ("The Sixth Circuit has not set forth an approach to inadvertent disclosure. However, district courts within the Sixth Circuit and Ohio courts have found that the 'middle ground' approach is the most fair and appropriate."); *see also* Dyson v. Amway Corp., No. G88-CV-60, 1990 WL 290683, at *2 (W.D. Mich. Nov. 15, 1990) ("guessing" the Sixth Circuit would approve of the balancing test).

291 *See* Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 937 (S.D. Fla. 1991) ("The Eleventh Circuit and the district courts within the Eleventh Circuit have not, as of yet, addressed this issue."); *In re* Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 689 (N.D. Ga. 1998) ("Under such circumstances, the prevailing view in courts of this circuit—and other circuits as well—is that a waiver can be found only after performing a balancing test"); *e.g.*, Tracey P. v. Sarasota Cty., No. 8:05-CV-927-T-27, 2006 WL 8440293, at *3–6 (S.D. Fla. Dec. 20, 2006). *But see Georgetown Manor*, 753 F. Supp. at 937 (adopting the *Mendenhall* rule).

292 Jones v. Eagle–North Hills Shopping Ctr., 239 F.R.D. 684, 685 (E.D. Okla. 2007) (noting that "little relevant precedent exists in this circuit on the subject"); *accord* Palgut v. City of Colorado Springs, No. 06–cv–01142–WDM–MJW, 2007 WL 1238730, at *2 n.1 (D. Colo. Apr. 27, 2007); *see also* Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 n.4 (D. Utah 2002) ("It has been suggested that in the Tenth Circuit inadvertent disclosure is an absolute waiver based on *United States v. Ryans*, 903 F.2d 731, 741 n. 13 (10th Cir. 1990). However, the case did not treat the issue and the footnote cited does not address inadvertent disclosure except to say it may constitute a waiver. *Id.* The *Ryans* footnote is too slim a statement on which to find an absolute waiver from inadvertent disclosure.").

293 *E.g.*, Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95-C-1303, 1995 WL 360590, at *7 (N.D. Ill. June 14, 1995) ("Although Dressler cites *Mendenhall v. Barber–Greene Co.*, 531 F.Supp. 951, 954–55 (N.D. Ill.1982) for the proposition that inadvertent production does not waive the privilege because waiver requires 'the relinquishment or abandonment of a known right,' this court prefers the balancing approach."); Stewart v. Gen. Motors Corp., No. 86-C-4741, 1988 WL 6927, at *2 (N.D. Ill. Jan. 27, 1988); *see also, e.g.*, Simon Prop. Grp. L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000) ("In Draus this court rejected the subjective approach but did not need to make a choice between the strict liability and balancing approaches because both produced the same result. In this case,

Circuit was partial to the strict accountability approach,[294] though closer examination indicates it did not hold as much.[295] And the D.C. Circuit persisted in its austere adherence to Wigmore until the bitter end with FRE 502,[296] as did the Federal Circuit.[297]

There remains, of course, the conspicuous and momentous question of what the objective factors to be considered were. Many judges looked to 1993's *Hydraflow, Inc. v. Enidine Inc.* in the Western District of New York,[298] to the point that the middle-of-the-road approach itself is "sometimes called the *Hydraflow* test."[299] The factors there identified were:

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

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however, there is a difference, and this court adopts the balancing approach."). The Seventh Circuit provides a mixed bag indeed, as one can even find its courts rejecting the balancing text in favor of strict liability. *See, e.g.*, Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 117 (N.D. Ill. 1996); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1990).

294 *See supra* notes 231–32; *see also* Indus. Commc'ns & Wireless, Inc. v. Town of Alton, N.H., No. 07-82-JL, 2008 WL 3498652, at *2 (D.N.H. Aug. 7, 2008) ("Arguably, the First Circuit adopted the strict accountability approach in *Texaco P.R. v. Dep't of Consumer Affairs*. But while a number of district courts in this circuit have utilized this approach, the more recent trend has been to utilize the middle test." (citations omitted)).

295 *See* Amgen, Inc. v. Hoechst Marion Roussel, Inc., Nos. 610, 611, 2000 WL 290346, at *3 (Fed. Cir. 2000) ("The First Circuit has not clearly stated that it is following either line of cases."); Figueras v. P.R. Elec. Power Auth., 250 F.R.D. 94, 96–97 (D.P.R. 2008) ("Although some courts have interpreted the First Circuit Court of Appeals' decision in *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 883 (1st Cir. 1995) as adopting the 'strict accountability' approach, this Court disagrees. In *Texaco Puerto Rico*, the court of appeals stated that "[i]t is apodictic that inadvertent disclosures may work a waiver of the attorney-client privilege." As Chief Judge Young from the District of Massachusetts stated, the word 'may' indicates that the district court has discretion, which is unavailable under the strict accountability approach. Therefore, district courts within the first circuit are not bound to follow the 'strict accountability' approach. This Court shall follow the majority approach, and apply the 'middle test.'" (citations omitted)).

296 *See, e.g.*, *In re* Grand Jury, 475 F.3d 1299, 1305 (D.C. Cir. 2007); Elkins v. D.C., 250 F.R.D. 20, 25–26 (D.D.C. 2008); General Elec. Co. v. Johnson, No. Civ.A 00-2855 (JDB), 2006 WL 2616187, at *18–20 (D.D.C. Sept. 12, 2006).

297 *See supra* note 230. *But see* Sikorsky Aircraft Corp. v. United States, 106 Fed. Cl. 571, 586 (2012) (describing how inferior courts within the Federal Circuit's jurisdiction sought to evade its authoritative precedent in favor of their preferred balancing test).

298 145 F.R.D. 626 (W.D.N.Y. 1993).

299 Gray v. Bicknell, 86 F.3d 1472, 1483–84 (8th Cir. 1996); *accord, e.g.*, Pinnacle Pizza Co. v. Little Caesar Enter., Inc., 627 F. Supp. 2d 1069, 1074 (D.S.D. 2007); Pucket v. Hot Springs School Dist. No. 23-2, 239 F.R.D. 572, 586 (D.S.D. 2006); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 597 (D. Minn. 1999); *see also* EPSTEIN, supra note 3, at 574 (same); Close, *supra* note 14, at 22 (same).

> of measures taken to rectify the disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.[300]

The *Hydraflow* court itself was more modest,[301] crediting its innovations to a 1987 case in the Middle District of North Carolina,[302] which in turn credited *Hartford Fire Insurance Co. v. Garvey* out of California,[303] and the previously discussed *Lois Sportswear* court back in New York.[304] Myriad courts have cited to these foundational cases[305]—one rightly praised the last as offering "the seminal discussion of the totality of the circumstances approach to the problem of inadvertent production."[306] If nothing else, such authorities spanning the nation demonstrate a true consensus gravitating towards the so-called Aristotelian mean.[307] With minor variations of phrasing and itemization,[308] the factors identified in *Hydraflow* and its philosophical forebears were accepted as enunciating the proper balancing of the equities for and against waiver.

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

301 *Id.*

302 Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 116 F.R.D. 46, 50 (M.D.N.C. 1987).

303 Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985).

304 Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 106 (S.D.N.Y. 1985).

305 *E.g.*, Alldread v. City of Grenada, 988 F.2d 1425, 1435 (5th Cir. 1993) (citing *Hartford*, 109 F.R.D. at 323); United States v. Gangi, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998) (first citing *Hydraflow*, 145 F.R.D. 637; and then citing *Lois Sportswear*, 104 F.R.D. at 106); United States v. United Techs. Corp., 979 F. Supp. 108, 116 (D. Conn. 1997) (same); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (same); Baxter Travenol Labs., Inc. v. Abbott Labs., 117 F.R.D. 119, 121 (N.D. Ill. 1987) (first citing *Hartford*, 109 F.R.D. at 323; and then citing *Lois Sportswear*, 104 F.R.D. at 106); United States ex rel. Bagley //v. TRW, Inc., 204 F.R.D. 170, 177 (C.D. Cal. 2001) (same); Monarch Cement Co. v. Lone Star Indus., Inc., 132 F.R.D. 558, 560 (D. Kan. 1990) (citing *Hartford*, 109 F.R.D. at 323); *In re* Wyoming Tight Sands Antitrust Cases, No. 85-2349-S, 1987 WL 93812, at *4 (D. Kan. Sept. 11, 1987) (citing *Hartford*, 109 F.R.D. at 323).

306 *Bagley*, 204 F.R.D. at 178.

307 *See* cases cited *supra* notes 281–83; *cf.* Irth Sol., LLC v. Windstream Commc'ns., LLC, No. 2:16-cv-219, 2017 WL 3276021, at *7–8 (S.D. Ohio Aug. 2, 2017) (surveying privilege precedent from courts "across the country").

308 *See, e.g.*, United States v. United Techs. Corp., 979 F. Supp. 108, 116 (D. Conn. 1997) ("a) whether the disclosing party took reasonable precautions to prevent disclosure; b) the speed at which the disclosing party acted to rectify its mistake; c) the overall volume of documents produced in discovery; d) the number of inadvertent disclosures included among those documents; and e) fairness"); *Hartford*, 109 F.R.D. at 323 (N.D. Cal. 1985) ("(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the 'overriding issue of fairness'"); *Lois Sportswear*, 104 F.R.D. at 105 (S.D.N.Y. 1985) ("The elements which go into that determination include the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the

Before venturing too much further, it must be admitted the last of the progenitors of *Hydraflow* is rather perplexing, for one may recall from the preceding section that the case was decided under the "no waiver" rule.[309] Nevertheless, *Lois Sportswear* recited very similar factors in its analysis:

> These factors are generally traced to *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, although the court there appears to have applied the subjective test of the disclosing party's intention, and used the listed factors as evidence as to whether the disclosure was "a knowing waiver or simply a mistake, immediately recognized and rectified." *Id.* After finding the disclosure was inadvertent, the *Lois Sportswear* court found no waiver because there was no intent to waive the privilege. Nevertheless, courts that have rejected the subjective approach and followed the balancing approach have used those same factors to determine whether waiver should be found.[310]

This observation that "no waiver" courts determining inadvertence (which would foreclose waiver) often found themselves employing the same factors as did a balancing test court to assess waiver directly does not stand alone. "In some instances," concluded a puzzled 1994 court after trying to tease the two apart, "the intent-based approach and the totality-of-the-circumstances approach appear to merge."[311] Laying bare the conflation, a Chicago court (helpfully?) explained that "mere inadvertent production of documents does not waive the privilege," quoting *Mendenhall*.[312] It then added: "Inadvertence is determined by weighing a number of factors such as the scope and volume of the discovery, the time available for the review, the adequacy of review procedures employed, the extent of the disclosure, the time taken to rectify the error and the fairness of the disclosure," paraphrasing quite explicitly the factors from *Hydraflow* and its ilk.[313] Such explicit conflation of the two putatively discrete approaches was not unusual.[314]

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disclosure. There is, of course, an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference.").

309 *See Lois Sportswear*, 104 F.R.D. at 106; *see supra* note 258.

310 Draus v. Healthtrust, Inc., 172 F.R.D. 384, 387 n.1 (S.D. Ind. 1997) (citations omitted).

311 Koch Foods of Ala., LLC v. Gen. Elec. Capital. Corp., 531 F. Supp. 2d 1318, 1321 (M.D. Ala. 2008) (citing Stratagem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 544 (S.D.N.Y. 1994) (stating that a waiver "must be intentional . . . to be effective," then considering precautions taken to avoid disclosure)).

312 *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, 1995 WL 683777, at *3 (N.D. Ill. Nov. 16, 1995) (quoting Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982)).

313 *Id.*

314 *E.g.*, Int'l Oil, Chem. & Atomic Workers, Local 7-517 v. Uno-Ven Co., No. 97-C-2663, 1998 WL 100264, at *3–4 (N.D. Ill. Feb. 23, 1998) ("Plaintiff suggests the magistrate judge's ruling is best understood as an application of the subjective approach. The court does not see it that way . . . . If the magistrate judge were applying the subjective approach, he could have noted that the documents were disclosed inadvertently and left his reasoning at that. He did not

If the subjective and balancing texts often reduced to a similar assessment of circumstances, then why were they so consistently viewed as discrete approaches? The difference was in presumption: "no waiver" courts cited circumstances to corroborate the privilege proponent's averment that no divulgence was intended,[315] whilst balancing courts entered into the analysis without predisposition, discounting as they did the subjective intent of the discloser.[316] It was thus only in the most extreme cases, beyond the arguable negligence of *Mendenhall*, wherein circumstances negated the discloser's inadvertence in a subjective court: those cases "look to the factual basis for the claim the disclosure was inadvertent to determine whether the client intended to disclose the document or communication, whether the disclosure was inadvertent, or whether the disclosure was unintentional but was so negligent or reckless that the court should deem it intentional."[317] In jurisdictions tracking the middle of the road, however, circumstances far short of gross negligence or recklessness could readily yield waiver.[318]

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do so, instead noting the precautions taken to prevent disclosure, the disclosure having occurred when defendants were trying to expedite discovery, and the question of fairness, all of which go to factors used in the balancing approach. Therefore, the court is of the opinion the magistrate judge's decision is best viewed as an application of the balancing approach."); Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 262–63 (D. Del. 1995).

315 *See, e.g.*, Flores v. Albertson's, Inc., No. CV-01-0515 PA(SHX), 2004 WL 3639290, at *5 (C.D. Cal. Apr. 9, 2004) ("As stated, plaintiffs argue that the disclosure of the documents was inadvertent. There was no subjective intent on the part of plaintiffs to disclose the information. Plaintiffs' counsel's actions support this conclusion."); Baker's Aid, a Div. of M. Raubvogel Co. v. Hussmann Foodservice Co., No. CV-87-09371988 WL 138254, at *5–6 (E.D.N.Y. Dec. 19, 1988) ("I must accord great weight to defendants subjective intent in producing the April 11, 1986 document. Upon examination of the factors listed above, I find that in this instance, disclosure was the result of an inadvertent error rather than a knowing waiver of the attorney-client privilege.").

316 *See* cases cited *supra* note 279.

317 *Berg Elecs.*, 875 F. Supp. at 263 (first citing Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990); and then citing Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982); and then citing Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991) ("Inadvertent disclosures are, by definition, unintentional acts, but disclosures may occur under circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional.")); *accord* Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 443 (S.D.N.Y. 1995) (quoting *Marine Midland*, 138 F.R.D. at 482); Fry v. McCall, No. 95 Civ. 1915, 1998 WL 273035, at *3 (S.D.N.Y. May 28, 1998) (quoting *Marine Midland*, 138 F.R.D. at 482); *see* Bensel v. Air Line Pilots Ass'n, 248 F.R.D. 177, 179–80 (D.N.J. 2008) (quoting Ciba–Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 411 (D.N.J.1995) ("gross negligence" standard)); *In re* Copper Market Antitrust Litigation, 200 F.R.D. 213, 221–22 (S.D.N.Y. 2001) ("[I]nadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the asserted privilege.").

318 *E.g.*, Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 164–65 (E.D.N.Y. 2005) (ordering waiver because reviewing attorney was unaware of the name of one attorney involved in the matter and accordingly did not annotate them as privileged, after considering unfairness to the defendant); United States v. Gangi, 1 F. Supp. 2d 256, 265–66 (S.D.N.Y. 1988) ("Standing alone, each of the individual 'events' in this 'unfortunate chain' is

In the majority view, the balancing test eliminated the worst foibles of both extremes, as compromises are wont to do.[319] To the D.C. Circuit, this majority rejoined that despite its professed reverence of the confidentiality of attorney and client, Wigmore's rule perversely "diminishes the attorney-client relationship because, in rendering all inadvertent disclosures—no matter how slight or justifiable—waivers of the privileges, the rule further undermines the confidentiality of communications."[320] Revisiting the dumpster-divers for privilege in antediluvian Wigmorean courts,[321] a balancing rule court could deny waiver to those who would purloin others' secrets.[322] To supporters of leniency, another court remonstrated that *Mendenhall*'s blanket rule "encourages sloppy practice; encourages counsel to not take precautions, and creates all the wrong incentives."[323] And both absolutist rules largely ignored the obvious reality that litigation at the turn of the millennium involved large if not colossal demands by way of document production, and although some mistakes are literally "inevitable,"[324] they need not be abetted by preemptive plenary absolution.[325] It is therefore worth examining exactly how these demands were being assessed when brought before courts administering discovery.

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arguably understandable and perhaps excusable. In combination, however, they demonstrate that the Government failed to take reasonable precautions to avoid inadvertent disclosures of the type that occurred here").

319 *See* Gray v. Bicknell, 86 F.3d 1472, 1482–84 (8th Cir. 1996); Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 290-92 (D. Mass. 2000); *Gangi*, 1 F. Supp. 2d at 264; *Marine Midland*, 138 F.R.D. at 482; Dyson v. Amway Corp., No. G88-CV-60, 1990 WL 290683, at *2 (W.D. Mich. Nov. 15, 1990); Broun & Capra, *supra* note 9, at 224 ("The middle ground or balanced approach would seem to eliminate the disadvantages of both the no waiver and absolute waiver rules.").

320 *Amgen*, 190 F.R.D. at 292.

321 Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc. 91 F.R.D. 254, 255–61 (N.D. Ill. 1981) (discussed *supra* notes 67–70).

322 McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 167–70 (D. Md. 1998) (discussing and rejecting the result in *Suburban Sew 'N Sweep*).

323 *Dyson*, 1990 WL 290683, at *2; *see* Emery, *supra* note 14, at 280 ("Waiver of privilege sometimes acts as a disincentive for lazy production in that a party is punished for failing to perform due diligence and protect its own privileges."); Broun & Capra, *supra* note 9, at 224.

324 *See* Judson Atkinson Candies, Inc. v. Latini–Hohberger Dhimantec, 529 F.3d 371, 388–89 (7th Cir. 2008); Transamerica Comp. Co. v. Int'l Bus. Mach. Corp., 573 F.2d 646, 651–52 (9th Cir. 1978); *cf.* ALEXANDER POPE, AN ESSAY ON CRITICISM 31 (W. Lewis 1711) (Floating Press 2010) ("To err is human . . ."); Gergacz, *supra* note 14, at 1 (quoting Pope in the context of FRE 502).

325 *See Amgen*, 190 F.R.D. at 290 ("Providing a measure of flexibility, the 'middle test' best incorporates each of these concerns and accounts for the errors that inevitably occur in modern, document-intensive litigation."); United States v. Gangi, 1 F. Supp. 2d 256, 264 ("Although this rule recognizes that mistakes will be made given 'the realities of the discovery process in complex litigation,' it also creates an incentive for counsel to guard the privilege closely, as the failure to take reasonable precautions will result in a waiver." (quoting Asian Vegetable Research v. Inst. of Int'l Educ., No. 94 CIV. 6551, 1995 WL 491491, at *7 (S.D.N.Y. Aug. 17, 1995))); *see also Dyson*, 1990 WL 290683, at *2 (Federal courts are "cognizant of the

B. Waiver, Simpliciter, and Subject-Matter Amidst Ballooning Discovery

"Two twentieth-century phenomena have increased the likelihood of such mishaps," began a 1995 article on inadvertent waiver: "the low-cost photocopy machine, which has resulted in more copies, and liberal discovery rules, which have given adversaries access to files to which they would not have had access previously."[326] The latter phenomenon was the culmination of a seismic shift in litigation itself, expanding discovery rules to allow parties to demand virtually anything that could have relevance be produced.[327] By the turn of the millennium, the proliferation of email and electronic records had transcended the reach of the photocopier into new multitudes.[328] Where these trends converged, "the Wigmore rule, born in an earlier era, seems too harsh in light of the vast volume of documents disclosed in modern litigation."[329] Such lessons were somewhat slow to sink in amongst a judiciary long steeped in the traditional approach to privilege.[330] In retrospect, however, the unprecedentedly sprawling extent of antitrust litigation against IBM in the 1970s served as a philosophical catalyst to the modern revolution in the privilege law of discovery, as narrated in a trilogy of watershed cases.[331]

Controversies began early in discovery in *Control Data Corp. v. IBM Corp.* (*IBM I*).[332] The first stage involved interrogatories and document inspection only, but its scope was still jaw-dropping: CDC averred that IBM had copied some 80 million

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tremendous difficulty that lawyers and litigants face in making these massive document productions. And it's quite foreseeable that there will be some slip-ups, some human error, some mistakes made in the system. It seems to me to be Draconian to apply a strict waiver rule no matter what precautions have been taken; no matter what the difficulties were, and that this Draconian rule does not take into consideration the problems that lawyers and litigants face. It seems to me to be sort of a hardball rule that really doesn't take into account understandable human error and it certainly isn't in line with the way that we urge lawyers to conduct themselves nowadays.").

326 John T. Hundley, *"Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 264 (1995).

327 *See* Baez-Eliza v. Instituto Psicoterapeutica de P.R., 275 F.R.D. 65, 69–70 (D.P.R. 2011) ("Our current rules of civil procedure were introduced many decades ago to effectuate a dramatic change in the way litigation was conducted. The rules in place at the time afforded litigants limited means to discover information necessary to prepare for trial. In fact, the prior rules were premised on the idea that 'a judicial proceeding was a battle of wits rather than a search for the truth[;] [thus] each side was protected to a large extent against disclosure of its case.'" citations omitted)).

328 *See* Noyer, *supra* note 14, at 67576; Sunshine, *Part & Parcel*, *supra* note 46, at 48.

329 Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 481 (E.D. Va. 1991).

330 *See* Outlaw III, *supra* note 14, at 3–4.

331 *See* EPSTEIN, *supra* note 3, at 571–72.

332 No. 3-68 CIV 312, 1972 WL 123079 (D. Minn. Apr. 18, 1972) (Neville, J.).

documents from its files.[333] Given this almost incomprehensible scope—even by twenty-first century standards—IBM had instituted a novel manner of protecting privilege, stationing an "interceptor" at its data rooms who would screen any documents marked for photocopying for privilege before permitting it.[334] As might be imagined, under this process CDC's inspection ground to a halt, and after application to the court, removal of the interceptor had been ordered—with the understanding that no waiver claims would be entertained going forward, though previous disclosures remained waived.[335] Now reversing himself, Judge Phillip Neville ruled that both parties had "no intent to waive any privilege and both, despite their protective measures, through inadvertence permitted privileged documents to fall into the other's hands."[336] Noting the "paucity of precedent" on inadvertent disclosure whilst citing a few harsher results, the court ruled disclosures in such overwhelming circumstances would not yield waiver, so long as "reasonable precautions" had been taken.[337]

The following year, the Ninth Circuit entertained an extraordinary petition under the All Writs Act in the government's antitrust case in *IBM Corp. v. United States* (*IBM II*).[338] In an effort to expedite its case,[339] the government agreed to accept the production made in *IBM I*, as redacted to remove any documents that had been inadvertently included there, with appropriate privilege log.[340] Upon delivery, however, the government (apparently dismayed at the bargain it had struck) contended privilege in all redacted documents had been waived by disclosure to CDC, and the district court granted its motion.[341] The appellate panel was not amused, observing that the parties in *IBM I* had labored under impossible conditions after the court there demanded the acceleration of an already expedited discovery program involving

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333 *Id.* at *1.

334 *Id.*

335 *Id.* at *1–2.

336 *Id.* Notably, the court disdained IBM's contention that CDC had been more cavalier with its documents, lacking dedicated interceptors, and thus should be thought to have waived them: "fairness and evenhanded justice should make any ruling of this import reciprocal and equally applicable to all parties. IBM's contention that the documents should be suppressed but those it obtained from CDC should not does not sit well with the court." *Id.* at *4.

337 *Id.* at *4–5.

338 471 F.2d 507, 510 (2d Cir. 1972), *rev'd en banc for lack of jurisdiction*, 480 F.2d 293 (2d Cir. 1973).

339 *Id.* ("As already noted, the Government saw many advantages to abandoning its own documentary discovery and to binding itself to the IBM-CDC discovery program, not the least of which was the accelerated schedule imposed by Judge Neville, a schedule which would both facilitate the progress of the New York action as well as avoid duplicative effort and expense.").

340 *Id.* at 508–09.

341 *Id.* at 509.

hundreds of millions of documents;[342] it was in this context that Judge Neville had granted the plenary indulgence from waiver to both sides reciprocally.[343] The court concluded: "It is clear to us beyond peradventure that the delivery of the documents pursuant to the Minnesota court order did not constitute a waiver by IBM of its attorney-client or work-product privileges. Of the vast amount of material made available . . . at issue here are only 1,200 documents."[344]

The final case in the trilogy is *Transamerica Computer Co. v. IBM Corp.* (*IBM III*),[345] where the district court rejected the same argument made in *IBM II* that the CDC production had caused waiver, but certified its decision for review.[346] The Ninth Circuit again relied on the severity of the Minnesota order: "The effect of the order was to require IBM to produce within a three-month period for inspection and for adversary copying approximately 17 million pages of documents. To say the least, the logistical problems confronting IBM were monumental and were exacerbated by a number of factors."[347] Counsel unfamiliar with the case were perforce used for review; the redaction process of the time was "cumbersome," IBM was defending multiple massive discovery requests simultaneously, and documents were "randomly strewn throughout various IBM branch offices and divisional headquarters."[348] Even so, IBM made a "herculean effort" to comply whilst preserving its privilege.[349] The court did not rest on that diligence, however; instead, "under the rather extraordinary circumstances of the accelerated discovery proceedings in that case IBM's inadvertent production there of a limited number of privileged documents was, in effect, 'compelled,' and therefore no waiver of the privilege could be predicated upon such involuntary production."[350]

The *IBM III* court's rationale for inferring compulsion resonates powerfully to this day in an era of electronic discovery that similarly confronts millions of documents in discovery:

> We have already described at length the extraordinary logistical difficulties with which IBM was confronted in its efforts to comply, as it eventually did, with the demanding timetable Judge Neville had established for the document inspection program. We believe that there is merit in IBM's argument that that timetable deprived IBM of the opportunity to claim the privilege inasmuch as it was statistically inevitable that, despite the extraordinary precautions undertaken by IBM, some privileged documents

342 *Id.* at 510.

343 *Id.* at 511.

344 *Id.*

345 573 F.2d 646 (9th Cir. 1978).

346 *Id.* at 647–48.

347 *Id.* at 648.

348 *Id.*

349 *Id.*

350 *Id.* at 651.

> would escape detection by the IBM reviewers. There were literally millions of ways for mistakes to be made in the screening process. For example, mistakes could easily occur during any of the millions of purely mechanical steps necessary for successful screening. In particular, inasmuch as 17 million individual pages had to be read, the physical failure to turn and examine a single one of those 17 million pages could result in the inadvertent production of privileged material. Moreover, as explained above, once privileged documents were located they had to be placed in green folders. The failure to perform so simple a mechanical act as the insertion of a document into a folder would also result in the production of privileged material.[351] In addition to the plethora of opportunities for mechanical blunders, there were inherent in the process numerous opportunities to overlook privileged material resulting from what might be characterized as visual or judgmental mistakes. For instance, in order to identify privileged material it was necessary for IBM examiners inspecting each of the 17 million pages to recognize a particular name out of myriad names as that of an attorney who had rendered advice to IBM, or to uncover in long textual passages a legal opinion which perhaps encompassed only a very few lines. Moreover, it is obvious that the chance of mistakes being made in the visual and judgmental steps of the screening process was considerably enhanced by the long hours that many of those most intimately involved in the screening were working, and by the necessary extensive utilization of outside personnel.[352]

Future courts following the majority view took the point, concluding that "in extraordinary situations such as expedited discovery or massive document exchanges, a limited inadvertent disclosure will not necessarily result in a waiver."[353] Even in productions numbered in multiples of thousands rather than millions, courts recognized that "mistakes of this type are likely to occur in cases with voluminous discovery" in forgiving inadvertent production of a handful of pages after diligent screening.[354] For firms or individuals with modest resources, commensurately minor burdens garnered sympathy that the discloser had acted appropriately—few parties, after all, could marshal the resources of IBM: "This is not a case where the Court is called upon to assess the adequacy of document screening and review procedures in

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351 Modern practitioners might simply replace "insertion of a document into a folder" with "clicking of a button marked privileged" to appreciate that the logistical nightmares of yesteryear remain with them today despite ever more sophisticated technology.

352 *Id.* at 651–52.

353 Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 11 F.R.D. 46, 50 (M.D.N.C. 1987) (first citing *IBM III*, 573 F.2d at 646; and then citing Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985)); and Kansas-Nebraska Natural Gas v. Marathon Oil Co., 109 F.R.D. 12 (D. Neb. 1985)); *see also* Outlaw III, *supra* note 14, at 3–4 (discussing pre-FRE-502 measures of production volume).

354 United States v. Pepper's Steel & Alloys, Inc., 742 F. Supp. 641, 645 (S.D. Fla. 1990); *accord, e.g.*, Judson Atkinson Candies, Inc. v. Latini–Hohberger Dhimantec, 529 F.3d 371, 388–89 (7th Cir. 2008); *In re* Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 417 (N.D. Ill. 2006).

the context of complex corporate litigation, where a hierarchy of attorneys has been involved," explained the court in *Johnson v. Sea-Land Service, Inc.*[355] "Rather, plaintiff, an individual, is represented by a relatively small law firm."[356] Finding plausible his attorney's overlooking a smattering of privilege in the three-hundred-odd documents the client had supplied at the eleventh hour for his deposition, the court excused the error.[357]

A "no waiver" court, of course, needed no such analysis to forgive mistakes.[358] A Wigmorean court, however, viewed an IBM-like situation differently from the "mere inadvertence" of *Mendenhall*, as illustrated in *Chubb Integrated Systems Ltd. v. National Bank of Washington*.[359] Five months after their initial requests, plaintiffs were given access to over 50,000 pages of documents, of which they requested copies of roughly a quarter, but defendants later determined some of those involved privilege and withheld them.[360] The court rejected the invocation of *IBM III* in support, observing that the dispositive factor there was not inadvertence but outright judicial compulsion, which all agreed—even the D.C. Circuit[361]—renders a production involuntary and causes no waiver.[362] Had the *Chubb* discovery proceeded under similarly breakneck conditions, the court might well have followed *IBM III* in forgiving truly "extraordinary circumstances."[363] Given the smaller volume and extended time for compliance, however, the court saw no Hobson's choice of either producing without adequate screening or violating a court order, only run-of-the-mill inadvertence, which *IBM III* did not excuse *per se*.[364]

Nor even in balancing test courts would the *IBM III* rule have permitted a company to sidestep the burdens of discovery with a "document dump" whilst expecting

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355 *See, e.g.*, Johnson v. Sea-Land Serv., Inc., No. 99-CIV-9161, 2001 WL 897185, at *6 (S.D.N.Y. Aug 9, 2001).

356 *Id.*

357 *Id.* at *6–7 ("While, of course, plaintiff could have sent the documents to his attorney before he came to New York, in a relatively modest, individual case such as this one, it is not surprising or particularly troubling that plaintiff brought his documents with him. There would have been no reason to expect that the documents would be so copious or complex as to require significant, advance time to review them for privilege.").

358 *See supra* Part II.A.2.

359 103 F.R.D. 52 (D.D.C. 1984).

360 *Id.* at 62.

361 *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (exempting court-compelled disclosure from waiver).

362 *See Chubb*, 103 F.R.D. at 63 n.2 ("The attorney-client privilege is waived by any voluntary disclosure . . . . Voluntary disclosure means the documents were not judicially compelled.").

363 *Cf. Sealed Case*, 877 F.2d at 980 (equating "extraordinary circumstances" with court-compelled waiver).

364 *Chubb*, 103 F.R.D. at 67 ("We believe that plaintiff misinterprets the decision.").

privilege to be preserved by virtue of the unwieldy size of its production, even if some modicum of precaution had been taken.[365] Parties proceeding under ordinary conditions of discovery in terms of time vis-à-vis volume ordinarily stood to lose their privilege had they divulged documents absent some particularized excuse beyond the rigors of federal litigation.[366] In *Ciba-Geigy Corp. v. Sandoz Ltd.*,[367] for example, defendants pointed to the 44,000 pages of documents produced, their supposedly punctilious protocols for detecting privilege, and a misplaced reliance on counsel.[368] The court was not impressed, discounting overall numbers and holding that "counsel has failed to establish that it undertook reasonable precautions to prevent the inadvertent disclosure of the Oppikofer document, given the small size of the production at issue, the lack of time constraints, and counsel's inexcusable neglect, on two occasions, to conduct a privilege review prior to production" at all.[369]

Nevertheless, even though the documents produced were surrendered, waiver might have been limited thereto and not extend to those concerning the same subject matter[370]—even where a party deliberately forgoes review.[371] Subject matter waiver is a doctrine of equity imposed to ensure selectively chosen items do not garble the

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365 Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 11 F.R.D. 46, 50 (M.D.N.C. 1987)*; see In re* Recombinant DNA Tech. Patent & Contractual Litig., MDL No. 912, 1994 WL 270712, at *41 (S.D. Ind. Dec. 22, 1993) (emphasizing in rejecting the paltry precautions taken that "21,000 pages of documents thought to be privileged 'slipped through'"); *see also* Outlaw III, *supra* note 14, at 3 ("As one can imagine, courts did not hesitate to find waiver where the disclosing party took little to no precautions to protect privileged materials.").

366 *Recombinant DNA*, 1994 WL 270712, at *38–40 ("Furthermore, while the scope of discovery here involved was not insignificant, it was not unmanageable. Although approximately 50,000 pages of documents were reviewed and about 12,000 pages produced, UC does not suggest that it was under any pressure in responding to the production request. This case is not comparable to [*IBM III*]."); *see, e.g.*, Scott v. Glickman, 199 F.R.D. 174, 178–79 (E.D.N.C. 2001); Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479 (E.D. Va. 1991); Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207 (M.D.N.C. 1986).

367 916 F. Supp. 404 (D.N.J. 1995).

368 *Id.* at 408.

369 *Id*. at 413 (carefully tracking time permitted and volume of documents in making judgment).

370 *See, e.g.*, *Recombinant DNA*, 1994 WL 270712, at *42; Prudential Ins. Co. v. Turner & Newall, PLC, 137 F.R.D. 178, 182–83 (D. Mass. 1991); *In re* Sause Bros. Ocean Towing, 144 F.R.D. 111, 116 (D. Ore. 1991); Bud Antle, Inc. v. Grow-Tech, Inc., 131 F.R.D. 179, 184 (N.D. Cal. 1990); ICI Americas, Inc. v. John Wanamaker of Phila., No. 88–1346, 1989 WL 38647, at *4 (E.D. Pa. Apr. 18, 1989).

371 *See Recombinant DNA*, 1994 WL 270712, at *42 ("In summation, when such inadequate screening procedures are coupled with an informed determination to forego a thorough review of the documents, the Court cannot be used as a safety net. Certainly, the parties are acutely aware of the significance of this litigation and must conduct themselves accordingly. In fairness to other parties, failure to do so can result only in living with the consequences . . . . However . . . we do not find a subject matter waiver; the waiver applies only to the documents actually produced.").

truth;[372] such concerns are not at play with documents randomly included in an unmitigated mass.[373] "A ruling of no waiver will maintain confidentiality which is the main purpose of the privilege," one court concluded: "This ruling limits the risk to parties in major discovery cases and still makes them, and not the Court, accountable for maintaining confidentiality" in the documents already disclosed.[374] Subject matter waiver of privileged communications during litigation predictably implicated the very core of the case, and thus "the ultimate sweep of this argument would effectively mean there was no remaining privilege," a result that would compromise any adversarial proceeding.[375] Absent indicia of misfeasance, such a sanction would be disproportionate,[376] and thus "federal courts generally frown on applying a broad-subject-matter waiver to claims of privilege in the context of discovery."[377]

But forbearance was still not dependable. Courts espying deliberate attempts to sidestep discovery burdens did not hesitate to impose subject matter waiver as punishment for bad faith or exploitation of process.[378] Others went further with a sort of objective test: in *Hartman v. El Paso Natural Gas Company*,[379] the Supreme Court of New Mexico affirmed a trial court's order of subject matter waiver that required "El Paso to produce confidential, in-house information written by key El Paso personnel during the period July 1, 1982 to June 18, 1986, a period when the events complained of in Hartman's amended complaint were taking place."[380] Finding El Paso's precautions in discovery lacking when measured against the *Hydraflow* factors,

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372 *See Sause Bros.*, 144 F.R.D. at 116; Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 n.8 (N.D. Ind. 1990); *see supra* note 105.

373 *See* Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 11 F.R.D. 46, 52 (M.D.N.C. 1987).

374 *Id.*; *accord Golden Valley*, 132 F.R.D. at 208.

375 *Golden Valley*, 132 F.R.D. at 206 ("Golden Valley insists that as a result of this production any attorney-client privilege Hunt–Wesson had, has now been waived; not only as to this document, but 'any communications referring or relating to attorney opinions addressing these issues.'").

376 *Id.* at 208 ("It is not apparent that Hunt–Wesson is attempting to gain any advantage from the disclosure and Golden Valley does not argue the point. Accordingly, a ruling that no waiver has occurred as to the non-disclosed documents will maintain the confidentiality which is the main purpose of the attorney-client privilege.").

377 Gerber Prods. Co. v. CECO Concrete Constr., LLC, 533 S.W.3d 139, 143 (Ct. App. Ark. 2017).

378 *See, e.g.*, Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 883–84 (1st Cir. 1995); *In re* Sause Bros. Ocean Towing, 144 F.R.D. 111, 116 (D. Ore. 1991) (noting the "contention that Canada's counsel has manipulated the discovery process with regard to the damage reports is nonetheless serious" and ordering theretofore withheld drafts of final reports produced).

379 763 P.2d 1144 (N.M. 1988).

380 *Id.* at 1146.

waiver simpliciter followed for those actually disclosed.[381] Indulging then in a bit of bootstrapping, the court found that "since the cat was already out of the bag, as far as the jury's knowledge of El Paso's conduct is concerned, it was not prejudicial to El Paso's case for the trial court to order production of the additional documents."[382] That old cat had struck again—to the tune of $2.1 million in compensatory damages and just over $1 million in punitive.[383]

III. CONSIDERATION AND ADOPTION OF FEDERAL RULE OF EVIDENCE 502

So matters anent waiver stood in the first decade of the twenty-first century: a simmering olio of competing approaches and unpredictable results.[384] In 2005, Judge Paul W. Grimm of the District of Maryland rendered a well-received decision in *Hopson v. Mayor of Baltimore* that provided a thorough airing of the contemporary problems with privilege,[385] and proposed what he himself admitted was a Rube-Goldberg device of using judicial orders to effect modifications to a broken regime.[386] But that regime was in its final days.[387] Incomparably able authors have written of how FRE 502 came to be with great skill, most conspicuously the principal drafters of the then-proposed rule in 2006,[388] and Judge Grimm's own magisterial assessment of the state of play under FRE 502 in 2011.[389] There would be little point in attempting to fawningly reduplicate such first-person accounts, and so the following is offered as the briefest summary; the intrepid scholar is urged to peruse these invaluable records in their entirety.[390]

Rulemakers were not writing on a blank slate with FRE 502; the possibility of a federal rule of evidence codifying questions of privilege had been debated for decades but repeatedly come to naught.[391] Famously, the adoption of the Federal Rules of

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381 *Id.* at 1152.

382 *Id.* at 1152–53.

383 *Id.* at 1146.

384 *See* Hopson v. Mayor of Balt., 232 F.R.D. 228, 232–243 (D. Md. 2005).

385 *Id.*; *see also* Grimm et al., *supra* note 14, at 2 (summarizing his own ruling in *Hopson* in the context of analyzing newly enacted FRE 502); Redgrave & Kehoe, *supra* note 14, at 34–35 (discussing *Hopson* at length).

386 *Hopson*, 232 F.R.D. at 240–43; Grimm et al., *supra* note 14, at 4–5.

387 *See* Grimm et al., *supra* note 14, at 2.

388 Broun & Capra, *supra* note 9. This author had the privilege to meet the latter whilst studying at Fordham University School of Law, a distinct pleasure undoubtedly shared by many grateful classes.

389 Grimm et al., *supra* note 14.

390 Another fine source, albeit not first person, is Michael Correll's thoughtful narration with the benefit of hindsight in 2012. *See* Correll, *supra* note 6, at 1040–49.

391 *See* McLoughlin et al., *supra* note 14, at 707; Noyes, *supra* note 14, at 679–80.

Evidence as a whole in 1973 was nearly derailed by a rebellion in Congress against its proposed treatment of evidentiary privileges.[392] Unable to substitute its own solution, however, Congress simply struck the entire corpus of the proposed privileges, and instead inserted the indeterminate FRE 501, which prescribes tersely that the "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" unless otherwise specified.[393] The Senate Judiciary Committee was clear about its purpose: the wholesale deletion should be "understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."[394] Faced with such a mandate, the Evidence Rules Advisory Committee, in returning to the subject in 1998, fared no better in refining such guidance,[395] especially given Congress's reservation of power to enact such rules.[396]

By 2006, however, Congress had reconsidered its traditional policy of nonintervention, with the chairman of the House Judiciary Committee formally requesting in January that the Judicial Conference undertake a rulemaking to address forfeiture of privileges specifically.[397] Representative Sensenbrenner sought to "protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake," and "permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation."[398] The Evidence Rules Advisory Committee in turn deputed Professors Kenneth Broun and Daniel Capra to propose a draft, which they circulated later that year.[399] The Committee's ensuing edits generally served to broaden protections to align with concerns by Representative Sensenbrenner and courts that prohibitive precautions anent privilege were driving litigation costs to unprecedented heights.[400] Central to achieving greater economy was a "predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection."[401]

In particular, the Committee declined to adopt the proposed baseline that voluntary disclosures presumptively waived privilege, being unconvinced that rule was even

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392 Noyes, *supra* note 14, at 681–82; Meyers, *supra* note 9, at 1444–45.

393 FED. R. EVID. 501; *see* Noyes, *supra* note 14, at 682–83; Meyers, *supra* note 9, at 1445.

394 Notes of Senate Committee on the Judiciary to Fed. R. Evid. 501, Senate Report No. 93–1277.

395 *See* Noyes, *supra* note 14, at 683, 690–91.

396 28 U.S.C. § 2074(b) (2018); *see* Correll, *supra* note 6, at 1040; Meyers, *supra* note 9, at 1446.

397 Broun & Capra, *supra* note 9, at 246; *see* Murphy, *supra* note 14, at 200.

398 Broun & Capra, *supra* note 9, at 246.

399 *Id.* at 247–48; *see* McLoughlin et al., *supra* note 14, at 707.

400 Broun & Capra, *supra* note 9, at 247–52.

401 *Id.* at 252.

right, and more critically, unassuming of its ability to foresee the proper carve-outs to that severe rule.[402] Accordingly, sections (a) and (b) of the proposal concerned protective limitations upon waiver under the common law foundation installed as authority by FRE 501.[403] Mindful of the trifurcated approach in the courts, the rule adopted the middle-of-the-road view and conditioned waiver simpliciter after inadvertent disclosure upon an assessment of whether reasonable diligence had been demonstrated before and after the error.[404] Perhaps inviting some of the judicial tempests to come, the Committee opted to keep the traditional terminology of inadvertence precisely to encompass all the varied court-beleaguering species of "mistaken or unintentional" divulgences.[405] Subject matter waiver, meanwhile, could attach only after voluntary disclosures and would be delimited by fairness to the opponent.[406]

After opportunity for public comment and further edits, the Judicial Conference recommended the proposed rule's adoption to Congress.[407] Importantly, the version submitted narrowed one item such that subject matter waiver would apply only to "intentional" rather than merely voluntary disclosures—the latter term having been ascribed to highly unintentional acts by stricter courts.[408] This was meant to confirm that the waiver itself must be intentional for subject matter waiver to come into play.[409] The Senate and then House approved the text without amendment, and President George W. Bush's signature on September 19, 2008 made it into law.[410] Signaling the law's import, Congress took the unusual step of promulgating a "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of

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402 *Id.* at 258–60.

403 *Id.*

404 *Id.* at 254–55.

405 *Id.*

406 *Id.* at 253.

407 *See* Correll, *supra* note 6, at 1042–43; Grimm et al., *supra* note 14, at 11.

408 *See* Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43 (D. Mass. 2011) (discussing choice of where to place the adjective "intentional"); McLoughlin et al., *supra* note 14, at 707–08; *compare* FED. R. EVID. 502(a) advisory committee's note to 2008 amendment ("Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver."), *with Sealed Case*, 877 F.2d at 980 ("Short of court-compelled disclosure, or other equally extraordinary circumstances, we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege").

409 *See* Cross & Nagendra, *supra* note 14, at 2.

410 Correll, *supra* note 6, at 1043–44; Grimm et al., *supra* note 14, at 5; *see* Act of Sept. 19, 2008, Pub. L. 110–322, §1(c), 122 Stat. 3538.

Evidence," which seems to be something more than legislative history but less than law[411]—and which understandably has been much noticed by courts.[412] As enacted, the first two subparts of Federal Rule of Evidence 502 provide as follows:

> (a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.
>
> (b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).[413]

The rule also includes provisions for agreements between parties, with or without approval of the court,[414] ordains its supremacy over state court determinations,[415] and clarifies that the privileges to which it applies are the attorney-client and work product.[416] Evidently eager to put its various accomplishments into action, Congress provided in the enabling act that its amendments "shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment."[417]

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411 Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 CONG. REC. H7818-H7819 (Sept. 8, 2008); *see* Correll, *supra* note 6, at 1044–45. *But see Bear Republic*, 275 F.R.D. at 43 (D. Mass. 2011) (relegating the Statement to mere legislative history).

412 *See* Correll, *supra* note 6, at 1044–45 n.75 (collecting cases).

413 FED. R. EVID. 502(a)–(b). For easy reference, this Article refers to 502(b)(2) as the precaution prong, and (b)(3) as the remediation prong, with associated adjectives following suit.

414 *Id.* at (d)–(e); *see infra* Section IV.D.

415 *Id.* at (c), (f).

416 *Id.* at (g). The Rule consciously omitted any changes to the doctrine of selective waiver as such. This Article does not touch on that doctrine, which already has received much scholarship. *See generally* Emery, *supra* note 14.

417 Act of Sept. 19, 2008, Pub. L. 110–322, §1(c), 122 Stat. 3538.

The World of Waiver That Is

IV. REVIEW OF THE FEDERAL JUDICIAL LANDSCAPE FOR WAIVER BY DISCLOSURE

Wasting little time, the first decision to apply the new FRE 502 appears to be *Stamps.com, Inc. v. Endicia, Inc.* a fortnight later.[418] The court first focused on the reason for the overhaul in waiver law, quoting the Senate Judiciary Committee's recommendation:

> [T]hough most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.[419]

Applying this overarching purpose, the court found the disclosures in question inadvertent, the precautions reasonable, and thus no waiver of any sort under FRE 502(b).[420] This result ensued despite a daunting parade of errors: lengthy delays owing to "mistakes and miscommunications" after defense counsel identified the privileged material; the delegation of the review to a "new associate and paralegals" unfamiliar with the case;[421] senior counsel's voluntary absence on travel and another trial; and the ubiquitous bogeyman of botched coding in the electronic review database.[422] On the other hand, senior counsel acted swiftly to recoup the documents once the mistakes were understood, and only three documents—out of millions of pages produced—slipped through in the first place.[423] The defendants' lurid assertion that "production of the documents and later assertion of privilege was part of an intentional plot to frustrate discovery" was unsupportable.[424]

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418 Stamps.com, Inc. v. Endicia, Inc., No. CV 06–7499–ODW, 2008 WL 11338241 (C.D. Cal. Oct. 6, 2008). It was, however, not the first *reported* decision—that honor goes to the later Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216 (E.D. Pa. 2008). *See* Murphy, *supra* note 14, at 212–14 (discussing the case).

419 *Stamps.com*, 2008 WL 11338241, at *2 (quoting S. Rep. 110–264, at 2 (2008)).

420 *Id.*

421 One can only feel sympathy for the thankfully anonymous associate whose inexperience managed to find its way into a federal holding.

422 *Id.*

423 *Id.*

424 *Id.*

A. The Three Schools of Waiver in the Era of FRE 502

Other courts swiftly began filling the case reporters with analogous decisions relying on the new federal rule.[425] It will be useful to peruse these according to the general trifurcation of approach preexisting FRE 502 as to inadvertent disclosures (and concomitant readiness to impose subject-matter waiver), for the new rule would at least theoretically have dramatically different impacts on each.

1. Revisiting the Protégés of Wigmore in the D.C., First, and Federal Circuits

Although a few cases predated it, *Amobi v. District of Columbia Dep't of Corrections* serves as the most thoughtful initial response to the new world order for waiver in the D.C. Circuit.[426] "Just over a year ago, parties in defendants' position in this Circuit would have no argument to protect against waiver; they would simply be dead in the water with an inadverten [sic] disclosure," began the court.[427] Dutifully, however, it recognized the new FRE 502 "overrides the long-standing strict construction of waiver in this Circuit," protecting such disclosures if the middle-of-the-road test was met.[428] Construing inadvertence by dictionary standards to mean "'inattentive, negligent; heedless, ... [or] unintentional,'" the court readily found the single document's production in the course of discovery to meet that subjective standard.[429] Playing the tempter, plaintiffs had entreated the court to reinstate the D.C. Circuit's traditional approach by the same tautology it had always applied: "According to plaintiffs, if the disclosure was by a lawyer, then it clearly was not mistaken and not inadvertent; if it was by a non-lawyer, then defendants did not take reasonable steps to protect privilege."[430] The court did not bite: "The premise of that statement is wrong. Lawyers make inadvertent mistakes; it is judges who never make mistakes."[431]

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[425] By way of scale, a search on Westlaw in late 2018 revealed well over a thousand decisions referring to FRE 502. Undoubtedly far more lurk in the orders of the magistrate judges, special masters, and other adjuncts to Article III jurists who so often decide matters of privilege that do not make their way into centralized electronic databases.

[426] Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45 (D.D.C. 2009). The privilege primarily under discussion was work product, but as the exceptions to waiver under FRE 502 apply to both that and attorney-client privilege, analysis of the new rule's effect remains instructive.

[427] *Id.* at 52.

[428] *Id.*

[429] *Id.* at 53.

[430] *Id.* at 54.

[431] *Id.* ("More to the point, to find that a document disclosed by a lawyer is never inadvertent would vitiate the entire point of Rule 502(b). Concluding that a lawyer's mistake never qualifies as inadvertent disclosure under Rule 502(b) would gut that rule like a fish. It would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege.").

Nonetheless, the court found the defendants had failed to carry their burden to demonstrate reasonable precautions and imposed waiver.[432]

Such a result has been distressingly uniform in the D.C. Circuit since 2008; although reciting the new standard, its district court has remained severe.[433] Some have used the very size and speed of discovery against the producer: "While the Court is particularly mindful of the 'magnitude of OFHEO's productions,' and the time pressures OFHEO faced, those circumstances should have evoked a heightened concern about inadvertent disclosures," wrote one in ordering waiver.[434] So too this inverted logic condemned an email with counsel that proved an exception to a course of diligent precautions in guarding email, arising from the technical misuse of a BCC field: "A party cannot prevent the waiver of attorney-client privilege under 502(b) for reasonable precautions that were not undertaken."[435] Again, the very thoroughness of diligence elsewhere was held against the proponent for failing to do so on one occasion.[436] Still others simply looked to *Amobi*'s reasoning that the privilege's proponent provided insufficient detail to show reasonable precautions and prompt remediation—even where a demand for a document's return was issued but refused.[437] Such courts could be found resuscitating fond memories of *Sealed Case*'s requirement that privilege "be jealously guarded"[438] as though "crown jewels."[439]

The D.C. Circuit's traditional emphasis on the burden of proof lying with the privilege's proponent made such decisions easier, as FRE 502 did not displace such

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[432] *Id.* at 54–55 ("Hence, the efforts taken are not even described, and there is no indication of what specific efforts were taken to prevent disclosure, let alone any explanation of why these efforts were, all things considered, reasonable in the context of the demands made upon the defendants. Instead, 'the court is left to speculate what specific precautions were taken by counsel to prevent this disclosure.' There can be no reasonable efforts, unless there are efforts in the first place.") (quoting Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 209 (N.D. Ind. 1990)).

[433] *See, e.g.*, Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64, 74 (D.D.C. 2017); Educ. Assist. Found. v. United States, 32 F. Supp. 3d 35, 44–46 (D.D.C. 2014); Feld v. Feld, No. 08-1557, 2011 WL 13193354 (D.D.C. Mar. 9, 2011); Williams v. D.C., 806 F. Supp. 2d 44, 48–53 (D.D.C. 2011); *In re* Fannie Mae Sec. Litig., MDL No. 1668, 2009 WL 10708594, at *1 (D.D.C. June 9, 2009); case cited *infra* notes 446–52 (subject matter waiver). *But see* Convertino v. U.S. Dep't of Justice, 674 F. Supp. 2d 97, 108–10 (D.D.C. 2009) (forgiving an inadvertent disclosure occasioned by correspondence between a client and attorney that had been unknowingly surveilled by the Department of Justice because he used his government computer for email).

[434] *Fannie Mae*, 2009 WL 10708594, at *1 (criticizing use of contract attorneys with only limited quality control for review).

[435] *Feld*, 2011 WL 13193354, at *3–4.

[436] *Id.* at *4.

[437] *E.g.*, Raynor v. D.C., No. 14-0750, 2018 WL 852366, at *2 (D.D.C. Feb. 12, 2018); Williams v. D.C., 806 F. Supp. 2d 44, 48–53 (D.D.C. 2011).

[438] *Williams*, 806 F. Supp. 2d at 52.

[439] Educ. Assist. Found. v. United States, 32 F. Supp. 3d 35, 45 (D.D.C. 2014).

precedent.[440] That allocation of burden had been true since Wigmore, to whom the absence of waiver was an element of privilege.[441] And the D.C. Circuit, uniquely, applied the same logic to work product privilege as well.[442] Cases could thus recite the burden of proof before discrediting a proponent's protestations of diligence as insufficient to meet an apparently insuperable obstacle.[443] Courts remonstrated they were being forced to speculate as to finer points of a screening protocol.[444] One sought to evince a sense of fairness, allowing it did "not intend to suggest a party seeking to invoke the protections of Rule 502(b) must always address all, or even necessarily most, of the considerations described above in order to secure relief," but opining all the same that "not one" was addressed with enough detail to meet the burden.[445] All told, the D.C. Circuit's reliance on onerous interpretations of burden and the resulting homogeneity of result do not comport well with the rationales underlying FRE 502(b).

Amobi and a few other cases at least seemed to think that the "new rule abolishes the dreaded subject-matter waiver" in inadvertent cases.[446] But that did not stop D.C. district courts from ordering it where some degree of intentionality could be found—and in creative fashion.[447] In *SEC v. Brown*,[448] the district court reviewed earlier D.C.

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[440] *See* Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53 (D.D.C. 2009) ("Rule 502 itself does not provide any guidance on who has the burden of proving waiver. In this district, prior to the enactment of the rule, 'the proponent of the privilege . . . [had] the burden of showing that it [had] not waived attorney-client privilege.' I see no reason why Rule 502 can be interpreted to modify that rule and I will apply it."); *see also* Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64, 74 (D.D.C. 2017) ("The D.C. Circuit's strict definition of privilege carries over to the waiver of privilege, placing the burden of protecting privileged communications squarely on the proponent of the privilege.").

[441] *See supra* note 38 and accompanying text.

[442] *See Amobi*, 262 F.R.D. at 53 ("determin[ing] that the document is privileged as work product and that defendants have the burden to prove that the privilege has not been waived").

[443] *See, e.g.*, *Educ. Assist. Found*, 32 F. Supp. 3d at 44–45; *Williams*, 806 F. Supp. 2d at 48–51 (noting the "holder of the privilege bears the burden" and that its "showing is woefully deficient," whilst also faulting a failure to submit affidavits rather than unsworn statements); *Amobi*, 262 F.R.D. at 53–55; *see also* U.S. Airline Pilots Ass'n v. Pension Ben. Guar. Corp., 274 F.R.D. 28, 30–33 (D.D.C. 2011).

[444] *See, e.g.*, *Williams*, 806 F. Supp. 2d at 50–51; *Amobi*, 262 F.R.D. at 54–55.

[445] *Williams*, 806 F. Supp. 2d at 51.

[446] Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advs., Inc., 266 F.R.D. 1, 10–16 (D.D.C. 2010); *accord Amobi*, 262 F.R.D. at 52.

[447] Consider, for example, the court facing a redacted application for attorneys' fees, which provided the profferer with the choice to either withdraw the redacted entries from reimbursement or permit a motion for subject-matter waiver should it wish to press for payment on them. *See* Animal Welfare Inst. v. Feld Enter., Inc., No. 03-2006, 2014 WL 12775090, at *2 (D.D.C. Jan. 23, 2014); *cf.* Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64, 74 (D.D.C. 2017) (ordering subject matter waiver of attorney interview memos underlying intentionally disclosed report).

[448] No. 09-1423, 2010 WL 11602724 (D.D.C. Sept. 29, 2010).

Circuit case law in *Sealed Case*, *Minebea*, *Elkins*, and *Intervet* without so much as a whisper of FRE 502 before following their lead in ordering a subject matter waiver as to the same topics voluntarily discussed with the SEC.[449] So too where the attorneys argued the report produced was not privileged, despite being manifestly so: the disclosure was found intentional contra the avowed mistake of law, subject matter waiver imposed, and questioning permitted as to a broad range of topics included in the report.[450] And *Hughes v. Abell* contrived with no mean talent to find that a client's disclosure that he had *not* discussed a topic with counsel constituted a subject matter waiver of the topics he *had* discussed with his counsel, a feat of bootstrapping that beggars the imagination.[451] It is incredible to think the client could have *intended* his denial to implicate privilege at all, let alone to yield a subject matter waiver of his conversations with counsel wholesale.[452]

Surely most troubling are holdings that wholly pretermit the revisions of FRE 502 without mention. Such an omission might have been understandable shortly after its passage, as with *The Navajo Nation v. Peabody Holding Co.*,[453] decided on January 9, 2009, which directly contravened the newfangled law in pronouncing that "*any* disclosure of attorney-client material will be considered" a subject matter waiver, which "will occur regardless of the party's intent when making the disclosure."[454] No such excuse can accrue to the 2015 district court that relied solely on *Sealed Case* to conclude that privilege had been waived by inadvertent disclosure without a hint of

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449 *Id.* at *2–3. The court added in a footnote: "Because the Court concludes that the scope of Integral's subject matter waiver is far narrower than Defendants seek, it need not reach the other arguments advanced by the parties under Federal Rule of Evidence 502(a)." *Id.* at n.6.

450 U.S. Airline Pilots Ass'n v. Pension Ben. Guar. Corp., 274 F.R.D. 28, 30–33 (D.D.C. 2011) ("A review of the Report shows that the 'same subject matter' includes: the scope and methods of the investigation; the documents reviewed; the efforts made to obtain more documents; the Plan's investment policy; the U.S. Airways Master Trust's policies and procedures; and Hagan's findings. Thus, questions in the Association's topics three and five, which cover the scope, conduct, participants, and conclusions of the investigations in which Hagan participated, are permissible.").

451 Hughes v. Abell, No. 09-0220, 2012 WL 13054819, at *3–5 (D.D.C. Mar. 7, 2012) ("[A]s indicated above, Rule 502 does not change the important premise that the disclosure of one communication waives the privilege with respect to other communications concerning the same subject matter when 'they ought in fairness be considered together,' Fed. R. Evid. 502(a)(3), 'in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary,' Fed. R. Evid. 502 explanatory note. Here, the Court finds that it would be unfair to disclose only what Mr. Hughes did or did not tell Weinstock regarding Modern Management, and not the rest of his communications with the firm around the time he entered the agreement with Wells Fargo in late September 2006.").

452 *But see id.* at *5 ("Furthermore, the danger of prejudice to Wells Fargo from selective disclosure is ample because the disclosure was made in a declaration intended to convince this Court to deny Wells Fargo's motion for summary judgment.").

453 255 F.R.D. 37 (D.D.C. 2009).

454 *Id.* at 48.

the required analysis of circumstances under FRE 502.[455] Adding insult to injury, it imposed subject matter waiver without even resolving the open question of whether the disclosure was accidental,[456] still relying upon *Sealed Case* alone, and expressly rejecting the government's submission that such a waiver must be predicated on correcting an unfairly intentional disclosure, as FRE 502(a) would inquire.[457]

If the D.C. Circuit remains imbrued with the teachings of its earlier precedent, the First Circuit has fared only somewhat better. At times, its district courts have looked to the separate provision in FRE 502(d) permitting for a court order to preemptively define the scope of waiver in holding inadvertence excused.[458] Yet waiver was also found under a 502(d) order when one party delayed for months in invoking clawback provisions after an allegedly mistaken production, under an amorphous standard asking whether maintenance of privilege would be contrary to its philosophical purposes.[459] Some decisions appear as harsh as those of the D.C. Circuit. The court in *SurfCast, Inc. v. Microsoft Corp.*[460] accepted that the disclosure was likely inadvertent, but faulted counsel for delaying its objection until the end of the day when the privileged document appeared in a deposition,[461] as well as for the oversight having originated in separating hard copy and email documents for review, a supposedly "self-imposed" wound.[462] (Once again pointing up the devil in the details, the mistake may well have actually arisen because the pivotal language—"I'd appreciate your views and lagal [*sic*] advice"—might not register to automated or even human detection of legal rather than "lagal" vocabulary.)[463]

District courts in the First Circuit have also not infrequently ordered subject matter waiver, but with somewhat more searching standards of intentionality and tactical advantage and fairness.[464] The analysis in *Bear Republic Brewing Co. v. Central City*

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455 Agility Pub. Warehousing Co. K.S.C. v. Dep't of Def., 110 F. Supp. 3d 215, 224–26 (D.D.C. 2015).

456 *Id.* ("As all parties now agree, some disclosures—perhaps accidental, perhaps not—have occurred here.").

457 *Id.* at n.7.

458 *See, e.g.*, E. Coast Sheet Metal Fabricating Corp. v. Autodesk, Inc., No. 12-cv-517-LM, 2014 WL 4627262, at *2 (D.N.H. Sept. 16, 2014).

459 *See* Thomas & Betts Corp. v. New Albertson's, Inc., No. 10-11947-DPW, 2014 WL 11462825, at *4 (D. Mass. July 21, 2014).

460 Surfcast, Inc. v. Microsoft Corp., No. 2:12-cv-333-JAW, 2013 WL 4039413, at *4–5 (D. Me. Aug. 7, 2013).

461 *Id.* at *4 (finding that the failure to object to the obviously privileged document prior to the end of the deposition rather than the end of the day was dispositive).

462 *Id.* at *4–5.

463 *See id.* at *1.

464 *See, e.g.*, Ortiz v. City of Worcester, No. 4:15-cv-40037-TSH, 2017 WL 1948523, at *4–5 (D. Mass. May 10, 2017); Columbia Data Prods., Inc. v. Autonomy Corp., No. 11-12077,

Brewing Co. is incisive and quite evenhanded.[465] There the court parsed at length whether the waiver itself—as opposed to the disclosure—needs to be intentional under FRE 502, holding that it did (and was).[466] It discarded, on the other hand, a discrete predicate requirement that waiver be made specifically "in a selective, misleading and unfair manner," as that clarifying language appeared only the note to the rule rather than the rule itself.[467] Thus satisfied subject matter waiver was available, the court imposed it sparingly under the fairness prong of the test, extending only to the circumstances under which the disclosed material was obtained: "the waiver goes just this far and no further."[468] Other First Circuit district courts, practicing even greater parsimony under FRE 502, have found subject matter waiver unnecessary where fairness did not demand it.[469]

Still, like the D.C. Circuit, however, there remain courts seemingly overlooking the new rule. The First Circuit itself pronounced in 2011 that waiver occurs "when otherwise privileged communications are disclosed to a third party" because "such disclosure 'destroys the confidentiality upon which the privilege is premised,'" citing its own pre-2008 precedent without mention of FRE 502.[470] Loose language makes mischief: *Riveiro-Caldera v. Cooperativa de Ahorro y Credito de Aguadilla* involved the district court's review of a magistrate judge's order denying waiver.[471] The district court looked to its court of appeals,[472] and overruled the magistrate.[473] Although counsel had been instructed not to (and usually did not) use a fax machine in the general office space for privileged communications, in this instance they had, and a

2012 WL 6212898, at *17–18 n.9 (D. Mass. Dec. 12, 2012); Massachusetts v. Mylan, Inc., No. 2003-11865-PBS, 2010 WL 2545607, at *1–2 (D. Mass. June 21, 2010).

465 Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43 (D. Mass. 2011).

466 *Id.* at 47.

467 *Id.*

468 *Id.* at 49–50.

469 *See* Mass. Mut. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 293 F.R.D. 244, 253 (D. Mass. 2013); *see also* Thomas & Betts Corp. v. New Albertson's, Inc., No. 10-11947-DPW, 2014 WL 11462825, at *5 n.7 (D. Mass. July 21, 2014) ("To be clear, the Supermarket Defendants have not argued for, and this Court has not found, a subject matter waiver. Rather, the Court finds that T&B waived any work production protection as to the spreadsheets only.").

470 Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 24 (1st Cir. 2011) (first citing United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997); and then citing *In re* Keeper of Records, 348 F.3d 16, 22 (1st Cir. 2003)).

471 Riveiro-Caldera v. Cooperativa de Ahorro y Credito de Aguadilla, No. 11-1702-CCC, 2013 WL 503965 (D.P.R. Feb. 8, 2013).

472 *See id.* at *3 (first citing *Llubere*s, 663 F.3d at 23–24; and then citing Texaco Puerto Rico v. Department of Consumer Aff., 60 F.3d 867, 883 (1st Cir. 1993)).

473 *Id.* at *5.

letter regarding termination of an employee was intercepted by that very employee.[474] The magistrate had found the precautions reasonable given the lapse was an exception rather than the rule, but the district court faulted the defendant for counsel's failure to follow instructions, as "the carelessness or negligence of an attorney is imputable to the client under the agency theory."[475] Notwithstanding harshness of result, the elision of FRE 502 is explicable given uncertainty as to whether a relevant federal proceeding was ongoing at the time.[476] No such allowance, however, applied to another court summarily ordering subject matter waiver and citing only pre-FRE-502 precedent.[477]

The Federal Circuit Court of Appeals, on the other hand, has acknowledged in passing that FRE 502 now sharply distinguishes inadvertent from intentional disclosures,[478] and tightened the requirements for subject matter waiver.[479] It is a unique court of appeals, however, as its privilege law is generally taken from the circuit whose district court it is reviewing on appeal.[480] And its own subordinate tribunal, the Court of Federal Claims, had been brazenly unabashed in flouting the Federal Circuit's instruction on strict waiver for nearly two decades:

> A decision of the Court of Claims, *National Helium*, was widely recognized for the proposition that an inadvertent disclosure of privileged material despite "a good faith, sufficiently careful, effort to winnow a relatively small number of privileged materials from a very large volume of documents" does not result in waiver of the attorney-client privilege. The salient question was deemed to be whether the producing party had employed a "lax, careless, or inadequate" screening procedure. However, in *Carter v. Gibbs*, a decision issued ten years after *National Helium*, the Federal Circuit held that the accidental appending of an internal Department of Justice memorandum to a motion for extension of time would waive work-product protection as to that memorandum. Without citing *National Helium*, the court stated that "[i]t is irrelevant whether the attachment was inadvertent. . . ." Opinions from this court previously employed a variety of devices to limit *Carter* and to follow *National Helium*. The enactment of Fed. R. Evid. 502 would seem to have put this controversy to rest. The court sees no reason to refrain from

474 *Id.* at *4.

475 *Id.* at *3.

476 *Id.* at *1 (noting the advice was sought in connection with the employee's protection sought under the Federal Bankruptcy Act). *See infra* Section V.B for discussion of the peculiar position of extrajudicial disclosures.

477 *See* BTU Ventures, Inc. v. Betancourt, No. 09-10058-JLT, 2011 WL 3421520, at *1 (D. Mass. Aug. 3, 2011).

478 *See In re* OptumInsight, Inc., No. 2017-116, 2017 WL 3096300, at *3 (Fed. Cir. July 20, 2017).

479 *See* Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1369–70 (Fed. Cir. 2012).

480 *See id.* at 1368; *In re* Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370, 1374 (Fed. Cir. 2001).

> embracing the subsection of that Rule pertaining to inadvertent disclosures, which accords with the principles applied in *National Helium*.[481]

That trial courts operating under the Federal Circuit's jurisprudence have apparently adjusted faithfully to FRE 502 thus signifies only that they were roughly following that rule already.[482] For what is worth, however, the Court of Federal Claims does appear to hew to an objectivist stance in assessing inadvertence based on context rather than subjective intent,[483] disregarding the example set by *Amobi*.

2. Minor Adjustments in "No Waiver" Courts to the New Standard

Speaking of intent: the acolytes of *Mendenhall* and its ilk faced the opposite challenge in the wake of FRE 502, being called on to now override subjective intent when objective circumstances evinced a lack of diligence. As discussed earlier, however, lenient courts were already considering many of the same factors in evaluating inadvertence, and thus the "no waiver" courts arguably faced an easier transition that the "always waiver" courts—some might call it only a change in emphasis or perspective.[484]

The Southern District of Florida, site of probably the second most influential decision of the "no waiver" school,[485] offers a vivid illustration of the lenient approach in the FRE 502 era in *Diamond Car Care, LLC v. Scottsdale Insurance Co*.[486] Plaintiffs claimed waiver had occurred because the privileged documents were used in depositions some five months after being produced (twice), and defendants allegedly made no timely objection.[487] Defendants countered they did not even know of the mistake until the deposition, and did object, adding that plaintiffs were the wrongdoers for concealing the inadvertent production despite numerous notices that privilege had been intended in letters, motion practice, and logs.[488] The court was unpersuaded of waiver, finding defendants' attempts to assert privilege on the document demonstrated lack of intentional waiver, which lack was not compromised

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481 Sikorsky Aircraft Corp. v. United States, 106 Fed. Cl. 571, 584 (Fed. Cl. 2012) (lineation and citations omitted) (citing numerous Federal Court of Claims cases applying the balancing test).

482 *Id.*; *accord, e.g.*, Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87 (2013); Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 503 (2009) ("By requiring the waiver to be intentional, Congress made it clear that a subject-matter waiver cannot result from an inadvertent disclosure.").

483 *See, e.g.*, Cormack v. United States, 117 Fed. Cl. 392, 399 (2014).

484 *See supra* notes 309–18 and accompanying text.

485 Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991).

486 No. 16-Civ-20813, 2017 WL 1293249 (S.D. Fla. Jan. 10, 2017).

487 *Id.* at *2–3.

488 *Id.*

by the five-month delay.[489] And intention controlled in light of their clear expressions thereof; quoting *Mendenhall* at length, the court concluded squarely that "even if Defendant negligently produced the privilege documents at issue, Plaintiff's argument fails because there is no waiver without an intentional relinquishment."[490]

That bald statement seemingly set the court athwart FRE 502's middle-of-the-road approach to inadvertent waiver, but the court pivoted to take the rule on its own terms, and found it supported the same conclusion.[491] On the first prong, there was little argument the production was inadvertent other than the long delay in assertion, which defendants had justified satisfactorily.[492] Defendants' repeated notices that the documents of the type in question were privileged during discovery—including seeking a protective order—apparently sufficed for precautionary measures.[493] And whilst the parties debated whether objection was made at the deposition, evidence showed defendants had at least demanded the documents destroyed shortly after its conclusion.[494] Yet it is notable the court found the precautionary prong in 502(b)(2) satisfied absent *any* evidence of defendant's screening protocol for privilege, so often the sensible focus of courts finding waiver.[495] As for the 502(b)(3) prong, recall that a First Circuit district court had found the same few hours' delay in objecting after a deposition yielded waiver, contra the result in *Diamond Car*.[496] Some measure of goal-oriented application of FRE 502's test is as surely on display in formerly "no waiver" courts as "always waiver" courts.

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489 *Id.* at *5.

490 *Id.*

491 *Id.* ("The application of Federal Rule of Evidence 502 supports the same conclusion. The disclosure of communications covered under the work product privilege does not waive protection when '(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.' The purpose of this rule is to resolve 'longstanding disputes in the courts about inadvertent disclosure issues" and "provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection.' As set forth below, Defendant meets all of the aforementioned requirements." (citations omitted)).

492 *Id.* at *6.

493 *Id.*

494 *Id.*

495 *Compare id. with, e.g.*, Desouza v. Park West Apartments, Inc., No. 3:15-CV-01668, 2018 WL 625010, at *2–3 (D. Conn. Jan. 30, 2018); Felman Prods., Inc. v. Indus. Risk Ins., C.A., No. 3:09-0481, 2010 WL 2944777, at *1–2 (S.D. W. Va. July 23, 2010). Courts have specifically noted the absence of details on screening as compelling a finding of waiver. *See* cases cited *supra* note 444. However, however, the absence is explicable by the distinction between attorney-client and work product privileges on the burden of proof. *See infra* text accompanying notes 522–27.

496 *See* Surfcast, Inc. v. Microsoft Corp., No. 2:12-cv-333-JAW, 2013 WL 4039413, at *4–5 (D. Me. Aug. 7, 2013) (discussed *supra* text accompanying notes 460–61).

Diamond Car also shows that there remains room under FRE 502 for the subjective test of inadvertence itself, as proposed in *Amobi*,[497] and explained more profusely by another decision of the Southern District of Florida, *Liles v. Stuart Weitzman, LLC*:

> The first element of Rule 502(b) requires that the disclosure of privileged documents be "inadvertent"; the rule, however, does not define that term. Courts considering whether a disclosure of privileged documents is inadvertent have taken two different approaches. Some courts considering the question have ruled that a party's subjective intent is not sufficient to establish that a disclosure is inadvertent; rather, these courts look at several factors to determine whether the "inadvertent" element has been satisfied, including the total number of documents reviewed, the procedures used to review the documents before production, and the actions of the producing party after discovering that the documents had been produced. Other courts have taken a simpler approach, "essentially asking whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake."[498]

Unsurprisingly, the court opted for the familiar subjective approach.[499] More surprisingly, perhaps, it did not rubber-stamp the intention against waiver with the surrounding circumstances, but faithfully assessed it under the latter prongs of FRE 502(b).[500] Criticizing the same lack of detail as *Amobi*, the court cited the miniscule size of the production and lack of time constraints in finding a lack of diligence, despite plaintiffs' characterization of the mistaken production as "barely 1%" of those produced.[501] (Indeed, the court often cited *Amobi* favorably in its analysis.)[502] As for remediation, the facts and result were congruent with *Diamond Bar*: the document was introduced at a deposition, objection lodged, an email sent later that day asserting privilege, and a motion filed the following day.[503] But that was not enough, for *all* prongs must be met, and accordingly, the inadvertent production yielded waiver.[504]

Preference for the subjective approach comported with an influential structural analysis from the Northern District of Illinois in *Coburn Group, LLC v. Whitecap Advisors LLC* shortly after the new rule's promulgation.[505] There the court distinguished the two methodologies of analyzing inadvertence based on intention

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497 *See* Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 52–53 (D.D.C. 2009).

498 Liles v. Stuart Weitzman, LLC, No. 09-61448, 2010 WL 11505149, at *2 n.9 (S.D. Fla. June 15, 2010).

499 *Id.* at *4.

500 *Id.* at *4–6.

501 *Id.* at *4–5.

502 *Id.* at *4–6.

503 *Id.* at *5–6.

504 *Id.* at *6.

505 Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032 (N.D. Ill. 2009).

versus circumstance, and came down strongly in favor of the former.[506] First, the structure of FRE 502 strongly implied the threshold analysis was a binary assessment of subjective motivation: if intentional, then subpart (a) applied; if not intentional and therefore inadvertent, then subpart (b) applied.[507] Second, the latter two prongs of 502(b) looked expressly to objective factors surrounding the disclosure; it would be redundant to import those selfsame factors *sub silentio* into the first prong.[508] There being "no real dispute" as to subjective intent, *Coburn Group* proceeded to analyze the latter two prongs, and this time denied waiver, finding the steps taken to screen for privilege commendable in their detail and depth, and the demand for the privilege documents' return suitably prompt.[509]

Many courts from the Chicago and South Florida district courts historically practicing leniency have thus maintained their subjectivist bent in reliance on *Coburn*'s compelling logic;[510] such courts could accept a proponent's representation of their (lack of) intention as satisfying the first element without much further inquiry.[511] But after applying the latter elements of FRE 502(b), subjective courts have scrupulously ruled in favor of waiver[512] as well as against,[513] as the surrounding circumstances of precautions and remediation taken dictate. The objectivist strain, however, depending upon circumstance to assess the gateway question of

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506 *Id.* at 1037–38.

507 *Id.* at 1038.

508 *Id.*

509 *Id.* at 1039–41.

510 Walker v. White, No. 16-C-7024, 2018 WL 2193255, at*3 (N.D. Ill. May 14, 2018) ("Although Rule 502 does not define 'inadvertent,' the majority of courts in this district ask 'merely whether the production was unintentional.'"); *accord* Excel Golf Prods., Inc. v. MacNeil Eng'g Co., No. 11-C-1928, 2012 WL 1570772, at *2 (N.D. Ill. May 3, 2012); *see, e.g.*, Siegmund v. Xuelian Bian, No. 16-CV-62506, 2018 WL 3725775, at *10 (S.D. Fla. Aug. 1, 2018); Viamedia, Inc. v. Comcast Corp., No. 16-CV-5486, 2017 WL 2834535, at *5–6 (N.D. Ill. June 30, 2017); Thermoset Corp. v. Bldg. Mats. Corp. of Am., No. 14-60268-CIV, 2015 WL 1565310, at *8 (S.D. Fla. Apr. 8, 2015); Thorncreek Apts. III, LLC v. Vill. of Park Forest, No. 08-C-1225, 2011 WL 3489828, at *5–6 (N.D. Ill. Aug. 9, 2011); Sidney I v. Focused Retail Prop. I, LLC, 274 F.R.D. 212, 215 (N.D. Ill. 2011); Kmart Corp. v. Footstar, Inc., No-09-C-3607, 2010 WL 4512337, at *3 nn.32–36 (N.D. Ill. Nov. 2, 2010); *see also* Walker v. GEICO Indem. Co., No. 6:15-cv-1002, 2017 WL 1174234, at *4 (M.D. Fla. Mar. 30, 2017); *In re* Yasmin & Yaz Mktg. Litig., MDL No. 2100, 2014 WL 4961490, at *2 (S.D. Ill. Oct. 3, 2014).

511 *E.g.*, *Thermoset Corp.*, 2015 WL 1565310, at *8 ("This Court concurs with the rationale of *Amobi* and, therefore, accepts GAF's representation that the production of the two emails at issue was inadvertent, that is, a mistake and unintentional.").

512 *E.g.*, *Walker*, 2018 WL 2193255, at *4; *Thorncreek Apts.*, 2011 WL 3489828, at *8; *Sidney*, 274 F.R.D. at 217–18; *Kmart*, 2010 WL 4512337, at *5.

513 *E.g.*, *Siegmund*, 2018 WL 3725775, at *10; *Viamedia*, 2017 WL 2834535, at *7; *Walker*, 2017 WL 1174234, at *8; *Thermoset Corp.*, 2015 WL 1565310, at *8–9; *Yasmin & Yaz*, 2014 WL 4961490, at *2–3; *Excel Golf*, 2012 WL 1570772, at *4.

inadvertence, rapidly became a diminutive minority view in these jurisdictions,[514] represented most frequently by the early case *Heriot v. Byrne*,[515] whose many later citations honor it more in the breach than the observance.[516]

The key distinction amongst outcomes in *Diamond Bar*, *Liles*, and *Coburn* then lies with the second prong of FRE 502(b). In all three cases, a handful of pages were inadvertently produced, unbeknownst to their owners, until they were unveiled by their opponents at a deposition.[517] Objections were duly lodged and demands straightaway sent that the offending documents were privileged and must be returned or destroyed, followed by motion practice to enforce the same.[518] What differed was the showing made as to precautions against disclosure: the *Coburn* court credited the detail-filled descriptions of the equally detailed review protocol undertaken, whilst the *Liles* court could conclude only that screening was insufficient because the motion papers were.[519] The lesson is that motion practice matters, and when it comes to preservation of privilege, more is more—perhaps even *Amobi* might have come out differently had the privilege's proponent there framed its arguments more fully![520] Ultimately, courts remain mindful of the lessons of *IBM I*, *II*, and *III* that would point eventually to FRE 502: "The scope of discovery is a logical starting point in many cases because '[w]here discovery is extensive, mistakes are inevitable and claims of inadvertence are properly honored so long as appropriate precautions are taken'"—and demonstrated.[521]

Yet in an inversion of responsibilities, the *Diamond Car* court rested not as did *Liles* on the failure of the privilege's proponent to show *adequate* precautions, but on

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514 *See White*, 2018 WL 2193255, at *4; *Viamedia*, 2017 WL 2834535, at *6; *Excel Golf*, 2012 WL 1570772, at *2.

515 Heriot v. Byrne, 257 F.R.D. 645, 659-60 (N.D. Ill. 2009); *see also* Comrie v. Ipsco, Inc., No. 08-C-3060, 2009 WL 4403364, at *2 (N.D. Ill. Nov. 30, 2009) (following *Heriot* rather than *Coburn*); *Yasmin & Yaz*, 2014 WL 4961490, at *2 (noting both strains of precedent exist).

516 *See, e.g.*, *Viamedia*, 2017 WL 2834535, at *5–6; *Thermoset Corp.*, 2015 WL 1565310, at *8; *Thorncreek Apts.*, 2011 WL 3489828, at *5–6; *cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 1, sc. 4.

517 *See* Diamond Car Care, LLC v. Scottsdale Ins. Co., No. 16-Civ-20813, 2017 WL 1293249, at *1 (S.D. Fla. Jan. 10, 2017); Liles v. Stuart Weitzman, LLC, No. 09-61448, 2010 WL 11505149, at *1 (S.D. Fla. June 15, 2010); Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1035–36 (N.D. Ill. 2009).

518 *Diamond Car*, 2017 WL 1293249, at *1; *Liles*, 2010 WL 11505149, at *5–6; *Coburn*, 640 F. Supp. 2d at 1036.

519 *Liles*, 2010 WL 11505149, at *5–6; *Coburn*, 640 F. Supp. 2d at 1039–40.

520 *Compare Liles*, 2010 WL 11505149, at *5–6 (likening lack of detail to *Amobi*) *with* Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 54–55 (D.D.C. 2009) (finding lack of detail dispositive).

521 *Coburn*, 640 F. Supp. 2d at 1039 (quoting Judson Atkinson Candies, Inc. v. Latini–Hohberger Dhimantec, 529 F.3d 371, 388–89 (7th Cir. 2008)).

the failure of the party challenging privilege to show *inadequate* precautions.[522] This inversion follows from a distinction between attorney-client and work product privileges, for in almost all courts the burden is on the proponent of privilege for the former, but on the challenger for the latter.[523] (Not so in the D.C. Circuit,[524] and a few other outliers,[525] where the burden remains on the proponent for both.) In most courts, therefore, those seeking to protect work product against waiver under FRE 502 may find considerable lenience indeed; *Diamond Car* explained its own result mirrors that of the Fifth Circuit in upholding work product privilege simply after finding that the challenger had failed to offer any "clear evidence" supporting a waiver.[526] That said, the court of appeals permitted further discovery via deposition to develop such evidence, so those trusting in a barren record should be wary.[527]

Finally, lest it be forgotten, the other half of *Mendenhall*'s holding concerned the role of counsel vis-à-vis client, and may be treated more briefly, for the new rule does not speak to whether attorneys' negligence may substitute for the client's in waiver. One may thus still find lenient-leaning courts applying the *Mendenhall* principle that it could not: *YS Garments v. Continental Casualty Co.* concerned a law firm, Buchalter, that had missed a deadline for objections to a subpoena, purportedly waiving privilege as to the unchallenged documents.[528] Finding the client had worked vigorously with counsel to assert its privilege, the court rejected the idea that the client had somehow "contributed to the waiver."[529] The client "had no reason to suspect that Buchalter would miss the deadline to object or fail to assert the relevant privilege," and in any event "cannot 'contribute' to a waiver by Buchalter because Buchalter does

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522 *Diamond Car*, 2017 WL 1293249, at *5 ("[T]he record here is lacking on whether a waiver actually occurred. Plaintiff argues that the privileged documents were presented to several deponents without any objections from Defendant. To the contrary, Defendant alleges that Plaintiff blindsided Defendant with the use of privileged documents at a deposition and that Defendant properly objected to its use. Therefore, the problem here is that there are no citations to any deposition testimony—let alone any deposition transcript included as an exhibit. Because Plaintiff has the burden to demonstrate that a waiver has occurred and it has failed to do so, there is no basis to conclude, on this issue, that the documents have lost their privileged status.").

523 *See* Ecuadorian Plaintiffs v. Chevron Corp., 619 F.3d 373, 379 n.10 (5th Cir. 2010) (citing Johnson v. Gmeinder, 191 F.R.D. 638, 643 (D. Kan. 2000)); *Diamond Car*, 2017 WL 1293249, at *4 (noting "courts across the country" agree and collecting numerous cases); B.H. *ex rel.* Holder v. Gold Fields Mining Corp., 239 F.R.D. 652, 655–56 (N.D. Okla. 2005) (collecting cases and identifying as majority view).

524 *See Amobi*, 262 F.R.D. at 53; *supra* notes 440–45.

525 *E.g.*, Resolution Tr. Corp. v. Mass. Mut. Life Ins. Co., 200 F.R.D. 183, 190–91 (W.D.N.Y. 2001); Granite Partners, L.P. v. Bear, Stearns & Co., 184 F.R.D. 49, 52 (S.D.N.Y. 1999).

526 *Ecuadorian Plaintiffs*, 619 F.3d at 379.

527 *Id.* at 379–80.

528 *See* YS Garments v. Cont. Cas. Co., No. CV-17-03345-SJO, 2018 WL 3829764 (C.D. Cal. Jan. 29, 2018).

529 *Id.* at *4.

not have the authority or ability to waive the attorney-client privilege unless given actual consent by" its client, which it clearly lacked.[530] By and large, however, stricter and mainstream courts alike continued to simply impute the error from counsel to client under agency theory.[531]

3. For the Majority, "Plus Ça Change, Plus C'est La Même Chose"[532]

By design, for the majority of courts who had gravitated to the middle-of-the-road rule, the new FRE 502 did little more than ratify established practice.[533] Indeed, the note from the Advisory Committee went so far as to endorse the ubiquitous factors enunciated in *Lois Sportswear* and *Hartford Fire*, and later regularized in *Hydraflow*,[534] as setting forth the relevant if not dispositive considerations, especially with regard to the size, extent, and time constraints on the production relative to the mistakes[535]—although some later commentators have expressed doubts.[536] Academic

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530 *Id.*; *see also* Terrell v. Cent. Wash. Asphalt, Inc., No. 2:11-cv-142, 2015 WL 461823, at *9 (D. Nev. Feb. 4, 2015) (rejecting argument that counsel's inadvertence could not be imputed to client because the client had personally endorsed the divulgence).

531 *See* Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *11 (S.D. Ohio Aug. 2, 2017); First Tech. Capital, Inc. v. JPMorgan Chase Bank, N.A., No. 5:12-CV-289, 2013 WL 7800409, at *3 (E.D. Ky. Dec. 10, 2013) ("The Rule 502(b) cases, which typically involve assessing lawyer acts, uniformly seem, without discussion, to treat conduct regarding disclosure and preventive steps as within the attorney-client agency. This is a model supported traditionally in the cases as a function of implied authority."); EPSTEIN, *supra* note 3, at 11; *e.g.*, Riveiro-Caldera v. Cooperativa de Ahorro y Credito de Aguadilla, No. 11-1702-CCC, 2013 WL 503965, at *3 (D.P.R. Feb. 8, 2013); Hilton-Rorar v. State & Fed. Commc'ns Inc., No. 5:09-CV-01004, 2010 WL 1486916, at *5 (N.D. Ohio Apr. 13, 2010).

532 JEAN-BAPTISE ALPHONSE KARR, LES GUÊPES (6th series 1859) (generally rendered in English as "the more things change, the more they are the same," although the original is singular).

533 *See* FED. R. EVID. 502(b) advisory committee's note to 2008 amendment (expressly noting it adopted the "middle ground" approach "in accord with the majority view"); *accord* Multiquip, Inc. v. Water Mgmt. Sys. LLC, No. CV-08-403-S, 2009 WL 4261214, at *2–3. (D. Ida. Nov. 23, 2009).

534 FED. R. EVID. 502(b) advisory committee's note to 2008 amendment; *see supra* text accompanying notes 298–306.

535 *Id.*; *see* Schaefer, *supra* note 14, at 219 ("That rule essentially adopts the 'balancing' approach to determine waiver."); Cavaneau, *supra* note 14, at 11; *see also* Grimm et al., *supra* note 14, at 35 n.159 (noting endorsement but that the rule is intended to allow for other factors to be considered as well); Murphy, *supra* note 14, at 211–12 (citing advisory committee intent to use the factors as guidelines); Broun & Capra, *supra* note 9, at 224 (noting Committee intent to adopt majority rule); *see also* Close, *supra* note 14, at 22 ("In 2008, FRE 502(b) codified what appears to be a 'modified' version of Hydraflow.").

536 *See* N. Am. Rescue Prods., Inc. v. Bound Tree Med., LLC, No. 4:08CV1474, 2010 WL 199948, at *2 (E.D. Mo. Jan. 14, 2010) ("Rule 502 does not set forth a five-factor test for determining waiver."); Murphy, *supra* note 14, at 223–24 (seemingly endorsing *Bound Tree*); Meyers, *supra* note 9, at 1484 ("[T]he analysis should still focus on the 502(b) framework and

qualms aside, circuits that previously employed the median approach have broadly acknowledged that the standards for reasonable diligence under FRE 502(b)(2)-(3) mirror their previous precedent.[537] Such recognition derives largely from the district

not simply walk through the individual factors of tests used in cases applying the old 'inadvertent waiver' standard"); Outlaw III, *supra* note 14, at 7 ("There is nothing in the rule or its history that suggests that FRE 502(b) is meant to be a preliminary analysis to be followed by the five-factor test. To the contrary, it is clear that FRE 502 was designed to replace the five-factor test by incorporating its elements."). Murphy notes both approaches. *See* Murphy, *supra* note 14, at 230 nn.280–81.

537 **Second**: Desouza v. Park W. Apts., Inc., No. 3:15-CV-01668, 2018 WL 625010, at *2 n.4 ("Courts in the Second Circuit have used both the factors from Fed. R. Evid. 502(b) and *Lois Sportswear* to determine whether a party has waived the attorney-client privilege through inadvertent disclosure.") (collecting cases); **Third**: J.N. v. S.W. Sch. Dist., 55 F. Supp. 3d 689, 599 n.11 (M.D. Pa. 2014) ("Federal Rule of Evidence 502(b) provides that, in a federal proceeding, unintentional disclosure of privileged materials does not result in waiver of that privilege if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error." Fed. R. Evid. 502(b). Adopting a case-by-case approach, courts within the Third Circuit consider the [*Hydraflow*] factors in determining whether an inadvertent disclosure constitutes waiver."); *accord* Gilson v. Penn. State Police, No. 1:12-cv-0002, 2015 WL 403181, at *2 (W.D. Pa. Jan. 30, 2015); **Fourth**: Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *10 (W.D. Va. Oct. 2, 2017) ("Observing that the five-factor test completely encompasses the three factors described in Rule 502, at least one court in this circuit has applied the five-factor test when determining whether a waiver has occurred under Rule 502(b).") (citing Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 133–36 (S.D. W. Va. 2010)); Johnson v. Ford Motor Co., No. 3:13-cv-06529, 2015 WL 1650428, at *7 (S.D. W. Va. Apr. 14, 2015) ("A five-factor test is often used in this circuit, a similar test has been adopted in the Sixth Circuit." (citations omitted)); **Fifth**: Adaptix, Inc. v. Alcatel-Lucent USA, Inc., No. 6:12-cv-22, 2015 WL 12781215, at *2–3 (E.D. Tex. June 1, 2015) (rejecting contention that FRE 502 diverges from the five-factor test and applying it); Alpert v. Riley, 267 F.R.D. 202, 209 (S.D. Tex. 2010) ("Rule 502(b) retains—without codifying—the multifactor test set out in the case law."); **Sixth**: Kumar v. Hilton Hotels Corp., No. 08–2689, 2009 WL 1683479, at *2 (W.D. Tenn. June 16, 2009) (recognizing that FRE 502 "addresses inadvertent disclosures by adopting the general principles of the 'middle ground' approach"); *see also Johnson*, 2015 WL 1650428, at *7; **Seventh**: Carmody v. Bd. of Trs., 893 F.3d 397, 405–06 n.2 (7th Cir. 2018); **Eighth**: Baranski v. United States, No. 4:11-CV-123, 2015 WL 3505517, at *4 (D. Mo. June 3, 2015) ("Rule 502(b) adopts the middle ground on whether inadvertent disclosure constitutes a waiver of the attorney-client and work product privileges. Although Rule 502(b) does not explicitly codify the *Hydraflow* test, it is flexible enough to accommodate all of its factors." (citation omitted)); Ewald v. Royal Norwegian Embassy, No 11-CV-2116, 2014 WL 1309095, at *7 (D. Minn. Apr. 1, 2014) (noting courts in its district use *Hydraflow* factors); **Ninth**: Am. Cap. Homes, Inc. v. Greenwich Ins. Co., No. C09-0622, 2010 WL 11561400, at *2 (W.D. Wash. Aug. 3, 2010) (noting in applying FRE 502 that "courts in the Ninth Circuit and elsewhere have employed a set of five factors," citing *Lois Sportswear* and *Hartford Fire*); *accord* Blueearth Biofuels, LLC v. Hawaiian Elec. Co., No. 09–00181, 2010 WL 11425708, at *7 (D. Haw. May 11, 2010) (applying *Lois Sportswear* to FRE 502); Mauna Kea Resort, LLC v. Affil. FM Ins. Co., No. 07-00605, 2009 WL 10677201, at *4–5 (D. Haw. June 24, 2009) (same); **Tenth**: Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959, at *11 (D. Colo. Dec. 14, 2009) (citing *Lois Sportswear* factors from the advisory note); **Eleventh**: Butterworth v. Lab. Corp. of Am. Holdings, No. 3:08–cv–411, 2010 WL 11470895, at *7 (M.D. Fla. Dec. 2, 2010) (applying the *Hartford Fire* factors under FRE 502(b)).

courts, as the courts of appeals have rarely had cause to examine the minutiæ of privilege.[538] But as for what constitutes the requisite intent under FRE 502(a)(1) and (b)(1)—that is, whether and by which provision a waiver is governed by FRE 502 at all—federal law remains rather unsettled to this day,[539] grappling with three interwoven nuances of definition and methodology.[540]

a. Subjective Versus Objective Assessment of Intent

First, courts across the country have pondered whether inadvertence is to be assessed based on circumstances or purpose: the issue discussed above within the subjective courts.[541] Unlike their lenient peers, middle-of-the-road courts prior to FRE 502 had often amalgamated what were now three distinct prongs, so the question of whether a change in course was due was more pointed.[542] One court summed up the philosophies that had emerged by 2013:

> The Rule does not define "inadvertent" and the Tenth Circuit has not addressed the issue. Of the courts that have considered it, some have continued to use the common law balancing test described above to determine if a disclosure is inadvertent. Others have conflated inadvertency with the second and third requirements of the rule—the duty to take reasonable steps to prevent and rectify the disclosure. Still others have given inadvertent its dictionary definition of unintentional or mistaken.[543]

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538 *See, e.g.*, Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 845, 850 (E. D. Mich. 2010) ("Neither the Sixth Circuit nor any other court of appeals has addressed a list of factors under Rule 502 yet."). Even in passing, the first and only to date would appear to be the Seventh Circuit—a decade later, in 2018. *Carmody*, 893 F.3d at 405–06 n.2.

539 *See* Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *9 (W.D. Va. Oct. 2, 2017) ("There is a dearth of authority in the Fourth Circuit, and in federal law generally, as to the definition of an 'inadvertent disclosure' under the meaning of Rule 502."); *see also* Meyers, *supra* note 9, at 1457–58, 1482–83.

540 Of course, there are also the courts that decline to grapple with FRE 502 entirely, in troubling disregard of federal law. *See, e.g.*, Relion, Inc. v. Hydra Fuel Cell Corp., No. CV06-607-HU, 2008 WL 5122828, at *3 (D. Or. Dec. 4, 2008) ("I conclude that Relion did not pursue all reasonable means of preserving the confidentiality of the documents produced to Hydra, and therefore that the privilege was waived. The fact that Wells St. John did not intend to produce any privileged documents is not dispositive."). Other articles have noted that *Relion* seemingly failed to engage with FRE 502 meaningfully at all. *See, e.g.*, Murphy, *supra* note 14, at 214.

541 *See supra* notes 505–16.

542 *See, e.g.*, Meyers, *supra* note 9, at 1457–58 ("Compounding the problem is that 'inadvertent' was the conclusion of the prior common-law approach, yet it is now an element under the rule."); *id.* at 1476; Grimm et al., *supra* note 14, at 29 (noting reliance on pre-FRE-502 case law).

543 De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *9 (D.N.M. May 21, 2013) (citations omitted); *see also, e.g.*, Shields v. Boys Town La., Inc., No. 15-3243, 2016 WL 9414346, at *2 (E.D. La. May 24, 2016) (distinguishing two approaches); Thermoset Corp.

A minority of courts have indeed persisted in their previous methodology, judging inadvertence by objective indicia of proponents' precautions and remediation, not by their avowed intent, whether using some version of the *Hydraflow* factors or the latter prongs of FRE 502(b) to which those factors are largely tantamount.[544] As one explained, "the question whether the mistake was inadvertent is wrapped up with whether [the producer] took reasonable steps to prevent its disclosure."[545] At least one commentator has endorsed this approach as providing for a more predictable and normative regime.[546]

But to most, this approach "does not make sense," being inherently redundant in either applying the latter factors twice or reading the first factor out of existence.[547] The better argument thus lies with those who have adopted the cogent logic embodied in *Coburn*, and *Amobi* before it, finding the dictionary meaning, structure, and purpose of FRE 502 coincide to clearly commend a subjective approach, disentangled from the latter prongs.[548] Or as one court said, almost as if in rebuttal: "In ordinary usage

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v. Bldg. Materials Corp. of Am., No. 14-60268-CIV, 2015 WL 1565310, at *8 (S.D. Fla. Apr. 8, 2015) (same).

544 Williams v. Merle Pharmacy, Inc., No. 15-cv-1262, 2017 WL 3705802, at *14 (C.D. Ill. Aug. 28, 2017) ("In determining whether a disclosure was inadvertent, courts look at such factors as 'the total number of documents reviewed, the procedures used to review the documents before they were produced, and the actions of producing party after discovering that the documents had been produced.' These common law factors overlap with the requirements of Rule 502(b).") (quoting Heriot v. Byrne, 257 F.R.D. 645, 658–59 (N.D. Ill. 2009)); *e.g.*, Cormack v. United States, 117 Fed. Cl. 392, 399 (2014); D'Onofrio v. Borough of Seaside Park, No. 09-6220, 2012 WL 1949854, at *10 (D.N.J. May 30, 2012); Silverstein v. Fed. Bureau of Prisons, No. 07–cv–02471, 2009 WL 4949959, at *11–13 (D. Colo. Dec. 14, 2009); *Heriot*, 257 F.R.D. at 658–59 ("This Court can find no reason to discard these factors, which aptly address the issue of whether a party inadvertently disclosed confidential information." (citation omitted)); Rhoades v. Young Women's Christian Ass'n of Greater Pittsburgh, No. 09-261, 2009 WL 3319820, at *2 (W.D. Pa. Oct. 14, 2009); United States v. Sensient Colors, Inc., No. 07-1275, 2009 WL 2905474, at *4 (D.N.J. Sept. 9, 2009) ("However, plaintiff's subjective intent is not controlling. All inadvertent disclosures are by definition unintentional. To determine if plaintiff's production was inadvertent the Court must look at a multitude of factors, including whether plaintiff took reasonable precautions to prevent errors."); *see also* Smith v. Auto-Owners Ins. Co., No. 15-cv-1153, 2016 WL 11117291, at *5–6 (D.N.M. Oct. 5, 2016) (discussing precautions taken and promptness of response in assessing inadvertence); *see* Grimm et al., *supra* note 14, at 29–30; Gergacz, *supra* note 14, at 10–11.

545 *Cormack*, 117 Fed. Cl. at 399.

546 *See, e.g.*, Gergacz, *supra* note 14, at 14–15.

547 Grimm et al., *supra* note 14, at 29.

548 *E.g.*, cases cited *supra* note 510 (collecting examples within N.D. Ill. And S.D. Fla.); Irth Sols., LLC v. Windstream Commc'ns, LLC, No. 2:16-cv-219, 2017 WL 3276021, at *8 (S.D. Ohio Aug. 2, 2017); Shields v. Boys Town La., Inc., No. 15-3243, 2016 WL 9414346, at *2 (E.D. La. May 24, 2016); First Tech. Capital, Inc. v. JPMorgan Chase Bank, N.A., No. 5:12-CV-289, 2013 WL 7800409, at *2 (E.D. Ky. Dec. 10, 2013); *In re* Tier 1 JEG Telecomm. Cases, No. 4:07-CV-00043, 2013 WL 12158598, at *7 (S.D. Iowa Nov. 25, 2013); BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09 CIV. 9783, 2013 WL 2322678, at *9 (S.D.N.Y. May 21, 2013) (The three "requirements are separate and should not be conflated in the analysis; in particular, inadvertence under the first prong does not turn on the reasonable steps taken to

something is 'inadvertent' if it is not intended or planned. To show inadvertence the producing party is not required to demonstrate the production occurred despite reasonable precautions to prevent disclosure."[549] This does not mean that context plays *no* part, but rather that its part is to corroborate an avowal of unintentionality, not hold the avower to an objective standard of reasonableness.[550] Indeed, this is just as it was in the pre-FRE-502 subjective courts.[551] FRE 502 has thus yielded the perhaps unexpected result of promoting broader adoption to the test of subjective intent practiced by the lenient school as the gatekeeper to its protections. Nonetheless, uncertainty has consequences, as some courts, apparently stymied by the uncertainty, have pretermitted the question and found waiver under the latter two prongs of FRE 502(b) whilst assuming inadvertence.[552]

b. A Binary Versus Multifarious Spectrum of Intent

Second, regardless of the subjective versus objective analysis, there is the question of whether inadvertence and intentionality occupy the entire spectrum of intent, or whether there might be unenumerated intermediates like negligence or recklessness that are neither inadvertent nor intentional and thus fall outside FRE 502 entirely.[553] For courts that follow a dictionary approach equating inadvertent with *un*intentional, the answer would be clear (literally by definition).[554] As for the rest, the court in *Irth*

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prevent mistaken disclosure addressed in the second prong."); Datel Holdings Ltd. v. Microsoft Corp., No. C–09–05535, 2011 WL 866993, at *3 (N.D. Cal. March 11, 2011) (distinguishing *Silverstein*); *see also* Deere & Co. v. Bush Hog, LLC, No. 3:09-CV-00095, 2011 WL 13097463, at *5 (S.D. Iowa June 16, 2011); Kelly v. CSE Safeguard Ins. Co., No. 2:08-cv-88, 2011 WL 3494235, at *2 (D. Nev. Aug. 10, 2011) ("A disclosure is inadvertent when it is a mistaken, unintended disclosure."); Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53–54 (D.D.C. 2009); Meyers, *supra* note 9, at 1482–84 (arguing for subjective standard).

549 *Tier 1*, 2013 WL 12158598, at *7.

550 *E.g.*, *Deere & Co.*, 2011 WL 13097463, at *5 ("Having viewed the document in camera, and considering the circumstances of this case, the Court finds that Dellett's and Delsman's declarations . . . are credible."); *see also* Cross & Nagendra, *supra* note 14, at 3 ("Thus, courts may look to the circumstances of disclosure and infer intent even where the disclosing party disavows any intent to waive privilege.").

551 *See supra* text accompanying notes 311–18.

552 *E.g.*, De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *9 (D.N.M. May 21, 2013).

553 *See* Gergacz, *supra* note 14, at 11–12; Meyers, *supra* note 9, at 1455.

554 *See* United States v. Sensient Colors, Inc., No. 07-1275, 2009 WL 2905474. at *4 (D.N.J. Sept. 9, 2009) ("All inadvertent disclosures are by definition unintentional."); *e.g.*, Thermoset Corp. v. Bldg. Materials Corp. of Am., No. 14-60268-CIV, 2015 WL 1565310, at *8 (S.D. Fla. Apr. 8, 2015); First Tech. Capital, Inc. v. JPMorgan Chase Bank, N.A., No. 5:12-CV-289, 2013 WL 7800409, at *2 (E.D. Ky. Dec. 10, 2013) ("[A]ny mistaken, or unintentional, production of privileged material is 'inadvertent.'"); *Tier 1*, 2013 WL 12158598, at *7; Kelly v. CSE Safeguard Ins. Co., No. 2:08-cv-88, 2011 WL 3494235, at *2; Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009); Amobi v. D.C. Dep't of Corr., 262

Solutions, LLC v. Windstream Communications LLC had occasion to conduct a searching and thoughtful analysis, which is to be commended given such a question is seldom squarely presented:[555]

> This is a rare case where inadvertence is challenged because inadvertence is a given in most cases. Plaintiff argues that what Defendant characterizes as "inadvertent" is "in fact nothing short of a negligent, if not reckless, production of allegedly privileged communications." Plaintiff's position presumes, without support, that there are three distinct types of disclosures: (1) intentional, (2) inadvertent, and (3) negligent.[556]

Invoking the structure of FRE 502, the court thought it clear that the rule contemplated only two possibilities, with no daylight betwixt and between.[557] A survey of "[c]ourts across the country" revealed that inadvertence was indeed being equated with unintentionality, with no mention of negligence in evidence.[558] And such an interpretation comported with the language of the rule, which cleanly separates issues of negligence that might be at play in evaluating the reasonableness of precautions or remediation from the gateway issue of motivation.[559] The conclusion was clear: "classifying a disclosure is a binary choice: it is either intentional or inadvertent," with negligence (being unintentional) subsumed within the latter.[560]

Contrarily, in the courts conflating the latter two prongs of FRE 502(b) with the question of inadvertence, negligence perforce crept in to the analysis.[561] Although judges studiously avoided reference to negligence *in hæc verba*, their assessments under 502(b)(1) are replete with normative judgments: one noted that the party's "actions can be described only as responsible," that "the procedures used to *review* the documents were reasonable," and that the party "should be able to rely" on its vendor

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F.R.D. 45, 53 (D.D.C. 2009); *see also* Meyers, *supra* note 9,, at 1455 ("Thus 'intentional' may mean 'not inadvertent.'"); Grimm et al., *supra* note 14 , at 31–33.

555 Irth Sols., LLC v. Windstream Commc'ns, LLC, No. 2:16-cv-219, 2017 WL 3276021, at *7–8 (S.D. Ohio Aug. 2, 2017).

556 *Id.* at *7 (citations omitted).

557 *Id.* at *8 ("Rule 502, however, does not distinguish between "negligent disclosure" and "inadvertent disclosure." Instead, the language of Rule 502 allows for only two options: there is either (1) intentional disclosure of privileged material, in which case Rule 502(a) defines the scope of the waiver or (2) an unintentional, inadvertent disclosure, in which Rule 502(b) guides whether waiver occurred." (citations omitted)).

558 *Id.* ("That a negligent disclosure is subsumed within the category of an inadvertent disclosure finds support in the relevant case law. Courts across the country have held that any action that was not intended, not planned, or a mistake, qualifies as "inadvertent"—regardless of how negligent a party's actions were." (citations omitted)).

559 *Id.* ("Intuitively, this makes sense based upon the remaining language of Rule 502(b). The reasonableness of counsel's actions are considered expressly in 502(b)(2) and (b)(3), with no evidence that reasonableness should also be part of the (b)(1) analysis.").

560 *Id.*

561 *See* cases cited *supra* note 544.

and "had no reason to suspect" a mistake was made.[562] Such tests are precisely an inquiry into negligence, which, to return to the dictionary, is the "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[563] Some courts have even used the taboo word itself.[564] Such furtive (or less than furtive) consideration of an intent standard conspicuously absent from the gateway prongs of FRE 502(a)(1) and (b)(1), muddying the question of which applies, provides further reason to reject the objective approach.[565]

The subjective approach properly regards negligence as a species of inadvertence, clearly governed by FRE 502(b).[566] There remains perhaps a bit more uncertainty about what to do with grossly negligent or reckless disclosures,[567] but the best rule is simply to state that such disclosures are not intentional and therefore inadvertent.[568] Epstein, indeed, points up the need for such Manichaeism to obtain some measure of

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562 Heriot v. Byrne, 257 F.R.D. 645, 659–60 (N.D. Ill. 2009).

563 *Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

564 *E.g.*, Diamond Car Care, LLC v. Scottsdale Ins. Co., No. 16-Civ-20813, 2017 WL 1293249, at *6 (S.D. Fla. Jan. 10, 2017).

565 *Cf. supra* note 557 (adverting to the textual absence of a negligence standard).

566 *See* Shields v. Boys Town La., Inc., No. 15-3243, 2016 WL 9414346, at *2 (E.D. La. May 24, 2016) (following *Amobi* and explaining the dichotomy as between "inadvertent in the sense of negligent mistake" and "deliberate and voluntary"); *e.g.*, Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53 (D.D.C. 2009) (including negligence in the definition of inadvertence); Thermoset Corp. v. Bldg. Mats. Corp. of Am., 2015 WL 1565310, at *8 (S.D. Fla. Apr. 8, 2015) (following *Amobi*); Liles v. Stuart Weitzman, LLC, No. No. 09-61448, 2010 WL 11505149, at *4 (S.D. Fla. June 15, 2010) (same).

567 *See, e.g.*, Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 503 (2009) (finding a disclosure "sufficiently careless and reckless to be intentional"); cases cited *infra* note 808 (applying a recklessness standard in evaluating inadvertence under agreements pursuant to FRE 502(d)); *see also* BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09 CIV. 9783, 2013 WL 2322678, at *9 (S.D.N.Y. May 21, 2013) (rejecting a parsing between recklessness and inadvertence); Meyers, *supra* note 9, at 1476 ("As I argue below, inadvertence as a factor, rather than a conclusion, is best measured by the privilege holder's mental state—was the disclosure truly accidental, or was it the result of sheer recklessness or bad faith?"); *cf.* Schaefer, *supra* note 14, at 198 (surveying pre-FER-502 courts' distinctions—if any—between intentionality, recklessness, negligence, and inadvertence).

568 *See BNP Paribas*, 2013 WL 2322678, at *9; Schaefer, *supra* note 14, at 197 (proposing a definition of "inadvertent disclosure" that would "encompass the full range of mistaken, negligent, grossly negligent, and reckless disclosures"); *e.g.*, Irth Sols., LLC v. Windstream Commc'ns, LLC, No. 2:16-cv-219, 2017 WL 3276021, at *8 (S.D. Ohio Aug. 2, 2017); First Tech. Capital, Inc. v. JPMorgan Chase Bank, N.A., No. 5:12-CV-289, 2013 WL 7800409, at *2 (E.D. Ky. Dec. 10, 2013) (holding "any mistaken, or unintentional, production of privileged material is 'inadvertent'"); *In re* Tier 1 JEG Telecomm. Case, No. 4:07-CV-00043, 2013 WL 12158598 (S.D. Iowa Nov. 25, 2013) ("In ordinary usage something is 'inadvertent' if it is not intended or planned."); Coburn Grp., LLC v. Whitecap Advisors, LLC, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009) ("the analysis under subpart (b)(1) is intended to be much simpler, essentially asking whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake.").

consistency: "What one court would deem excusable mistake, another will call 'gross negligence.'"[569]

c. Intent to Disclose Versus Intent to Waive

Third, there is the question of what exactly needs to be intentional or inadvertent: the disclosure itself or the resultant waiver.[570] Such a distinction may seem to be "slicing the baloney mighty thin,"[571] but it has practical consequences, most markedly in mistake-of-law cases in which the act of disclosure was intended but waiver was not, based on an error in assessing the privileged status of the document.[572] Some post-FRE-502 courts continue to view such situations as intentional disclosures under FRE 502(a)(1);[573] indeed, some sliced yet finer, holding for example that a disclosure was not "inadvertent" where the document was produced intentionally, and the only mistake was producing it in unredacted form.[574] The latter reasoning comes close to a tautology that would collapse FRE 502's dichotomy between intentionality and inadvertence: *every* mistakenly produced privileged document is by definition mistaken in that the necessary redactions were not applied.[575] Strict courts of the D.C. Circuit, *pace* the liberal-minded *Amobi*, unapologetically deem mistakes as to

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569 EPSTEIN, *supra* note 3, at 574.

570 *See, e.g.*, Leftwich v. City of Pittsburgh, No. 16-2112, 2017 WL 2774774, at *2 n.2 (D. Kan. June 27, 2017) ("Rule 502(a) applies to an 'intentional waiver.' It is unclear whether that requirement means that the privilege-holder must not only intend to disclose the communication but also intend that the disclosure operate as a waiver.").

571 Sessions v. Dimaya, 138 S. Ct. 1204, 1215 (2018) ("As THE CHIEF JUSTICE's valiant attempt to do so shows, that would be slicing the baloney mighty thin.").

572 *See, e.g.*, Sinclair Oil Corp. v. Texaco Inc., 208 F.R.D. 329, 331 (N.D. Okla. 2002); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, 1995 WL 683777, at *3 (N.D. Ill. Nov. 16, 1995); Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 (D. Utah 1990).

573 *E.g.*, ePlus Inc. v. Lawson Software, Inc., 280 F.R.D. 247, 255 (E.D. Va. 2012); Deere & Co. v. Bush Hog, LLC, No. 3:09-CV-00095, 2011 WL 13097463, at *5 (S.D. Iowa June 16, 2011) (exemplifying intentionality as "when disclosure is based on a mistaken understanding that the document was not privileged"); U.S. Airline Pilots Ass'n v. Pension Benefit Guar. Corp., 274 F.R.D. 28, 30–33 (D.D.C. 2011); Seger v. Ernest-Spencer Metals, Inc., No. 8:08CV75, 2010 WL 378113 (D. Neb. Jan. 26, 2010); Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959, at *11 (D. Colo. Dec. 14, 2009); *see* Grimm et al., *supra* note 14, at 20–22 ("Thus, Rule 502(a) does not require a demonstration that the party that disclosed the privileged or protected information subjectively intended to waive the protection, but rather a showing that the production was 'voluntary' and not 'inadvertent.'").

574 *ePlus*, 280 F.R.D. at 255. *But see* Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *9 (W.D. Va. Oct. 2, 2017) (distinguishing *ePlus* sharply).

575 *Cf.* Mays v. Bd. of Comm'rs Port of N.O., No. 14-1014, 2015 WL 13531796, at *2 (E.D. La. Nov. 15, 2015) ("Here, Plaintiff cites no case law whatsoever to support her claim, which appears to amount to equating Federal Rule of Evidence 502(b)'s protections for 'inadvertent disclosure[s],' or disclosures that are accidental and unintentional, with protections for disclosures made without the advice of counsel and without knowledge of the law.").

privileged status categorically intentional under FRE 502(a), susceptible to subject matter waiver.[576]

The better view, and the greater majority, holds that it is the waiver of a known privilege that must be intentional to qualify under FRE 502(a).[577] Foundationally, the Advisory Committee had discussed the very issue and sought to cabin subject matter waiver to knowing and intentional cases.[578] Thus "the scope of any potential waiver under Rule 502 depends on whether the waiver of the privilege—rather than the act of disclosing the information—is deemed intentional or inadvertent."[579] Courts have conceded that discerning the desire to waive may prove more difficult than the desire to physically release a document.[580] But in keeping with the purpose of the rule, they have accepted the challenge nevertheless, regularly saving counsel that mistakenly produce documents under the misimpression they are not privileged from the dread specter of subject matter waiver.[581] This approach does offer economies of its own, saving courts themselves from parsing between lawyers who failed to recognize privilege in the first place and those who failed to keep privileged documents from being produced; the result was error either way:[582]

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576 *See, e.g.*, *U.S. Airline Pilots*, 274 F.R.D. at 30–33.

577 *See, e.g.*, First Tech. Capital, Inc. v. JPMorgan Chase Bank, N.A., No. 5:12-CV-289, 2013 WL 7800409, at *2 (E.D. Ky. Dec. 10, 2013); SEC v. Welliver, No. 11–cv–3076, 2012 WL 8015672, at *5 (D. Minn. Oct. 26, 2012); Barnett v. Hospital, No. 5:11-CV-399, 2012 WL 12886505, at *3 (N.D. Ohio Apr. 17, 2012); Valentin v. Bank of New York Mellon Corp., No. 09 Civ. 9448, 2011 WL 1466122, at *2 (S.D.N.Y. Apr. 14, 2011) ("Disclosure is unintentional even if a document is deliberately produced, where the producing party fails to recognize its privileged nature at the time of production."); Datel Holdings Ltd. v. Microsoft Corp., No. C-09-05535, 2011 WL 866993, at *3 (N.D. Cal. Mar. 11, 2011); Seyler v. T-Sys. N. Am., Inc., No. 10 Misc. 7 (JGK), 2011 WL 196920, at *288 (S.D.N.Y. Jan. 21, 2011); Bear Republic Brewing Co. v. Cen. City Brewing Co., 275 F.R.D. 43, 47 (D. Mass. 2011); Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959, at *12–13 (D. Colo. Dec. 14, 2009); Coburn Grp., LLC v. Whitecap Advisors, LLC, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009); *see also* Gergacz, *supra* note 14, at 16 ("It is not a question of whether the disclosure itself was intended . . . . Instead, what is intended is the relinquishment of the privilege. This is assessed by evaluating whether the loss of confidentiality has compromised the goals of the privilege.").

578 *See Welliver*, 2012 WL 8015672, at *5 (quoting minutes of the Advisory Committee and discussing); Cross & Nagendra, *supra* note 14, at 2 (same).

579 *Welliver*, 2012 WL 8015672, at *5; *accord Bear Republic*, 275 F.R.D. at 47; *Silverstein*, 2009 WL 4949959, at *12–13 ("There is a clear distinction between intentional disclosure and intentional waiver.").

580 *See* Astrazeneca LP v. Breath Ltd., No. 08-1512, 2010 WL 11428457, at *4 (D.N.J. Aug. 26, 2010) ("First, while the Court has concluded that Apotex intentionally disclosed an attorney-client communication, it is not clear that Apotex intended to waive the attorney-client privilege.").

581 *See* cases cited *supra* note 577.

582 *First Tech*, 2013 WL 7800409, at *2; *Barnett*, 2012 WL 12886505, at *3 ("It is unclear to the Court after considering the testimony of defendant's attorneys Hearey and Billington, whether the unredacted content of the documents at issue were not recognized by defendant as privileged before the documents were disclosed, or whether the documents were recognized as

> Here, the only evidence (and reasonable conclusion) is that either FTC identified the pages at issue as privileged and then mistakenly produced them anyway, or FTC did not adequately screen the documents for and thus did not appreciate application of privilege as to those items. Nothing suggests that FTC wittingly included in a production papers it knew were privileged. The Court finds that the production, as to the 45 pages, was not an intentional act of disclosing protected information and thus was inadvertent. FTC meets the 502(b)(1) standard.[583]

Judge Grimm formulated the rule slightly differently, although the result remains the same: he would look not to intent to *waive*, but rather to intent to *disclose a document known to be privileged*.[584] Such a reformulation may be worthwhile to curtail baseless argument suggesting one *could* deliberately publish an avowedly privileged document without waiving its privilege.[585] In any event, penalizing counsel and clients for mistakes of logistics but not of the law of privilege always made for arbitrary results, even in subjective courts.[586] Moreover, such a principle invites gamesmanship and artful pleading,[587] an outcome hardly attributable to the Congress that passed the FRE 502.[588] To wit: counsel who botch a privilege call under a mistake of law might yet salvage their blunder by reframing their argument to claim that privilege "would have" been recognized but for some logistical error.[589] Properly

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privileged and disclosed by mistake. However, either way under Rule 502(b), the disclosure was inadvertent."); *Datel*, 2011 WL 866993, at *3.

583 *First Tech*, 2013 WL 7800409, at *2

584 *See* Grimm et al., *supra* note 14, at 20 n.108 (opining that intentional waiver requires wittingly producing something known to be privileged, as opposed to wittingly producing something thought not privileged).

585 *Id.* at 20–22.

586 *See supra* notes 268–73.

587 *See* Cross & Nagendra, *supra* note 14, at 4 ("Waiver also can occur where the disclosing party claims that the disclosed information was not privileged to begin with, if the court finds the claim to be a meritless effort to avoid subject matter waiver as to undisclosed information and the disclosing party relies on the disclosed information in the litigation.").

588 *Cf.* Brown v. Gen. Servs. Admin., 425 U.S. 820, 833 (1976) ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

589 *See*, *e.g.*, Deere & Co. v. Bush Hog, LLC, No. 3:09-CV-00095, 2011 WL 13097463, at *5 (S.D. Iowa June 16, 2011) (accepting, in a court viewing mistakes of law as an intentional waiver, counsel's declarations that "they did not recall reviewing the document at issue and its duplicates, but had they seen the documents, they would have designated them as privileged"). To be clear, this author does not intimate that the affiants or other participants therein botched the assessment of privilege, misrepresented any material fact, or otherwise misbehaved, but rather cites the opinion to illustrate the potential procedural foibles occasioned should such a principle be applied elsewhere.

understood and applied—whether under the rubric of intent to waive or Judge Grimm's alternative—the rule finally closes that bizarre historical discrepancy.[590]

d. A Case Study in Confusion Under FRE 502

A more detailed review of an ornery case illustrates how these three questions interlock and overlap yet more confusingly in the real world.[591] In *Silverstein v. Federal Bureau of Prisons*,[592] the court recognized at the outset that "Rule 502 clearly abrogates previous Tenth Circuit law concerning subject matter waivers on disclosed documents otherwise protected by attorney-client privilege and work-product protection."[593] At issue was a three-page memorandum going to the heart of the case that had been prepared by the BOP's counsel but, through a convoluted series of misunderstandings, had been turned over during discovery based on lead counsel's misreading of its status at a critical juncture and despite several attorneys' having previously designated it as privileged.[594] Once its nature was ascertained far later in preparation for a deposition of the BOP's counsel, its return was demanded, and judicial process invoked to rule on its status.[595] By that time, however, the memorandum had been discussed between counsel at length and provided to experts on both sides.[596]

Despite recognizing the dictionary definition of inadvertent as unintentional, the court recited the minority view that the factors surrounding precautions and

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590 *See* cases cited *supra* note 581; *see also* Gergacz, *supra* note 14, at 16 ("Parties, hereafter, will know that the key for protecting privilege during document discovery is not the unfathomable 'how' a disclosure may occur (e.g., by mistake, poor judgment, or unintended disclosure). Instead, the key is predictable planning: put reasonable safeguards in place and create a procedure for prompt action if a disclosure occurs.").

591 *See* Gergacz, *supra* note 14, at 11–14 (highlighting *Silverstein* as a model of confusion).

592 Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959 (D. Colo. Dec. 14, 2009).

593 *Id.* at *9.

594 *Id.* at *1–4. As another court summarized: "In *Silverstein*, a party intentionally disclosed a privileged document based on a mistaken understanding that the document was not privileged even though the document had been previously and correctly determined by other lawyers to be privileged. Upon learning that the document had been misidentified and was actually privileged, counsel did not take reasonable steps to rectify the error." Datel Holdings Ltd. v. Microsoft Corp., No. C–09–05535, 2011 WL 866993, at *3 (N.D. Cal. March 11, 2011).

595 *Silverstein*, 2009 WL 4949959, at *4.

596 *Id.* at *8 ("There is no question that the October 2004 document was disclosed to opposing counsel, discussed between and among counsel, and a conscious decision made not to recall the document in spite of its previous characterization as privileged. Mr. Synsvoll continued, as noted, to gather more information about the document indicating that the document was not simply forgotten after its initial disclosure. Further, the October 2004 Document was also disclosed to all of the defendants' testifying experts in this case. Plaintiff also sent the document to his experts, Drs. Haney and Friedman, as well as correctional expert Steve Martin." citations omitted)).

remediation informed the assessment of inadvertence under FRE 502(b)(1).[597] But it then skipped to the latter prongs of 502(b), under which the BOP "utterly failed to continue to reasonably protect the document and failed again to take reasonable steps to rectify the erroneous disclosure which had taken place only four days previously."[598] And *that* entire analysis was seemingly superfluous, for the court adopted the additional minority view as to the mistake-of-law issue distinguishing intent to disclose from intent to waive, declaring itself

> not convinced that this type of mistake was Congress' concern when creating Rule 502. Based on all the commentary, the word "inadvertent" from Rule 502 mandates a remedy for an unintended, rather than mistaken, disclosure. The October 2004 Document was specifically examined and willfully withheld from production by two attorneys representing the BOP. This is not a case where the questioned document was part of a larger production which went unnoticed by the producer to the opposition party. The October 2004 Document was specifically addressed by the holder of the privilege.[599]

It is perhaps suspicious that despite other courts' citation of the Oxford English Dictionary in synonymizing inadvertence with mistake,[600] the *Silverstein* court opted instead for an abridged college dictionary published two decades earlier that happened to elide that particular synonym.[601] In any event, the disclosure was disqualified from inadvertence based on the lead attorney's decision to divulge the document, even though it was avowedly premised on a misreading of its content.[602]

Further proving a maverick, the court also discarded the rule of bifurcation dictating that any disclosure not qualifying as inadvertent was definitionally intentional; instead, "having found that the waiver cannot be considered 'inadvertent' under Rule 502(b), the court must determine whether the disclosure was intentional."[603] The question was not already answered because the court found that 502(a)(1) required not just that the privilege holder intend to waive its privilege, but

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597 *Id.* at *10 ("Courts have considered a number of factors to determine inadvertency, including the number of documents produced in discovery, the level of care with which the review for privilege was conducted, and the actions of the producing party after discovering that the document had been produced.").

598 *Id.* at *11–12.

599 *Id.* at *11.

600 *See* Amobi v. D.C. Dep't of Corrs., 262 F.R.D. 45, 53 (D.D.C. 2009) (finding that "defining inadvertent as mistaken comports with the dictionary definition of the word") (citing THE OXFORD ENGLISH DICTIONARY (2d ed. 1989), as updated in its online edition of even date); *accord* Irth Sols., LLC v. Windstream Commc'ns, LLC, No. 2:16-cv-219, 2017 WL 3276021, at *8 (S.D. Ohio Aug. 2, 2017); Shields v. Boys Town La., Inc., No. 15-3243, 2016 WL 9414346, at *2 (E.D. La. May 24, 2016).

601 *See Silverstein*, 2009 WL 4949959, at *10 (citing WEBSTER'S NEW WORLD DICTIONARY (3d College ed. 1988)).

602 *Id.* at *12.

603 *Id.*

that it do so "to gain advantage in the litigation," looking to FRE 106 for guidance because it employed a standard of "in fairness ought to be considered."[604] Applying that extratextual rule seemingly more suited to the parallel language in 502(a)(3), *Silverstein* reviewed the circumstances, finding that the long period during which the lead counsel maintained the document was not privileged militated strongly for intentionality, as the opinion defined it, notwithstanding other attorneys who had disagreed and avowals of accident.[605] Given privilege was only reasserted on the eve of a pivotal deposition, the court concluded the BOP had "intentionally and willfully intended to mislead the plaintiff and gain an advantage in the litigation, six days before the close of discovery," obviously prejudicing its opponent and accordingly meriting subject-matter waiver under 502(a)(3).[606]

The *Silverstein* analysis demonstrates that the third question—what exactly is being tested in evaluating intentionality—can bleed into an evaluation of overall fairness within the context of the proceeding, the subject of FRE 502(a)(3). And that, in turn, reinvokes the venerable sword-and-shield doctrine.

B. A Resurgent Sword & Shield Doctrine

Over the decade after the passage of FRE 502, it has sometimes seemed the old saw about the sword and shield were on the lips of every district court[607]—and even

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604 *Id.* ("There is a clear distinction between intentional disclosure and intentional waiver, for instance. 'The idea is to limit subject matter waiver to situations in which the privilege holder seeks to use the disclosed material for advantage in the litigation but to invoke the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials . . . .'") (quoting 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.2 (3rd ed. 2009 Supp.)).

605 *Id.* at *12–13.

606 *Id.* at *13–14.

607 *In re* Symbol Techs., Inc. Sec. Litig., No. CV 05-3923, 2016 WL 8377036, at *5 (E.D.N.Y. Sept. 30, 2016) ("In applying subject matter waiver, 'courts have invoked the metaphors of "sword" and "shield" to describe the type of strategic assertion of privilege that would implicate fairness considerations.'"). Many dozens of courts have done so just in the last few years. *E.g.*, NexPay, Inc. v. Comdata Network, Inc., No. 3:14-cv-01749, 2018 WL 4181619, at *1 (M.D. Tenn. Aug. 30, 2018); Audubon Soc. of Portland v. Zinke, No. 1:17-cv-00069, 2018 WL 1522691, at *8 (D. Or. Mar. 27, 2018); Doe 1 v. Baylor Univ., 320 F.R.D. 430, 439–40 (W.D. Tex. 2017); Princeton Dig. Image Corp. v. Office Depot, Inc., C.A. No. 13-239, 2017 WL 3264068, at *2 (D. Del. Aug. 1, 2017); *In re* Symbol Techs., Inc. Sec. Litig., No. CV 05-3923, 2017 WL 1233842, at *15–16 (E.D.N.Y. Mar. 31, 2017); BridgeBuilder Tax + Legal Servs., P.A. v. Torus Spec. Ins. Co., No. 16-2236, 2017 WL 914809, at *7 (D. Kan. Mar. 8, 2017); Cave Consulting Grp., Inc. v. OptumInsight, Inc., No. 15-cv-03424, 2016 WL 7475820, at *8 (N.D. Cal. Dec. 29, 2016); Noval Williams Films, LLC v. Branca, No. 14 Civ. 4711, 2016 WL 7238960, at *4 (S.D.N.Y. Dec. 14, 2016); Bona Fide Conglom., Inc. v. SourceAmerica, No. 3:14-cv-00751, 2016 WL 4361808, at *9 (S.D. Cal. Aug. 16, 2016); Gateway Deliveries, LLC v. Mattress Liquidators, Inc., No. 2:14-cv-02033, 2016 WL 232427, at *2–3 (D. Ariz. Jan. 20, 2016); Chisholm Trail Dev., LLC v. Arvest Bank, No. CIV-15-0633, 2015 WL 13567098, at *1 (W.D. Okla. Dec. 30, 2015); Madrigal v. Allstate Indem. Co., No. CV 14-4242, 2015 WL 12748277, at *7–8 (C.D. Cal. Nov. 5, 2015); Patrick v. City of Chi., 154 F. Supp. 3d 705, 715–16 (N.D. Ill. 2015); Luminara Worldwide, LLC v. Liown Elecs. Co., No. 14-3103, 2015 WL

the occasional court of appeals.[608] This is hardly surprising given that FRE 502(a) veritably "embodies the principle that 'privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.'"[609]

1. Discerning the Proper Test for Intentional Waiver

More specifically, FRE 502(a)(3) makes the question of fairness dispositive to subject matter waiver if intentionality is established.[610] A few courts, to be sure, have followed *Silverstein* in garbling the threshold question of intent with that fairness test.[611] The magistrate judge in *De Los Santos v. City of Roswell*, for example, took the view that advisory note regarding selective and misleading disclosures informed the question of both intent and unfairness.[612] But the district court, ruling on

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9861106, at *5 (D. Minn. Oct. 5, 2015); Hairston v. ED Nelson Transport, No. 3:13-cv-1457, 2015 WL 12843869, at *3 (M.D. Fla. Sept. 25, 2015); Adinolfe v. United Tech Corp., 2015 WL 11254706, at *4 n.4 (S.D. Fla. Sept. 17, 2015); Obeid v. La Mack, No. 14 cv 6498, 2015 WL 5581577, at *10 (S.D.N.Y. Sept. 16, 2015); Fagen, Inc. v. Exergy Devel. Grp. of Idaho, L.L.C., No. 12-2703, 2015 WL 12977507, at *4 (D. Minn. June 1, 2015); Mitre Sports Int'l, Ltd. v. Home Box Office, Inc., 304 F.R.D. 369, 371 (S.D.N.Y. 2015); *see also* Ewald v. Royal Norwegian Embassy, 2014 WL 1309095, at *7 (D. Minn. Apr. 1, 2014); Century Aluminum Co. v. AGCS Marine Ins. Co., 285 F.R.D. 468, 472 (N.D. Cal. 2012); Favors v. Cuomo, 285 F.R.D. 187, 198–99 (E.D.N.Y. 2012); Shukh v. Seagate Tech., LLC, 848 F. Supp. 2d 987, 990 (D. Minn. 2011); SEC v. McNaul, 277 F.R.D. 439, 444 (D. Kan. 2011); Shinnecock Indian Nation v. Kempthorne, 652 F. Supp. 2d 345, 365–66 (E.D.N.Y. 2009).

608 *E.g.*, *In re* OptumInsight, Inc., No. 2017-116, 2017 WL 3096300, at *3 (Fed. Cir. July 20, 2017).

609 PETA, Inc. v. Tri-State Zoological Park of W. Md., Inc., No. PX-17-2148, 2018 WL 3546725, at *3 (D. Md. July 24, 2018); *see also* Correll, *supra* note 6, at 1055–56; Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 27, 30.

610 FED. R. EVID. 502(a)(3); *see* Columbia Data Prods. v. Autonomy Corp. Ltd., No. 11–12077, 2012 WL 6212898, at *17 n.9 (D. Mass. Dec. 12, 2012) (holding that "fairness controls the question of waiver under Rule 502(a)"); Silverstein v. Federal Bureau of Prisons, No. 07–cv–02471, 2009 WL 4949959, at *12 (D. Colo. Dec. 14, 2009) ("If the waiver is intentional, meaning that the disclosed privileged material is used to gain advantage in the litigation, the court must then determine the scope of the waiver—that is, whether it extends to undisclosed communications covering the same subject matter.").

611 *E.g.*, Coyne v. Los Alamos Nat'l Security, LLC, No. 15-0054, 2016 WL 10587986, at *6 (D.N.M. Mar. 10, 2016) ("Defendant LANS makes no showing that Ms. Coyne's disclosure of certain emails in this case was made with the intent to put protected information at issue in a selective, misleading or unfair manner."); De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *10 (D.N.M. May 21, 2013), *objs. overruled*, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013); *see also* Bear Republic Brewing Co. v. Cen. City Brewing Co., 275 F.R.D. 43, 48 (D. Mass. 2011) ("These Notes seem to provide that for there to be a waiver of more than what was disclosed, the disclosure and waiver must be not only 'intentional' but also be made '. . . in a selective, misleading and unfair manner.'").

612 *De Los Santos*, 2013 WL 12330144, at *10 n.15 ("Some courts have read 'intentional' broadly, ignoring the Advisory Committee's 'additional requirement' that the disclosure be 'selective, misleading and unfair' since it is not part of the rule itself. I find that the Advisory

objections, elucidated that it saw the Advisory Committee's note as "advising district courts on how to evaluate fairness," not intentionality, otherwise affirming the magistrate's conclusions.[613] *De Los Santos*, *Silverstein*, and their ilk are thus best understood as inartfully observing that all three prongs must be satisfied, and thus no subject matter waiver follows from an intentional disclosure unless it also meets the fairness prong of FRE 502(a)(3), rather than a philosophy that subjectively intentional waiver is not actually intentional under FRE 502(a)(1) absent tactical motivations. These things matter: without intention, there can be no subject matter waiver, no matter how heinous any other sins.[614]

More significantly, courts disagree on the default principle and application under 502(a)(3): is waiver generally limited to what was actually disclosed, with subject matter waiver only available in exceptional situations where fairness demands it, or does an intentional waiver generally extend to documents concerning the same subject matter, absent a reason to constrain it on grounds of fairness?[615] One article has helpfully linked the two approaches to what it denominates the Modern and Classic Views of privilege and waiver.[616] The former "emphasizes the attorney-client privilege as a useful and beneficial component of the judicial system and broader society, and so takes a more generous view of the privilege and a much more limited view of the circumstances under which the privilege is lost and the scope of that loss."[617] The latter, meanwhile, believes privilege to be "a necessary evil, and courts holding to the Classic View are rigorous in the application of the requirements of the privilege. The failure of a client to comply with the strictures of the classic requirements of the privilege results in a complete or broad loss of the privilege."[618]

Courts from the first school have followed the Advisory Committee's note religiously in finding that "Rule 502(a) establishes the new general rule that an intentional disclosure 'results in a waiver only of the communication or information disclosed.'"[619] These courts thus read FRE 502(a)(3) as enunciating an exception to

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Committee note, while not dispositive, helps clarify both the intentionality and fairness prongs of the Rule and will consider it.").

613 *Id.* at *5.

614 *See, e.g.*, Foti v. City of Jamestown Bd. of Pub. Utils., 2014 WL 3842376, at *4–7 (W.D.N.Y. Aug. 5, 2014) (affirming no subject-matter waiver available despite a production made without any semblance of precaution to protect privilege at all); Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53 (D.D.C. 2009); *see also* Cross & Nagendra, *supra* note 14, at 6 (observing that "a finding of intentional waiver is a necessary condition for subject matter waiver under Rule 502(a)").

615 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 695–96; Meyers, *supra* note 9, at 1455.

616 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 698–702.

617 *Id.* at 695.

618 *Id.*

619 Bona Fide Conglom., Inc. v. SourceAmerica, No. 3:14-cv-00751, 2016 WL 4361808, at *9 (S.D. Cal. Aug. 16, 2016); *accord* Gateway Deliveries, LLC v. Mattress Liquidators, Inc., No. 2:14-cv-02033, 2016 WL 232427, at *2–3 (D. Ariz. Jan. 20, 2016).

that general rule, with subject matter waiver only applicable if some particularized unfairness is affirmatively demonstrated.[620] This structure followed from the Advisory Committee's direction that subject matter waiver should be "reserved" for "unusual situations,"[621] involving disclosures made in a "selective, misleading, and unfair manner."[622] More courts than not have come to align themselves with this view, whether *in hæc verba* or using various synonyms such as "tactical advantage" or "adversarial gain."[623]

The stricter school taking the Classic View derives authority from the traditional penalty of subject matter waiver for intentional disclosure under the Wigmore regime.[624] By its own terms, FRE 502(a) itself did not plainly displace that customary baseline.[625] *Bear Republic Brewing Co. v. Central City Brewing Co.*[626] examined the

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620 *See Bona Fide*, 2016 WL 4361808, at *9 ("An exception to this general rule exists, and a subject matter waiver will be found, where the disclosed and undisclosed communications 'ought in fairness to be considered together.'") (citations omitted); *accord Gateway*, 2016 WL 232427, at *2–3; Adinolfe v. United Tech Corp., 2015 WL 11254706, at *4 n.4 (S.D. Fla. Sept. 17, 2015).

621 *Bona Fide*, 2016 WL 4361808, at *9 ("A subject matter waiver is therefore 'reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.' To determine whether a given case presents such an unusual situation, courts must engage in 'a case-specific analysis of the subject matter and adversaries.'") (citations omitted); *accord Adinolfe*, 2015 WL 11254706, at *4 n.4.

622 *See, e.g.*, *Bona Fide*, 2016 WL 4361808, at *9; *Adinolfe*, 2015 WL 11254706, at *4 n.4; Madrigal v. Allstate Indem. Co., No. CV 14-4242, 2015 WL 12748277, at *7–8 (C.D. Cal. Nov. 5, 2015); Obeid v. La Mack, No. 14 cv 6498, 2015 WL 5581577, at *10 (S.D.N.Y. Sept. 16, 2015); Neogenix Oncol., Inc. v. Gordon, No. CV 14-4427, 2015 WL 13735953, at *7 (E.D.N.Y. July 31, 2015); Fagen, Inc. v. Exergy Devel. Grp. of Idaho, LLC, No. 12-2703, 2015 WL 12977507, at *4 (D. Minn. June 1, 2015); Mitre Sports Int'l Ltd. v. Home Box Office, Inc., 304 F.R.D. 369, 371 (S.D.N.Y. 2015); RLIS, Inc. v. Cerner Corp., No. 3:12-CV-209, 2014 WL 12599509, at *1 (S.D. Tex. Dec. 24, 2014); Blankenship v. Super. Controls, Inc., No. 13-12386, 2014 WL 12659921, at *3–4 (E.D. Mich. Nov. 25, 2014); De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *10 (D.N.M. May 21, 2013), *objs. overruled*, 2013 WL 12330083, at *150 (D.N.M. June 26, 2013); Favors v. Cuomo, 285 F.R.D. 187, 198–99 (E.D.N.Y. 2012); SEC v. Welliver, No. 11–cv–3076, 2012 WL 8015672, at *5 (D. Minn. Oct. 26, 2012); Shinnecock Indian Nation v. Kempthorne, 652 F.Supp.2d 345, 365–66 (E.D.N.Y. 2009).

623 *See* RLIS, Inc. v. Cerner Corp., No. 3:12-CV-209, 2014 WL 12599509, at *1 (S.D. Tex. Dec. 24, 2014) (citing cases generally in agreement but using language of "tactical advantage" or "adversarial gain"); *see, e.g.*, cases cited *supra* note 622; *see also* Cross & Nagendra, *supra* note 14, at 4 (noting most courts follow this approach).

624 *See supra* cases cited notes 106–113.

625 *See* De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013) ("The plain language of Rule 502(a) is insufficient to determine how a court should gauge 'fairness' in the discovery context.") (quoted *infra* note 639); Mills v. Iowa, 285 F.R.D. 411, 416 (S.D. Iowa 2012).

626 Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43 (D. Mass. 2011).

issue at length, taking note of both the Advisory Committee note and the Statement of Congressional Intent accompanying FRE 502, which it thought "can best be described as a piece of legislative history."[627] It disdained deriving guidance from either, however, because "the situation with this 'legislative history' is the same as with the Advisory Committee Notes, *i.e.*, the plain unambiguous wording of the Rule is what the law [is] despite what is stated in either the Advisory Committee Notes or the legislative history."[628] With the Advisory Committee's and Congress's advice duly discounted, the court charted its own course:

> There will always be a "misrepresentation" by a partial disclosure in the sense that less than a complete picture has been disclosed, and that will be true whether the disclosure was made in a "selective, misleading and unfair manner" or not. If "misrepresentation" means more than that, how is a Court going to make a finding as to the issue since neither the Court nor the party asserting that there has been a waiver (who has the burden of proving waiver[629]) will know what has not been disclosed? It is best to leave the "in fairness" analysis to the scope of the subject-matter waiver, not to whether there has been one in the first place as a result of an "intentional" disclosure and "waiver" of privileged or protected material.[630]

No small number of courts have followed suit.[631] As *Bear Republic* set forth, such an approach deems it presumptively unfair for a party to produce materials only partially, satisfying FRE 502(a)(3) even absent a showing of particularized

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627 *Id.* at 48–49 & n.6 ("There is some evidence that the Advisory Committee Notes, in stating that the Rule 502(a) applies only when the disclosure be made in a "selective, misleading and unfair manner" is referring to subdivision (3) rather than subdivision (1) i.e., that the disclosed and undisclosed information '. . . ought in fairness to be considered together'. Thus, the Advisory Committee in a Report to the Standing Committee dated May 15, 2007 wrote that '. . . [a] subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure "ought in fairness" to be required in order to protect against a misrepresentation that might arise from the previous disclosure.'") (citations omitted).

628 *Id.* at 49.

629 The issue at hand concerned work product privilege, where the burden lies with the challenger in most courts. *See supra* notes 522–527.

630 *Bear Republic*, 275 F.R.D. at 48 n.6.

631 *Id.*; *e.g.*, Colley v. Dickenson City Sch. Bd., No. 2:17CV00003, 2018 WL 5318259, at *3 (W.D. Va. Oct. 29, 2018); Trireme Med., LLC v. Angioscore, Inc., No. 14-cv-02946, 2016 WL 4191828, at *1 (N.D. Cal. Aug. 9, 2016); Luminara Worldwide, LLC v. Liown Elecs. Co., No. 14-3103, 2015 WL 9861106, at *5 (D. Minn. Oct. 5, 2015); Cormack v. United States, 118 Fed. Cl. 33, 43 (Fed. Cl. 2014); Mills v. Iowa, 285 F.R.D. 411, 416 (S.D. Iowa 2012); Shukh v. Seagate Tech., LLC, 848 F. Supp. 2d 987, 991–92 (D. Minn. 2011); *see also* New Phoenix Sunrise Corp v. C.I.R., 408 F. App'x 908, 919–20 (6th Cir. 2010) (appearing to infer subject-matter waiver without a fairness analysis in a "put in issue" context). *But see* Cross & Nagendra, *supra* note 14, at 4 ("Fortunately, this case looks to be an outlier, with many other courts instead adhering to the guidance provided by the Advisory Committee's Note.").

unfairness.[632] Fairness then only mitigates the extent of the further subject matter that must be divulged[633]—although one could envisage even a strict court finding it unfair that any further material be produced in an appropriate case.[634] "Generally," however, the strict rule means that "a waiver extends to all communications on the same subject matter" when intentional.[635]

There is no ready resolution in sight to this divergence of methodology.[636] Some courts, indeed, have already muddled the two approaches, for example declaring that the default rule is of subject matter waiver but in the same breath finding it applies only where disclosure is made in a "selective, misleading, and unfair" manner.[637] The District of New Mexico confronted the clash in 2013, admitting the rule's text could not answer the question, but crediting the persuasiveness of school of thought following the Advisory Committee note:

> De Los Santos next challenges Judge Wormuth's conclusion that subject matter waiver only applies if the lease was intentionally disclosed in a selective, misleading, or unfair manner. According to De Los Santos, the Court need only decide if the disclosure was intentional in order to allow subject matter waiver.
>
> The plain language of Rule 502(a) is insufficient to determine how a court should gauge "fairness" in the discovery context. Luckily, the Rules Committee included a note to Rule 502 advising district courts on how to evaluate fairness, and, as Judge Wormuth discussed in the discovery order,

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632 *Bear Republic*, 275 F.R.D. at 48 n.6; *accord Luminara*, 2015 WL 9861106, at *5 ("The widely applied standard for determining the scope of a waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter. The waiver extends beyond the document initially produced out of concerns for fairness, so that a party is prevented from disclosing communications that support its position while simultaneously concealing communications that do not.") (quoting *Shukh*, 848 F. Supp. 2d at 991–92); *see also* Emery, *supra* note 14, at 293–94 (analyzing outcomes "[a]ssum[ing] that a court holds that all selective disclosures are misleading and unfair as a matter of law").

633 *Bear Republic*, 275 F.R.D. at 48 n.6.

634 *See* Rice, *Continuing Confusion*, *supra* note 39, at 1004 ("Once a client or his attorney waives the privilege, the scope of that waiver is defined roughly by the subject matter of the communication disclosed. This, however, is only the first step. Thereafter, it is refined by the standard of fairness. In many instances, as in *von Bulow*, the concern for fairness has resulted in the subject matter of waiver being narrowly limited to four comers of the instrument disclosed, or to the literal words repeated.").

635 *Trireme Med.*, 2016 WL 4191828, at *1 (citing *Cormack*, 118 Fed. Cl. at 43); *accord Colley*, 2018 WL 5318259, at *3 ("Once a waiver has been determined, it is generally held that it applies to all other communications on the same subject matter.").

636 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 697 (writing that "Rule 502's inability to fully resolve the tension between the Classic and Modern Views is increasingly important"); *id.* at 744 (finding application of the standard for waiver "almost necessarily imprecise"); Meyers, *supra* note 9, at 1455.

637 Simpson v. City of Indianapolis, No. 1:13-cv-791, 2014 WL 2557226, at *2 (S.D. Ind. June 6, 2014).

> there is case law from other circuits that rely on this committee note. I see nothing clearly erroneous about the Judge Wormuth's reliance on these legal sources in lieu of cases from the Southern District of Iowa and the District of Massachusetts[638] . . . Judge Wormuth was required to consider only that which he found to be the most persuasive in order to resolve this matter. Surely an explanation of Rule 502 by its very drafters is highly persuasive.[639]

Cases have also trotted out hornbooks that recognized that subject matter waiver was intended to be narrowly applied, and only in cases of unfair advantage.[640] Authors analyzing FRE 502 have thought so as well.[641] One explained that a "majority of judicial opinions establish a clear principle: if privileged documents are produced intentionally but would not be used in the case to the receiving party's disadvantage, courts generally will limit waiver to the disclosed documents themselves."[642] Nonetheless, the school proponing subject matter waiver as a default rule has persevered, counting amongst its numbers many of the stricter courts of the D.C., First, and Federal Circuits.[643]

2. Assessing the Scope of Subject Matter Waiver

On some things all would agree. No court would allow parties to conjure their own arbitrary lines in the sand to circumscribe an intentional waiver, for FRE 502(a) supplies the correct delineation: like subject matter that ought in fairness be considered together with that disclosed.[644] In *San Francisco Residences Club, Inc. v. Baswell-*

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638 The court refers to *Mills v. Iowa* and *Bear Republic*, cited *supra* notes 626–627.

639 De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013) (citations omitted).

640 *E.g.*, Hawk Mountain LLC v. Mirra, No. 12-2083, 2016 WL 690883, at *2 (D. Del. Feb. 19, 2016) (quoting 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2016.2 (3d ed.1995, suppl. 2010)).

641 *See, e.g.*, Cross & Nagendra, *supra* note 14, at 2–3; McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 746; Murphy, *supra* note 14, at 208; Morse, *supra* note 14, at 65; Redgrave & Kehoe, *supra* note 14, at 36; Meyers, *supra* note 9, at 1457 ("[T]he rule creates a presumption that disclosure should result in subject-matter waiver only in rare circumstances, and that even waiver as to the disclosed information is by no means automatic."); *see also* Emery, *supra* note 14, at 293 ("Impliedly, subsection (a) allows for selective disclosures, as long as those disclosures are not misleading and unfair. FRE 502 mitigates this confusion by providing a test, which might be extrapolated as: 1) was the disclosure made during a federal proceeding or to a federal office or agency; 2) did the disclosure include privileged materials; 3) if so, was the disclosure selective; 4) if so, was the disclosure misleading; and 5) if so, was the disclosure unfair? If the answer to all of those inquiries is 'yes,' then there may be a total waiver of privilege, but if any of the answers are 'no,' then the waiver is limited to the disclosure itself.").

642 Cross & Nagendra, *supra* note 14, at 2.

643 *See generally* cases cited *supra* note 631.

644 FED. R. EVID. 502(a)(2)–(3).

Guthrie,[645] a party had expressly waived privilege as to communications regarding a transaction and attendant post-closing matters, but attempted to defend a temporal Maginot Line[646] on New Year's Eve 2007 under the fiction that it represented some approximation of when those matters had come to an end.[647] The court would have none of this, finding the "only distinction is one tick of the clock at midnight" and "devoid of substantive relevance."[648] Given deposition testimony that relevant events did continue past that date in some degree, "it would be palpably unfair to permit the plaintiffs to selectively waive some communications on the same subject matter while closely guarding others. Plaintiffs cannot be allowed to abuse the attorney-client privilege simply by hiding behind the coincidences of the Gregorian calendar."[649] Nor was there any defensible reason in another case justifying a selective waiver as to the opinions of a company's outside counsel on a transaction but not local counsel's opinions; waiver of the first thus extended to the same subject matter with the other.[650]

Likewise, all concur that subject matter waiver is called for where the disclosing party deliberately divulges only favorable portions of its legal work whilst concealing the unfavorable, the central concern of the sword-and-shield doctrine.[651] Thus, where

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645 S.F. Res. Club, Inc. v. Baswell-Guthrie, 897 F. Supp. 2d 1122 (N.D. Ala. 2012).

646 *Cf.* United States v. Cortina, 630 F.2d 1207, 1217 (7th Cir. 1980) ("Unless we deter behavior such as Brown's, that bulwark will become a Maginot Line, laughingly circumvented by those sworn to respect it."). The non-metaphorical Maginot Line, of course, did not protect France any better than it did plaintiff's privilege. *See* Tamenut v. Mukasey, 521 F.3d 1000, 1005 (8th Cir. 2008) (Beam, J., dissenting) ("'Fifty Million Frenchmen Can't Be Wrong,' [is] an observation proven grossly inaccurate when France constructed the Maginot Line to defend itself from invasion by Germany at the outset of World War II. This defensive line was generally considered one of the great failures of military history.") (citations omitted).

647 *S.F. Res. Club*, 897 F. Supp. 2d at 1221–22.

648 *Id.* ("The implication of Mr. Burnick's comment is essentially correct: there is no good reason why "post closing clean-up matters" in 2007 relating to the Quality Circle and Tech Point (a/k/a Old Madison Pike) transactions should be distinguished from exactly the same undertakings in 2008. The only distinction is one tick of the clock at midnight on New Year's Eve. Despite plaintiffs' attempts to maintain the 2007/2008 distinction, Mr. Bulso made it unambiguously clear that plaintiffs waived attorney-client privilege for (a) any communications regarding the Old Madison Pike and Quality Circle transactions up to the closing thereof, and (b) "post closing clean-up matters" that occurred in 2007. Yet because the December 31, 2007 cutoff date is devoid of substantive relevance, the latter waiver amounts to a waiver of all post closing clean-up matters as to those transactions.").

649 *Id.* ("The court has no difficulty finding that the fairness element of waiver is satisfied. For one, plaintiffs' efforts to maintain a 2007/2008 distinction in the face of Mr. Bulso's statements can be charitably described as dubious.").

650 Fagen, Inc. v. Exergy Devel. Grp. of Idaho, L.L.C., No. 12-2703, 2015 WL 12977507, at *5–6 (D. Minn. June 1, 2015). This accorded, of course, with long-standing precedent. *See* Technitrol, Inc. v. Dig. Equip. Corp., 181 U.S.P.Q. 731, 1974 WL 20497, at *2 (N.D. Ill. 1974).

651 Levy v. Young Adult Inst., No. 13-CV-02861, 2015 WL 10891654, at *2–3 (S.D.N.Y. Dec. 14, 2015) ("Subject matter waiver is only appropriate in 'unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.' Fed.R.Evid. 502, Committee Notes; *see also In re* General Motors LLC Ignition Switch

the government conceded it had disclosed overtly legal opinions regarding the law at issue, offering no explanation other than that the reviewing attorney was "no longer employed by the government," the court ordered subject matter waiver of the remaining legal work to complement the "selectively 'sanitized' version . . . that cherry-picks legal interpretations favorable to Federal Defendants while excluding those that are unfavorable."[652] So too was subject matter waiver necessary where a litigant deliberately disclosed five interview memoranda in order to cross-examine confidential informants whilst holding back the remaining nine it had generated.[653] Likewise where defendants disclosed only the surveillance footage they sought to use at trial, they were not permitted to withhold the residuum on work product grounds: "Defendants should not be allowed to selectively disclose only the surveillance that they think helps them, and hide the rest."[654]

The converse, as proposed by the lenient school of decisions, is that no subject matter waiver should be needed in a spirit of fairness where there is no discernible scheme or possibility of gaining unfair advantage.[655] A South Florida district court observed, in response to an overweening demand for subject matter waiver, that discovery was in its early stages and no evidence had even been presented, mooting any issues of unfairness.[656] Likewise, no broader waiver followed after privileged documents were designated as exhibits to a deposition because no showing was made that any advantage had been sought or obtained.[657] A non-tactical motivation may be obvious from the circumstances: another court rejecting subject matter waiver observed the plaintiff "only produced the emails she asserts are not subject to the

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Litigation, 80 F. Supp. 3d 521, 533–34 (S.D.N.Y. 2015). This rule prevents a party from tactically disclosing some beneficial privileged information while concealing harmful reports and opinions. See In re von Bulow, 828 F.2d 94, 101 (2d Cir. 1987).").

652 Audubon Soc'y of Portland v. Zinke, No. 1:17-cv-00069, 2018 WL 1522691, at *7–8 (D. Or. Mar. 27, 2018) ("In fact, the only difference between the comment Federal Defendants voluntarily disclosed and the one they now seek protected—comment TM25—is that the legal interpretation discussed in comment TM25 could potentially be interpreted as being more deferential to waterfowl management at the expense of farming/agricultural leasing.").

653 *In re* Symbol Techs., Inc. Sec. Litig., No. CV 05-3923, 2017 WL 1233842, at *15–16 (E.D.N.Y. Mar. 31, 2017).

654 Hairston v. ED Nelson Transp., No. 3:13-cv-1457, 2015 WL 12843869, at *3 (M.D. Fla. Sept. 25, 2015).

655 *See generally* cases cited *supra* notes 622–623.

656 *See* Adinolfe v. United Tech. Corp., 2015 WL 11254706, at *4 n.4 (S.D. Fla. Sept. 17, 2015) ("This case is still in the early stages of discovery and there has been no 'presentation of evidence' by Plaintiffs that will give them an unfair advantage in the ultimate resolution of the case.").

657 SEC v. Welliver, No. 11–cv–3076, 2012 WL 8015672, at *5–6 (D. Minn. Oct. 26, 2012) ("Obviously, Defendants' disclosure and waiver were intentional, but the current record does not support a conclusion that a subject-matter waiver is appropriate. Neither party described the context in which the deposition exhibits were used. Further, it is not clear if and how the parties relied on or intend to rely on those documents. Simply put, nothing in the present record suggests that Defendants deliberately disclosed this information to gain a tactical advantage.")

attorney-client privilege because Defendant LANS was already in possession of them," whilst continuing to assert privilege on subsequent materials, and LANS has simply shown no discernible prejudice from being unable to rifle through the complete attorney-client file, as it desired.[658] (Presumably, any prejudice from such a result would accrue to the plaintiff, not LANS.)

Belying the *Bear Republic* court's protest as to how a court could possibly evaluate fairness with reference to as-yet undisclosed documents,[659] courts are often to be found parsing just such materials.[660] One judge reviewed the remaining privileged documents at issue *in camera* and emerged with no finding of a broader waiver; indeed, the plaintiff had commendably made "no effort to demonstrate that the withholding of otherwise privileged documents by this defendant would result in any unfairness" where no such effort could evidently succeed.[661] A special master, after extensive reviews *in camera* and briefing, concluded that the production of six exhibits after a deliberative re-review by counsel seeking to correct errors in privilege could be called nothing but intentional, but that the complexity of the production called for a narrow subject matter waiver only.[662] Another court conducted an email-by-email review and granted subject matter waiver only as to the portions of a handful whose pattern of redactions painted a "misleading picture" of the full content, as the rest caused no unfair disadvantage.[663] In so holding, the court summed up the lenient view that "[w]here the disclosed information does not afford the disclosing party a tactical advantage that would lead to a selective and deceptive presentation of evidence at trial, however, selective waiver may be permissible."[664]

Such a construction of the fairness prong implies that a litigant may be able to defang subject matter waiver by representing it will not use the disclosed but privileged material.[665] This may be straightforward when the documents are irrelevant

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658 Coyne v. Los Alamos Nat'l Sec., LLC, No. 15-0054, 2016 WL 10587986, at *6 (D.N.M. Mar. 10, 2016).

659 Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43 (D. Mass. 2011) (quoted *supra* note 630).

660 *E.g.*, Obeid v. La Mack, No. 14 cv 6498, 2015 WL 5581577, at *10 (S.D.N.Y. Sept. 16, 2015); Noval Williams Films LLC v. Branca, No. 14 Civ. 4711, 2016 WL 7238960, at *4 (S.D.N.Y. Dec. 14, 2016); *see* Correll, *supra* note 6, at 1056 ("To that end, the early approach employed by most courts has been to conduct in camera reviews of the disclosed and undisclosed documents to assess this requirement.").

661 *Obeid*, 2015 WL 5581577, at *10 ("Indeed, although plaintiff appends to his counsel's letter some examples of documents produced by the individual defendants, a review of them reflects that none is seemingly favorable (or unfavorable) to Gemini's position.").

662 *See* N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs., No. 12-526, 2017 WL 10606787, at *9–12 (D.N.M. Feb. 17, 2017).

663 *Noval Williams*, 2016 WL 7238960, at *4.

664 *Id.*

665 *See* Cross & Nagendra, *supra* note 14, at 6–7 ("To avoid subject matter waiver associated with a voluntary disclosure of privileged information, make clear that the disclosure is not

or cumulative to the case at hand.[666] For documents that are germane, however, the court may reserve judgment, threatening reconsideration should a document be used "unfairly or to gain a tactical advantage."[667] A yet more guarded judge may require parties to preemptively disallow themselves any use of the privileged documents.[668] When they are willing to do so, however, courts may be equally willing to take them at (and hold them to) their word:

> Here, Defendants assert that they will not present evidence of their counsel's advice because they are not pursuing an advice-of-counsel defense. The court will hold Defendants to this commitment and, accordingly, Defendants will not be using the attorney-client privilege as both a shield and a sword. Considerations of fairness do not justify a subject matter waiver.[669]

The minority of courts viewing subject matter waiver as the default result of an intentional disclosure are of course less indulgent: once intentionality was established, subject matter waiver followed, as sure as night follows day.[670] So where a single draft settlement document and presentation regarding license negotiations had been intentionally produced, the court found waived all privilege pertaining to the negotiations without any analysis of whether the selective disclosure was advantageous or misleading.[671] Likewise in *Colley v. Dickenson Country School Board*,[672] after the superintendent disclosed certain correspondence with their counsel, the waiver was extended at the plaintiff's insistence to all attorney-client communications prior to the litigation's commencement, without so much as a mention of selectiveness or tactical motivation.[673] (The court had a hunch as to the *plaintiff's* motivation: "I suspect that the plaintiff has gone to such lengths to obtain

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misleading or otherwise unfair. For example, the producing party can disavow any intention to use the disclosed information to prosecute or defend the claims in the litigation.").

666 *See* Patrick v. City of Chi., 154 F. Supp. 3d 705, 715–16 (N.D. Ill. 2015) ("Mr. Patrick has not attempted to rely on any aspect of any conversation he ever had with Mr. Theis. Quite the contrary. He is quite adamant that none of those conversations should be admissible in this case. Mr. Patrick is therefore not seeking to use the privilege simultaneously 'as a shield and a sword.' Hence, the traditional subject matter waiver ought not apply here.") (quoting United States v. Bilzerian, 926 F.2d 1285, 1292 (2nd Cir. 1991)).

667 RLIS, Inc. v. Cerner Corp., No. 3:12-CV-209, 2014 WL 12599509, at *1–2 (S.D. Tex. Dec. 24, 2014).

668 Gateway Deliveries, LLC v. Mattress Liquidators, Inc., No. 2:14-cv-02033, 2016 WL 232427, at *2–3 (D. Ariz. Jan. 20, 2016).

669 *Id.*

670 *See* cases cited *supra* note 635.

671 Luminara Worldwide, LLC v. Liown Elecs. Co. Ltd., No. 14-3103, 2015 WL 9861106, at *5 (D. Minn. Oct. 5, 2015).

672 Colley v. Dickenson City Sch. Bd., No. 2:17CV00003, 2018 WL 5318259 (W.D. Va. Oct. 29, 2018).

673 *Id.* at *3.

privileged material because she hopes she can find a document from the lawyers advising the Board that they were at fault, which the Board ignored, thus showing willfulness and providing a basis for enhanced damages.")[674]

C. Post-Production Concerns: Clawbacks and Professional Comity

Shifting the sword to the other hand, one recurring theme in determining the inadvertence of a production both before and after FRE 502(b) was the expedition with which disclosing counsel demanded return of the supposedly inadvertent production[675]—a "clawback," in the jargon of privilege.[676] Tardiness in clawing back some documents compared with haste as to others may implicate serious sword-and-shield concerns, or even imply a disclosure was truly intentional.[677] Meanwhile, once opposing counsel is put on notice that privileged material has been produced, burdens shift and obligations of comity and candor in shielding the privilege arise.[678] Even before such notice, parties receiving documents may be held to task for seeking to weaponize privileged documents that were obviously mistakenly provided.[679]

1. Reasonable Remediation by the Producing Party

Before the advent of FRE 502, there was some debate in courts as to how to measure the promptness of remediation under the *Hydraflow* factors or similar tests,

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674 *Id.* at n.2. If so, the plaintiff was likely to be disappointed, for the court continued: "Perhaps such a document exists, but I doubt it. It certainly did not appear in the documents that I earlier reviewed in camera." *Id.*

675 *See infra* notes 700–714 and accompanying text.

676 *E.g.*, Talismanic Props., LLC v. Tipp City, Ohio, 309 F. Supp. 3d 488, 494 (S.D. Ohio 2017) ("The City argues that the documents were 'inadvertently disclosed' and that the Court should permit the 'clawback' of these documents by application of Fed. R. Evid. 502."); FED. R. EVID. 502(d) advisory committee's note to 2008 amendment (noting "the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product"). One may find the term spelled as a single word, two words, or hyphenated; this Article opts for the first for consistency. *See Clawback*, BLACK'S LAW DICTIONARY (10th ed. 2014) (employing the single-word orthography for the noun and spacing for the verb); *cf.* Jared S. Sunshine, *The Purloined Greek Letters: Twenty-First Century Developments in the Enforcement of Intellectual Property Rights in Fraternity and Sorority Marks*, 37 QUINNIPIAC L. REV. 679, 682 & n.11 (2019) (discussing the same orthographical variations in the terms "markholder," "trademark," and "servicemark").

677 *See infra* notes 715–731 and accompanying text.

678 *See, e.g.*, Bona Fide Conglom., Inc. v. SourceAmerica, No. 3:14-cv-00751, 2016 WL 4361808 (S.D. Cal. Aug. 16, 2016) (discussed *infra* notes 756–768).

679 *See, e.g.*, Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617 (W.D. Va. Feb. 9, 2017), *objs. overruled*, 2017 WL 4368617 (W.D. Va. Oct. 2, 2017) (discussed *infra* notes 750–755).

but most had settled on the date the producing party realized the error.[680] The Advisory Committee nonetheless sought to provide clearer guidance to FRE 502(b): it does "not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently."[681] Courts quite naturally read this as confirming that precautionary measures under 502(b)(2) need not extend past production.[682] But most have also considered this direction to reaffirm that the promptness in remediation under FRE 502(b)(3) is judged from when the producing party becomes aware of a mistake, not the date of production.[683] Given that view was broadly held before the new rule,[684] and is only reinforced by the rule's passage, there is now little dissent that cognizance or notice of the error is necessary to trigger an obligation to remediate.[685]

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680 *See, e.g.*, Judson Atkinson Candies, Inc. v. Latini–Hohberger Dhimantec, 529 F.3d 371, 389 (7th Cir. 2008); United States v. Nat'l Ass'n. of Realtors, 242 F.R.D. 491, 495 (N.D. Ill. 2007); U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., No. 97 Civ. 6124, 2000 WL 744369, at *6 (S.D.N.Y. June 8, 2000); Aramony v. United Way of Am., 969 F. Supp. 226, 237 (S.D.N.Y. 1997); *see also* Outlaw, *supra* note 14, at 4 (citing cases following minority counting from the time-of-production and those following the majority rule).

681 FED. R. EVID. 502(b) advisory committee's note to 2008 amendment.

682 *E.g.*, SEC v. Blackburn, No. 15-2451, 2015 WL 10911438, at *4 (E.D. La. Oct. 26, 2015); D'Onofrio v. Borough of Seaside Park, No. 09-6220, 2012 WL 1949854, at *11 (D.N.J. May 30, 2012); Datel Holdings Ltd. v. Microsoft Corp., No. C-09-05535, 2011 WL 866993, at *4 (N.D. Cal. Mar. 11, 2011); Heriot v. Byrne, 257 F.R.D. 645, 660–61 (N.D. Ill. 2009).

683 *E.g.*, Phipps v. Wal-Mart Stores, Inc., No. 3:12-cv-0109, 2018 WL 1183746, at *8 (M.D. Tenn. Mar. 7, 2018); *Blackburn*, 2015 WL 10911438, at *5 ("The fact that the SEC did not raise the issue for nearly four months is not material. It is not required to engage in post-production review. Once it determined that the wrong emails were produced, it acted immediately to claw them back."); AAMP of Fla. v. Auto. Data Sol., Inc., No. 8:13–CV–2019, 2015 WL 12844396, at *4 (M.D. Fla. May 21, 2015); Burnett v. Ford Motor Co., No. 3:13-cv-14207, 2015 WL 1650439, at *11 (S.D. W. Va. Apr. 14, 2015); Stewart Title Guar. Co. v. Owlett & Lewis, P.C., 297 F.R.D. 232, 242 (M.D. Pa. 2013); Prowess, Inc. v. RaySearch Labs. AB, No. 11-1357, 2013 WL 1976077, at *4 (D. Md. May 9, 2013); West Penn Allegheny Health Sys., Inc. v. UPMC, No. 2:12-cv-0692, 2013 WL 12141531, at *5–7 (W.D. Pa. Apr. 9, 2013); *D'Onofrio*, 2012 WL 1949854, at *12; Valentin v. Bank of New York Mellon Corp., No. 09 Civ. 9448, 2011 WL 1466122, at *3 (S.D.N.Y. Apr. 14, 2011); Kmart Corp. v. Footstar, Inc., No. 09 C 3607, 2010 WL 4512337, at *5, n.54 (N.D. Ill. Nov. 2, 2010); Liles v. Stuart Weitzman, LLC, No. 09-61448, 2010 WL 11505149, at *5 (S.D. Fla. June 15, 2010); Luna Gaming-S.D., LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *6 (S.D. Cal. Jan. 13, 2010); Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1041 (N.D. Ill. 2009); *see also* Heriot v. Byrne, 257 F.R.D. 645, 661–62 (N.D. Ill. 2009) (applying the advisory committee note to FRE 502(b)(2) but also concluding promptness of remediation is measured from notice of the error); Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 56.

684 *See* Outlaw, *supra* note 14, at 4 (noting majority rule).

685 *See* Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1041 (N.D. Ill. 2009) ("Prior to Rule 502, courts in this circuit looked to the time between a party's learning of the disclosure and that party's taking action to remedy it, rather than the time that elapsed since the document was placed in the hands of the other party. The Committee's comment that Rule

Although a party need not mechanically perform a post-production review of every disk it releases,[686] it cannot ignore signs that something is amiss and satisfy the remediation prong through willful ignorance.[687] *D'Onofrio v. Borough of Seaside Park* surveyed just such a case, where the defendants suffered "seemingly unending problems" with their productions.[688] First, they were aware they had inadvertently produced counsel's notes on certain documents, but inexplicably did no further investigation.[689] Second, their privilege log was missing 872 of the 1238 pages it ought logically to have contained; the court was "perplexed how counsel missed the fact that approximately 70% of the information that should have been included was not."[690] Finally, the defendants were given express notice that one section of the disk contained 728 inadvertently produced documents due to a computer glitch, yet still no re-review of the remainder of the disk was undertaken.[691] The court rejected the argument that the producing party had not known of the problem: "whether a party is informed by its adversary that privileged information has been inadvertently produced . . . or whether the circumstances surrounding a party's production indicates that something has gone awry, as is the case here, is of little import."[692] Once constructive notice accrued, so did an obligation to remediate.[693]

Courts thus generally agree that when an error in privilege rears its ugly head, a broader reexamination must reasonably follow.[694] Nevertheless, counsel is not expected to achieve "perfection or anything close based on the clairvoyance of hindsight," as where the fact that "deposition documents gave some indication that some content had been truncated was not a sufficiently obvious clue that any missing

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502 does not require a post-production review supports this view that the relevant time under subpart (b)(3) is how long it took the producing party to act after it learned that the privileged or protected document had been produced.") (citations omitted). *But see also* Outlaw, *supra* note 14, at 8 (predicting the minority view would survive).

686 *See* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 55.

687 *See, e.g.*, *Stewart*, 297 F.R.D. at 242; *D'Onofrio*, 2012 WL 1949854, at *12–17; *Kmart*, 2010 WL 4512337, at *5; *Luna Gaming*, 2010 WL 275083, at *6; United States v. Sensient Colors, Inc., No. 07-1275, 2009 WL 2905474, at *5 (D.N.J. Sept. 9, 2009).

688 *D'Onofrio*, 2012 WL 1949854, at *12.

689 *Id.* at *12–13.

690 *Id.* at *13 ("In the first instance, the Court notes that the privilege log is not simply missing 'fewer' entries than should have been included; instead, the bulk of the entries are missing.").

691 *Id.* at *14–15.

692 *Id.* at *16.

693 *Id.* ("Instead, the key is that once a party has notice that something is 'amiss with its production and privilege review[,]' that party has an obligation to 'promptly re-assess its procedures and re-check its production.'") (quoting United States v. Sensient Colors, Inc., No. 07-1275, 2009 WL 2905474, at *5 (D.N.J. Sept. 9, 2009)).

694 *E.g.*, cases cited *supra* note 687.

material concerned privileged material."[695] Some judges may be quite indulgent in forgiving lack of clairvoyance.[696] A South Florida court, for example, found no constructive notice because the law firm's paralegal "did not alert [counsel] when the attempt to create a privilege log yielded no documents with 'privileged' tags," and thus counsel themselves had no inkling of inadvertent production prior to the deposition where the documents were sprung on them.[697] At that point, of course, counsel demanded their return and, evidencing their diligence, handed over a privilege log "within ninety minutes of discovering the error."[698] As these examples indicate, it is quite often only at depositions that an inadvertent disclosure is first unveiled—and urgency in response then demanded.[699]

Urgency matters, for in some courts, once "a party realizes a document has been accidentally produced, 'it must assert that privilege with virtual immediacy.'"[700] "Generally," wrote a slightly more charitable magistrate, a clawback must be issued

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695 Datel Holdings Ltd. v. Microsoft Corp., No. C-09-05535, 2011 WL 866993, at *4 (N.D. Cal. Mar. 11, 2011).

696 *See, e.g.*, Phipps v. Wal-Mart Stores, Inc., No. 3:12-cv-0109, 2018 WL 1183746, at *8–9 (M.D. Tenn. Mar. 7, 2018) (weighing size of production against minor "indications" being sufficient to raise doubts as to the production); AAMP of Fla. v. Auto. Data Sol., Inc., No. 8:13–CV–2019, 2015 WL 12844396, at *4 (M.D. Fla. May 21, 2015); West Penn Allegheny Health Sys., Inc. v. UPMC, No. 2:12-cv-0692, 2013 WL 12141531, at *5–7 (W.D. Pa. Apr. 9, 2013) (distinguishing the harshness of *D'Onofrio* and *Sensient* and finding 502(b)(3) satisfied); *Datel*, 2011 WL 866993, at *4.

697 *AAMP*, 2015 WL 12844396, at *4.

698 *Id.*

699 *See, e.g.*, Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 845, 850 (E.D. Mich. 2010) (citing the explanatory note and noting that objection must be made promptly following use at a deposition); Liles v. Stuart Weitzman, LLC, No. 09-61448, 2010 WL 11505149, at *5 (S.D. Fla. June 15, 2010) (collecting cases finding remediation prompt when undertaken directly following deposition); *e.g.*, Carmody v. Bd. of Trs., 893 F.3d 397, 405 (7th Cir. 2018); Diamond Car Care, LLC v. Scottsdale Insurance Co., No. 16-Civ-20813, 2017 WL 1293249, at *6 (S.D. Fla. Jan. 10, 2017); Surfcast, Inc. v. Microsoft Corp., No. 2:12-cv-333-JAW, 2013 WL 4039413, at *4–5 (D. Me. Aug. 7, 2013); Stewart Title Guar. Co. v. Owlett & Lewis, P.C., 297 F.R.D. 232, 241-242 (M.D. Pa. 2013); Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032 (N.D. Ill. 2009).

700 Cormack v. United States, 117 Fed. Cl. 392, 400–01 (Fed. Cl. 2014) (quoting Sikorsky Aircraft Corp. v. United States, 106 Fed. Cl. 571, 585–85 (Fed. Cl. 2012)); *accord Stewart*, 297 F.R.D. at 241–42 (finding failure to object at deposition worked waiver even though the clawback was sought at the end of the deposition); Mycone Dental Supply Co. v. Creative Nail Design Inc., No. C-12-00747, 2013 WL 4758053, at *3 (N.D. Cal. Sept. 4, 2013); Skansgaard v. Bank of Am., N.A., No. C11-0988, 2013 WL 828210, at *3 (W.D. Wash. Mar. 6, 2013); *Sikorsky*, 106 Fed. Cl. at 585086 (contrasting cases finding privileged waived after delays between six days and months with those finding privilege preserved when asserted the same day or "immediately"). *Compare, e.g.*, Surfcast, 2013 WL 4039413, at *4–5 (finding waiver because of a day's delay), *with Diamond Car*, 2017 WL 1293249, at *6 (finding such delay reasonable) (discussed *supra* note 496).

"within days after learning of the disclosure."[701] Other courts, however, have cloven closer to the normative regime of FRE 502 in finding that promptness of remediation need only be reasonable under the circumstances, not reflexively immediate (or even within a few days).[702] Counsel may need time to research the relevant law before making a motion.[703] If the document was produced in the first place based on a mistake arising from nonobvious privilege, it is understandable that counsel may need time to ascertain that it ought to be clawed back even after seeing it again.[704] Confusion likely derives from the fact that documents introduced at depositions may rightly require an immediate if not instantaneous response—but based on the distinct doctrine that failure to object to a document's introduction in depositions (or at trial)

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701 Ceglia v. Zuckerberg, No. 10-CV-00569A(F), 2012 WL 1392965 (W.D.N.Y. Apr. 19, 2012); *see also* Barkett, *supra* note 14, at 1599–01 (discussing case).

702 *E.g.*, Phipps v. Wal-Mart Stores, Inc., No. 3:12-cv-0109, 2018 WL 1183746, at *8 (M.D. Tenn. Mar. 7, 2018) (finding that "Defendant acted reasonably in engaging in dialogue with Plaintiffs regarding the documents over the course of several months, before seeking to claw back the documents when they were attached to Plaintiffs' Motion to Compel"); West Penn Allegheny Health Sys., Inc. v. UPMC, No. 2:12-cv-0692, 2013 WL 12141531, at *7 (W.D. Pa. Apr. 9, 2013) ("Finally, the ten days that elapsed between the time that Jones Day discovered the additional inadvertent production in 2012 and its first request for the return of the materials, and the few months that elapsed between Jones Day's discovery and its second request that DOJ return the materials were not inappropriate in these circumstances."); Valentin v. Bank of New York Mellon Corp., No. 09 Civ. 9448, 2011 WL 1466122, at *3 (S.D.N.Y. Apr. 14, 2011) (lapse of six days not undue); *see* Meyers, *supra* note 9, at 1485 ("[T]he rule does not automatically impose waiver unless the response is perfect. Rather, the essential question is whether, under the circumstances of the case, the party acted appropriately."); Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1041 (N.D. Ill. 2009); *see also* Terrell v. Cent. Wash. Asphalt, Inc., No. 2:11-cv-142, 2015 WL 461823, at *9 (D. Nev. Feb. 4, 2015) (finding year-long delay unreasonable); Luna Gaming-S.D., LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *6 (S.D. Cal. Jan. 13, 2010) (finding complete lack of follow up unreasonable).

703 *E.g.*, *Coburn*, 640 F. Supp. 2d at 1041; *see also* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 57–58 (discussing case).

704 *See, e.g.*, *Valentin*, 2011 WL 1466122, at *3 ("Here, BNYM had cause to be concerned only when it learned on February 18, 2011 that the handwriting was that of the former in-house counsel. And, it only fully understood the privileged nature of the notes four days later when it verified when the plaintiff had first asserted his legal claims."); Alcon Mfg., Ltd. v. Apotex, Inc., No. 1:06-cv-1642, 2008 WL 5070465, at *6 (S.D. Ind. Nov. 26, 2008) (finding delay in assertion on document with nearly illegible handwriting reasonable under standard of FRE 502(d) order); *cf.* Noyes, *supra* note 14, at 759 ("What if the Receiving Party asks the deponent about privileged information without revealing that the subject matter of the question was derived from a document produced pursuant to a Rule 502(d) order?").

waives any privilege.[705] Thus even though the original disclosure was governed by FRE 502, the failure to object works waiver of its own right.[706]

In any event, however, substance rather that form controls in such assertions;[707] a clawback demand must be pursued persistently, not posed *pro forma* and left to languish, if privilege is to be preserved.[708] In *Terrell v. Central Washington Asphalt, Inc.*, defense counsel posted a letter to their adversaries on the eve of a deposition asserting inadvertent production of draft interrogatory responses, and asking for a response so that the court could be consulted if there was disagreement, following the proper forms of Federal Rule of Civil Procedure 26(b)(5)(B), all as directed by FRE 502(b)(3).[709] At the deposition the next day, however, counsel made no objection when the draft was used, which the court found itself called for waiver.[710] Plaintiff's counsel had no reason not to use the exhibit, for they did not receive the clawback letter until well after the deposition![711] In any case, plaintiff's counsel then promptly responded that they disagreed with the clawback.[712] "Nonetheless," narrated the court, "Central Washington waited two hundred and thirty two days until the eve of the close of discovery before filing a motion with the court. This delay is unreasonable."[713]

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705 *See* Hologram USA, Inc. v. Pulse Evol. Corp., No. 2:14–v–00772, 2016 WL 3654285, at *3 (D. Nev. July 5, 2016); Luna Gaming-S.D., LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *5 (S.D. Cal. Jan. 13, 2010) ("But under both state and federal law, if a privileged document is used at a deposition, and the privilege holder fails to object immediately, the privilege is waived."); Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 845, 850 (E.D. Mich. 2010).

706 *See* FED. R. EVID. 502 advisory committee's note to 2008 amendment; *Luna Gaming*, 2010 WL 275083, at *5; Noyes, *supra* note 14, at 759 ("Counsel's inability to quickly raise and support the claims that Rule 502(d) preserved may mean that they are simply waived through different conduct."); *infra* notes 847–848 and accompanying text.

707 *See* Terrell v. Cent. Wash. Asphalt, Inc., No. 2:11-cv-142, 2015 WL 461823, at *8 (D. Nev. Feb. 4, 2015) ("The fundamental command of the Federal Rules of Civil Procedure is 'never to exalt form over substance.'") (quoting Amron v. Morgan Stanley Inv. Advisors Inc., 464 F.3d 338, 343 (2nd Cir. 2006)).

708 *See id.*; *Luna Gaming*, 2010 WL 275083, at *6 ("[A]lthough Luna's counsel belatedly objected to the use of the 2003 Memo at the depositions of Celani and Oegema and invoked the claw-back provision, Luna's counsel never followed up with Dorsey's counsel to obtain the return of the documents, nor did Luna's counsel seek an order from the court. Under the circumstances, after Dorsey did not return the document soon after the request, Luna should have petitioned the court. Failing to take affirmative steps to retrieve the document, beyond merely asking for it at depositions, also waives the privilege.") (citations omitted) (citing LaSalle Bank Nat'l Ass'n v. Merrill Lynch Mortg. Lending, Inc., No. CV 04-5452, 2007 WL 2324292, at *5 (S.D.N.Y. Aug. 13, 2007)).

709 *Terrell*, 2015 WL 461823, at *8–9.

710 *Id.* at *8.

711 *Id.*

712 *Id.*

713 *Id.* at *9. Given this deficient performance, counsel also argued that their client should not be penalized for their own inadvertent disclosure. With FRE 502(b) easily satisfied, the

Asserting privilege but delaying or abandoning the clawback inherently raises the suspicion that no privilege is in play, only the interdict of inconvenient documents.[714]

This suspicion becomes near-certainty when privilege is only asserted after a document has been used against a party, whilst innocuous documents of equally privileged provenance are left undefended.[715] Such conduct openly defies the sword-and-shield doctrine and has been embarrassingly transparent at times. The court in *In re Recombinant DNA Technology Patent & Contract Litigation* found waiver for lack of diligence in a massive but supposedly inadvertent production, alighting upon "one inadvertently produced document in particular."[716] The University of California had disclosed to Eli Lilly two patent opinions, one by law firm Irons & Sears, and the other by one Lorance Greenlee, who had begun his work at the law firm.[717] Suspiciously, however, UC pressed only for return of the Irons letter, whilst it "never attempted to rectify its error—if it was an error—in producing the Greenlee letter," and indeed Greenlee was questioned about it without objection.[718] There was a ready explanation for this peculiarity: "Lilly suggests that UC's desire to regain only the Irons opinion is fueled by the fact that the Irons opinion offers an unfavorable report of UC's patent position, while the Greenlee letter presents a more favorable position."[719] The court accordingly found privilege in the Irons letter waived as well, relying on what sounded suspiciously like subject-matter waiver reasoning, even though this cat was already out of the bag.[720]

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court had no sympathy from such Mendenhallian logic, even citing *Sealed Case* and its famous invocation that privilege be "jealously guarded." *Id.*

714 *See, e.g., id.*; cases cited *supra* note 708.

715 *See, e.g.,* Hologram USA, Inc. v. Pulse Evol. Corp., No. 2:14–v–00772, 2016 WL 3654285, at *3 (D. Nev. July 5, 2016) ("Defendants' counsel did not object to the introduction of Exhibits 22 or 34. Instead, he objected when Plaintiffs' counsel used the documents as a bridge to undercover other allegedly privileged information.").

716 *In re* Recombinant DNA Tech. Patent & Contract Litig., MDL No. 912, 1994 WL 270712, at *39 (S.D. Ind. 1993).

717 *Id.* at *39–40.

718 *Id.* at *40.

719 *Id.* at *41.

720 *Compare id.* ("Lilly, whether inadvertently or not, had been given the Greenlee letter—one portion of a study conducted by two attorneys on the same subject matter. Lilly had been permitted to read and analyze that portion. Subsequently, UC 'inadvertently' produced the other portion of this study—the Irons opinion. UC seeks to regain possession only of the later-produced portion . . . . In any event, fairness dictates that if UC was willing to permit Lilly to rely on the Greenlee portion of this study without objection (or to use this portion of the study for its own purposes), the remainder or counterpart of the study, likewise should remain in the mix.") *with id.* ("Moreover, we note that holdings in the cases UC cites to support its limited waiver argument are not contrary to our finding today. In those cases, the courts found that while there was no subject matter waiver of documents not yet produced, privilege had been lost in those documents actually produced—even though produced inadvertently. In the instant case, both the Greenlee letter and the Irons opinion actually have been produced. Such actual production weighs in favor of a waiver of privilege.") (citations omitted).

Attempts at selective disclosure through the back door of selective clawbacks may have been less brazen in the wake of FRE 502, [721] but courts will not be bamboozled easily.[722] In one case, the defendant belatedly sought to claw back a series of exhibits offered in open court.[723] In the first instance, the judge thought privilege had been "irrevocably and permanently waived" by failure to object immediately in such a context.[724] Turning to the details, the court noted defense counsel had properly objected to one exhibit's introduction, but it was no longer dispute, having been clawed back already.[725] Tellingly, however, "counsel did not object to the introduction of Exhibits 22 or 34. Instead, he objected when Plaintiffs' counsel used the documents as a bridge to undercover other allegedly privileged information."[726] This sort of brinksmanship in allowing certain exhibits to be entered unchallenged and only complaining when the line of questioning turned dangerous could not stand.[727] As another court explained straightforwardly of a related privilege:

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[721] *See, e.g.*, Med. & Chiropractic Clinic, Inc. v. Oppenheim, No. 8:16-cv-1477, 2018 WL 4558441, at *2–3 (M.D. Fla. Jan. 31, 2018); Hologram USA, Inc. v. Pulse Evol. Corp., No. 2:14–v–00772, 2016 WL 3654285, at *3 (D. Nev. July 5, 2016). *Compare, e.g.*, Potomac Elec. Power Co. & Subsidiaries v. United States, 107 Fed. Cl. 725, 730 (Fed. Cl. 2012) (denying construction of clawback provision that would "put the Government at a strategic disadvantage for various potential tactical reasons" and "force it to guess whether a given disclosure was made intentionally or not"), *with* Shire LLC v. Amneal Pharm., LLC, 2014 WL 1509238, at *2–6 (D.N.J. Jan. 10, 2014) (denying clawbacks as to inadvertently produced documents but finding their disclosure remained inadvertent rather than part of a selective scheme).

[722] This is especially so when opposing counsel is at hand to draw attention to any potential violations of the sword-and-shield doctrine: "Mr. Sugarman has serious concerns that Banc's efforts to selectively claw back documents and hurt his defense will not stop here. There are numerous documents that are identical (or substantially similar) to those at issue here that have been produced, are available on public dockets, or both, but are not on Banc's current clawback list." Defendant's Reply Brief in Support of Motion for Order that Individual Document from Defendant Banc's Feb. 21, 2018 Document Production Are Not Privileged, at 2, *In re* Banc of Cal. Sec. Litig., No. SACV 17-00118, 2018 WL 6730235 (C.D. Cal. Aug. 1, 2018). Courts may not agree, of course. *See In re* Banc of Cal. Sec. Litig., No. SACV 17-00118, 2018 WL 6167907, at *3 (C.D. Cal. Nov. 26, 2018) ("Sugarman also maintains that Banc's treatment of several of these documents conflicts with how Banc has treated other versions of the document or similar documents. The Court does not view the possibility of inconsistent positions as a basis for destroying the privilege.").

[723] *Hologram USA*, 2016 WL 3654285, at *3.

[724] *Id.* at *3.

[725] *Id.* at *3, n.1.

[726] *Id.* ("For instance, as to Exhibit 22, Defendants' counsel permitted questions regarding Mr. Caddick's opinion, but objected when Plaintiffs inquired into whether Defendants asked Mr. Caddick to revise his opinion . . . . Similarly, Defendants' counsel never objected to the introduction of Exhibit 34 and instead only objected to questions surrounding the purpose and identity of an individual referenced in Exhibit 34.").

[727] *Id.*

> Defendants are correct that certain other documents produced by Plaintiff reflect similar communications, both with regard to participants and content, and Plaintiff has not requested the return of those documents. As urged by Defendants,
>
> > It is fundamentally unfair and inequitable for M&C to use the mediation privilege as both a shield and a sword—withholding documents under the privilege and/or seeking to claw them back when it serves M&C's purpose to do so, while at the same time intentionally producing other documents as to which the same privilege argument could be made, but not seeking to claw them back, because it presumably serves M&C's purpose to have those documents in the evidentiary record.
>
> Under the circumstances, I agree that allowing Plaintiff to claw back these documents is fundamentally unfair in the circumstances presented.[728]

Nor should language in a clawback agreement under FRE 504(d)[729] be manipulated to allow for tactical waivers by permitting undesirable documents to be clawed back whilst leaving others behind.[730] The sword-and-shield doctrine looks to result, not form.[731]

2. The "Candor and Courtesy" Expected of the Receiving Party[732]

Playing no favorites, courts contrariwise look askance at parties receiving clearly privileged material who opt to squirrel it away for strategic advantage rather than raise the likely error to permit for a clawback.[733] The Seventh Circuit recently offered an upbraiding in *Carmody v. Board of Trustees of University of Illinois*,[734] where the university had inadvertently produced a key memorandum bearing the bolded, all-caps heading "ATTORNEY-CLIENT COMMUNICATION *PRIVILEGED AND*

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728 Med. & Chiropractic Clinic, Inc. v. Oppenheim, No. 8:16-cv-1477, 2018 WL 4558441, at *2–3 (M.D. Fla. Jan. 31, 2018) (citations omitted).

729 *See infra* Section IV.D.

730 *See* Smith v. Best Buy Stores, L.P., No. 4:16-cv-00296, 2017 WL 3484158, at *4 (D. Idaho Aug. 14, 2017); Potomac Elec. Power Co. & Subsidiaries v. United States, 107 Fed. Cl. 725, 730 (Fed. Cl. 2012).

731 *Cf.* Terrell v. Cent. Wash. Asphalt, Inc., No. 2:11-cv-142, 2015 WL 461823, at *8 (D. Nev. Feb. 4, 2015) (quoted *supra* note 707).

732 Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *10 (W.D. Va. Oct. 2 2017) (quoted fully *infra* note 771).

733 *See, e.g.*, Cases cited *infra* note 740; *see also* EPSTEIN, *supra* note 3, at 619–623 ("In the absence of a governing state rule, should an attorney who is the beneficiary of an inadvertent disclosure return it upon request? To do so certainly buys one a great deal of good will with opposing counsel, and courts seem to expect such behavior in cases where the document production is neither substantial nor important.").

734 Carmody v. Bd. of Trs., 893 F.3d 397 (7th Cir. 2018).

CONFIDENTIAL," subsequently submitting a privilege log identifying the document as such.[735] Carmody's lawyer was evidently aware of the document's explosive potential, waiting a year to unveil it triumphantly at a deposition with the comment that it "was one that we wanted you to copy."[736] University counsel straightaway demanded the document's return as inadvertently produced, but Carmody's lawyer refused, leading to motion practice.[737] Weighing the *Hydraflow* factors under FRE 502(b), the court of appeals affirmed the district court's upholding privilege, laying particular emphasis on the ultimate question of fairness:

> An element of basic fairness here also weighs against Carmody because of his lawyer's tactics. He or his lawyer surreptitiously photographed the document, stayed silent for a year, tried to surprise the university with the document at a deposition, and then made the document public by attaching it as an exhibit to a motion for summary judgment after defense counsel had demanded its return but before the court could resolve the issue.[738]

The court of appeals added in a folksy aside: "The university lawyer's oversight was surely a doozy, but the point of Rule 502(b) is to protect client's confidences from their lawyers' human errors like this one."[739]

Accidental recipients of information shielded by privilege who seek to wield it as a sword themselves are likely to be disappointed in the FRE 502 era, for such conduct may sway courts to forgive any lapses of the producing party.[740] Higher expectations of professional comity are not merely hortatory; state canons of professional ethics impose affirmative obligations on parties receiving obviously privileged material that will be given effect both in state[741] and federal courts.[742] Rule 4.4(b) of the Model

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735 *Id.* at 405.

736 *Id.*

737 *Id.*

738 *Id.* at 406.

739 *Id.*

740 *Id. Compare e.g.*, AAMP of Fla. v. Auto. Data Sol., Inc., No. 8:13–CV–2019, 2015 WL 12844396, at *4 (M.D. Fla. May 21, 2015) (finding the producing party did not exercise reasonable precautions but nonetheless not finding waiver because receiving counsel violated their ethical obligations), *with* D'Onofrio v. Borough of Seaside Park, No. 09-6220, 2012 WL 1949854, at *11 (D.N.J. May 30, 2012) (finding receiving counsel's ethical violations in failing to report obviously privileged files "obviously weighs against finding that a waiver occurred," although it did not overcome the producing party's lapses). *See also* EPSTEIN, *supra* note 3, at 622 ("But what is certain is that counsel should clearly . . . not try to put something over on his or her adversary. Such tactics are likely to backfire with the court.").

741 *E.g.*, Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 655 (N.J. 2010); *see* Barkett, *supra* note 14, at 1591–92 (discussing case).

742 *E.g.*, Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *10 (W.D. Va. Feb. 9, 2017), *objs. overruled*, 2017 WL 4368617 (W.D. Va. Oct. 2, 2017); Bona Fide Conglom., Inc. v. SourceAmerica, No. 3:14-cv-00751, 2016 WL 4361808

Rules of Professional Conduct requires a party accidentally receiving privileged material to notify the discloser,[743] a principle that no fewer than thirty-two states have adopted—and another eight and the District of Columbia impose even more stringent requirements.[744] Federal Rule of Civil Procedure 25(b)(5)(B) imposes duties on recipients receiving notice that documents have been inadvertently produced.[745] Distinctively from many state rules, FRCP 25(b)(5)(B) offers no ambit for the receiving party to demur on the contention the disclosure was truly intentional.[746] The Southern District of New York has found that the precise course of conduct in *Carmody*—ignoring assertions of privilege, refusing to destroy or sequester identified documents, and filing them publicly in open court instead—was a blatant violation of the federal rule,[747] though it declined to issue sanctions in response.[748] Needless to say, however, privilege was not waived under such distasteful circumstances.[749]

Others have not been so shy as to sanctions: in *Harleysville Insurance Co. v. Holding Funeral Home, Inc.*,[750] defense counsel had surreptitiously accessed plaintiff's files electronically, disregarded indicia of privilege, and then disseminated the material to third parties, all without seeking any guidance from the court or opposing counsel.[751] Indeed, the "only action defense counsel claim they took in response to discovering that they had access to Harleysville's Claims File—calling the Virginia State Bar Ethics Hotline for advice—belies any claim that they believed that their receipt and use of the materials without Harleysville's knowledge was

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(S.D. Cal. Aug. 16, 2016); *AAMP*, 2015 WL 12844396, at *4; *D'Onofrio*, 2012 WL 1949854, at *11; *see* EPSTEIN, *supra* note 3, at 620.

743 MODEL RULES OF PROF'L CONDUCT R. 4.4; *see* Barkett, *supra* note 14, at 1590–92 (discussing application of the rule); Schaefer, *supra* note 14, at 205-07 (discussing application and adoption of the rule).

744 Schaefer, *supra* note 14, at 206–07, nn.56–57 (collecting state rules).

745 *See* Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy, 860 F.3d 1244, 1259 (9th Cir. 2017) ("When privileged information is turned over inadvertently to a party in the course of discovery, applicable privileges generally are not waived. Fed. R. Evid. 502(b). Far from obtaining the right to share the inadvertently produced documents, the party who mistakenly received the information must 'promptly return, sequester, or destroy' it once notified it is privileged. Fed. R. Civ. P. 26(b)(5)(B)."); Galena Street Fund, L.P. v. Wells Fargo Bank, N.A., No. 12-cv-00587, 2014 WL 943115, at *9–11 (D. Colo. Mar. 10, 2014); Barkett, *supra* note 14, at 1592–93; Schaefer, *supra* note 14, at 216–17; Noyes, *supra* note 14, at 750.

746 *See* Schaefer, *supra* note 14, at 225.

747 Fuller v. Interview, Inc., No. 07 Civ. 5728, 2009 WL 3241542, at *2, n.1 (S.D.N.Y. Sept. 30, 2009).

748 *See* Kelly v. CSE Safeguard Ins. Co., No. 2:08-cv-88, 2011 WL 3494235, at *4 (D. Nev. Aug. 10, 2011) (discussing case).

749 *Fuller*, 2009 WL 3241542, at *3–5.

750 Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617 (W.D. Va. Feb. 9, 2017), *objs. overruled*, 2017 WL 4368617 (W.D. Va. Oct. 2, 2017).

751 *Id.* at *7–8.

proper."[752] The magistrate judge considered but rejected the severe remedy of disqualification,[753] instead levying the costs of motion practice.[754] On review, the district court—after convening a full-blown evidentiary hearing replete with competing experts on professional ethics—excoriated defense counsel's behavior at great length, and strengthened the sanction to an evidentiary bar against any discovery whatsoever predicated on the purloined files.[755]

Faring even worse was plaintiff's counsel in *Bona Fide Conglomerate, Inc. v. SourceAmerica*,[756] where the attorney had obtained from his client and transcribed some twenty-five recordings of the defendant's counsel Robinson during the period at issue in the litigation.[757] SourceAmerica only learned of this when three were cited in the complaint itself, sending a letter demanding their return two weeks later.[758] Plaintiff's counsel refused on the basis of waiver, and motion practice ensued.[759] It was not until a year later that SourceAmerica winkled out that there were twenty-two more such recordings, and renewed its demands for their return.[760] Plaintiff's counsel again demurred, and the tapes appeared (anonymously, obviously) on WikiLeaks within the month.[761] SourceAmerica thereupon moved to exclude the tapes and to disqualify plaintiff's counsel.[762] Reviewing the sordid affair, the district court found the relevant excerpts of the tapes facially privileged, and that Robinson had no authority to waive that privilege, stymieing the plaintiff's attempt to argue for subject matter waiver over all the tapes under FRE 502(a).[763]

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752 *Id.* at *8 ("If defense counsel believed that the circumstances which allowed its access to the information waived any claim of privilege or protection, they should have asked the court to decide the issue before making any use of or disseminating the information. Counsel chose not to do so, however, and, therefore, the court believes that such conduct requires some sanction."); *cf.* Lifewise Master Funding v. Telebank, 206 F.R.D. 298 (D. Utah 2002) (arguing unsuccessfully that waiver should be granted in recompense for proper professional behavior in consulting ethical hotline).

753 *Cf.* Schaefer, *supra* note 14, at 227 (noting courts hesitate to disqualify counsel absent violation of the law).

754 *Harleysville*, 2017 WL 4368617, at *8.

755 *Id.* at *11–17.

756 Bona Fide Conglom., Inc. v. SourceAmerica, No. 3:14-cv-00751, 2016 WL 4361808 (S.D. Cal. Aug. 16, 2016).

757 *Id.* at *2.

758 *Id.*

759 *Id.* at *3.

760 *Id.* at *3–4.

761 *Id.* at *4.

762 *Id.*

763 *Id.* at *7–9.

Turning to the question of disqualification, the court was manifestly not pleased with the lead attorney for Bona Fide—as it turned out, a singularly inapt name.[764] Applying California law of professional responsibility, the court found he had "violated his ethical duties" in continuing to review and transcribe the tapes after being notified of their privilege,[765] and precedent established clearly that counsel could not "hide behind the fact that the privileged documents were provided by his client."[766] Moreover, counsel had used the tapes to craft claims against SourceAmerica, might do so again in the future, and (not to put too fine a point on it) the tapes had *somehow* ended up on WikiLeaks.[767] All this led to one inexorable conclusion: not only would the lead lawyer for plaintiffs be disqualified, but so to would his entire law firm, as the court found that several other attorneys there had disregarded their professional duties as well, tainting the entire organization vicariously.[768] The attempted wielders of privileged materials as a sword against their owner had cut themselves quite deeply indeed.

Yet the federal rules offer few inexorable commands,[769] and parties who attempt in good faith to respond to the appearance or allegations of privilege, avoiding tactical usage of mistakenly disclosed material, will generally be formally absolved of peccadillos.[770] Professional comity and ethics should provide their own guidance when it comes to privilege, as the *Harleysville* magistrate judge recited, but guidance is not a requirement:

> The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility . . . . [W]e emphasize that more is required of lawyers than mere compliance with the minimum requirements of that standard. The traditions of professionalism at the bar embody a level

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764 *Id.* at *9–12.

765 *Id.* at *10–11.

766 *Id.* at *11 (quoting United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 2013 WL 2278122, at *3 (C.D. Cal. May 20, 2013)).

767 *Id.* at *11 ("Here, Bona Fide has already used some of the information in the Robinson Tapes, albeit information deemed not to have been privileged, to craft claims against SourceAmerica. Moreover, another NPA (NTI) has already attempted to use information from the Robinson Tapes against SourceAmerica in its own case and the Robinson Tapes are now publicly available on Wikileaks. Further, Cragg cannot unlearn the privileged information he has had in his possession over two years. Thus, there is the potential that Bona Fide may use privileged information from the Robinson Tapes directly or indirectly in the future.").

768 *Id.* at *11–12.

769 *Cf.* Terrell v. Cent. Wash. Asphalt, Inc., No. 2:11-cv-142, 2015 WL 461823, at *8–9 (D. Nev. Feb. 4, 2015) ("The fundamental command of the Federal Rules of Civil Procedure is 'never to exalt form over substance.'") (quoting Amron v. Morgan Stanley Inv. Advisors Inc., 464 F.3d 338, 343 (2nd Cir. 2006)).

770 *E.g.*, Kelly v. CSE Safeguard Ins. Co., No. 2:08-cv-88, 2011 WL 3494235, at *4 (D. Nev. Aug. 10, 2011).

> of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility.[771]

Few courts can or would *enforce* such highfalutin principles, however;[772] absent egregious behavior, courts will favor the lawyer providing zealous representation (who may indeed be ethically obligated to consider the disclosure)[773] over the one who failed to "zealously protect" the privilege.[774] This accounts for the frequency of inadvertent productions only coming to light at depositions where, as in *Carmody*, the questioning counsel unveils with some fanfare a particularly compromising document.[775] Notably, such circumstances do not generally seem to yield sanctions or even scolding of the party who orchestrated the surprise.[776] Instead, opinions generally address themselves to whether the producing counsel thereupon objected with sufficient urgency to satisfy their remedial duties and effect a clawback.[777] In the FRE 502 era, commentators have called for clearer protections for mistakenly

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771 Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 1041600, at *7 (W.D. Va. Feb. 9, 2017) (quoting the Virginia State Bar Standing Committee on Legal Ethics, in turn quoting Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989)) (alterations original).

772 *See* Jackson v. Deen, No. CV 412-139, 2013 WL 1911445, at *4 (S.D. Ga. May 8, 2013) ("The Eleventh Circuit has interpreted *Snyder* as standing for the proposition that courts can't sanction lawyers for violating some 'transcendental code of conduct' that exists only in the subjective opinion of the court and is divorced from the specific guidance provided by case law, rule, or ethics code.") (citing *In re* Finklestein, 901 F.2d 1560, 1565 (11th Cir. 1990)).

773 *See, e.g.*, *In re* Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 698 (N.D. Ga. 1998) ("If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives . . . ." (citation omitted)) (cited in Schaefer, *supra* note 14, at 224 n.145); EPSTEIN, *supra* note 3, at 622 ("But what is to be done when the privileged documents are crucial? Does counsel, in the name of good sportsmanship, have the right to turn over items of great possible benefit to his or her own client? Probably not."); Schaefer, *supra* note 14, at 246 ("Receiving attorneys as fiduciaries are necessarily—and rightly—influenced by the interests of their own clients."); Noyes, *supra* note 14, at 749–50; Cavaneau, *supra* note 14, at 11–12 ("[I]f counsel has seen work product that includes important information about opposition strategy and thinking, it would be impossible (and perhaps a failure to adequately represent the client) if that information is not taken into account in structuring presentation of the case."). *But see, e.g.*, AAMP of Fla. v. Auto. Data Sol., Inc., No. 8:13–CV–2019, 2015 WL 12844396, at *4 (M.D. Fla. May 21, 2015); Schaefer, *supra* note 14, at 205–06 (noting attorneys may ethically return inadvertent disclosure unread).

774 SEC v. Lavin, 111 F.3d 921, 929 (D.C. Cir. 1997) ("In other words, the holder must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure.").

775 *See* cases cited *supra* notes 699.

776 *Id.*

777 *Compare, e.g.*, Surfcast, Inc. v. Microsoft Corp., No. 2:12-cv-333-JAW, 2013 WL 4039413, at *4–5 (D. Me. Aug. 7, 2013) (finding waiver because of a day's delay) *with* Diamond Car Care, LLC v. Scottsdale Insurance Co., No. 16-Civ-20813, 2017 WL 1293249, at *6 (S.D. Fla. Jan. 10, 2017) (finding such delay reasonable) (discussed *supra* note 497).

produced documents prior to a clawback.[778] Professional conduct rules are likely a necessary component of such a revolution.[779] Even if such advances were to come to pass, however, it ultimately remains the responsibility of every man, woman, and corporation to protect its own privilege with diligence.[780]

D. The New Normal of FRE 502(d) and (e): Contracting for Privilege

Some particularly provident litigants, therefore, may seek to mutually agree with their opponents on more robust protections than the rule provides by default.[781] FRE 502 accommodates such arrangements in subparts (d) and (e),[782] which permit the parties to come to an agreement on inadvertent waivers and clawbacks that will bind them,[783] or to seek an order from the court should they wish the agreement to extend beyond the instant proceedings and parties to the world at large.[784] The provisions in question are terse: one notes that "agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order," whilst the other allows that a "federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[785] The resultant order can be exceedingly brief as

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778 *See, e.g.*, Schaefer, *supra* note 14, at 239–43.

779 *Id.* at 249–53.

780 Galena Street Fund, L.P. v. Wells Fargo Bank, N.A., No. 12-cv-00587, 2014 WL 943115, at *9 (D. Colo. Mar. 10, 2014) ("However, Rule 502(b) does not remove a party's 'responsibility to take reasonable precautions against disclosure of privileged documents and to take reasonable and immediate actions when a disclosure of an otherwise privileged document is discovered.' In addition, '[t]he burden of showing that the privilege has not been waived remains with the party claiming the privilege.'") (citations omitted) (quoting Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959, at *10 (D. Colo. Dec. 14, 2009).

781 *See* Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *7 (S.D. Ohio Aug. 2, 2017); Barkett, *supra* note 14, at 1593–94; Noyes, *supra* note 14, at 687–88; *see also* Caveneau, *supra* note 14, at 11.

782 *Irth*, 2017 WL 3276021, at *7 ("[T]his section 'codifies the well-established proposition' that parties may agree 'to limit the effect of waiver by disclosure between or among them.' These agreements limiting waiver, known as 'clawback' provisions, 'essentially "undo" a document production and allow the return of documents that a party belatedly determines are protected by the attorney-client privilege or work product immunity.' These types of agreements, according to the Fed. R. Evid. 502(d) advisory committee's note, are 'becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery.'") (quoting FED. R. EVID. 502(d)-(e) advisory committee's note to 2008 amendment).

783 FED. R. EVID. 502(e).

784 *Id.* at (d).

785 FED. R. EVID. 502(d)–(e). That these may be cited without resort to block quotation, *see supra* text accompanying note 413, speaks for itself.

well.[786] Various scholars have written more pointedly on the singular subject of these provisions, and this already overburdened Article alights upon them comparatively briefly.[787]

This new policy has been used frequently by litigants, as it only codifies what had become standard practice already.[788] Courts, meanwhile, rightly view a FRE 502(d) order as a route to minimize the extent of privilege disputes laded onto their dockets.[789] Yet the brusqueness of the rule itself has contributed to an unexpected degree of extratextual embroidery by courts seeking to apply it to novel or unforeseen circumstances, or even ordinary ones.[790] As one author has noted, there is "conspicuous absence in FRE 502(d) of any reference to inadvertent disclosure or reasonable steps. The committee notes and recent case law suggest this omission is meaningful."[791] Yet, Judge Grimm observed in his article published not long after the rule's adoption that courts were nonetheless already importing the requirement of reasonableness from FRE 502(b) into orders under FRE 502(d) lacking any such language.[792] The judge objected properly that such an approach contradicts the express guidance to the rule itself,[793] effectively writes FRE 502(d) and (e) out of existence, and sharply compromises the rule's goals.[794] As for why courts could go so far astray, the judge thought the errancy might derive from judicial distaste with

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786 *See, e.g.*, 28 U.S.C.A. RCFC Form 14 (amended eff. May 14, 2018) ("Pursuant to agreement of the parties and the authority granted this court under Fed. R. Evid. 502(d), it is hereby ordered that a party's disclosure, in connection with this litigation, of any communication or information covered by the attorney-client privilege or entitled to work product protection shall not constitute a waiver of such privilege or protection either in this litigation or in any other federal or state proceeding.").

787 *See, e.g.*, Correll, *supra* note 6; Grimm, Bergstrom & Kraueter, *supra* note 14; Noyes, *supra* note 14.

788 *See* FED. R. EVID. 502(d)-(e) advisory committee's note to 2008 amendment; Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 8.

789 *E.g.*, Baez-Eliza v. Instituto Psicoterapeutica de P.R., 275 F.R.D. 65, 67–68 (D.P.R. 2011) (repeatedly advising the parties to consider an FRE 502(d) order to solve their acrimonious discovery disputes and threatening to impose one if they could not proceed amicably); *see* Correll, *supra* note 6, at 1032–33; *id.* at 1067 (noting FRE 502(d) "encourages courts to advance their own interests—specifically their own dockets"); *cf.* Morris v. Scenera Research, LLC, No. 09-CVS-19678, 2011 WL 3808544, at *8 (Super. Ct. N.C. Aug. 26, 2011) (discussing traditional use of agreements to streamline discovery).

790 *See* Irth Sols., LLC v. Windstream Commc's LLC, No. 2:16-cv-219, 2017 WL 3276021, at *7–8 (S.D. Ohio Aug. 2, 2017); East Coast Sheet Metal Fabric. Corp. v. Autodesk, Inc., No. 12–cv–517, 2014 WL 4627262, at *2 (D.N.H. Sept. 16, 2014) ("Borrowing the reasonableness language that appears in Rule 502(b), many courts have read a reasonableness requirement into Rule 502(d).").

791 Close, *supra* note 14, at 23.

792 Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 77–98.

793 *Id.* at ¶ 77 (citing FED. R. EVID. 502(d) advisory committee's note to 2008 amendment).

794 *Id.* at ¶ 79.

departing from a normative standard: "some courts have displayed a misguided reluctance to accept that parties may agree to procedures that would not be deemed reasonable under Rule 502(b)(2) or (3)."[795]

Not all, however; other courts have agreed with Judge Grimm's cogent criticisms, looking as always to the note provided by the Advisory Committee.

> Borrowing the reasonableness language that appears in Rule 502(b), many courts have read a reasonableness requirement into Rule 502(d). However, this court declines to do so. Federal Rule of Evidence 502(d) was adopted for the express purpose of allowing parties to limit the costs associated with screening documents produced during discovery for privileged material. To accomplish this, Rule 502 "seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable." Inserting a reasonableness requirement into Rule 502(d) would thwart this purpose.[796]

The problem has not abated; the court in *Irth Solutions, LLC v. Windstream Communications LLC* recognized in 2017 with a palpable sense of disappointment that

> despite Rule 502's goal of creating uniformity, courts still dispute how to analyze inadvertent disclosures when a cursory clawback agreement exists and alleged carelessness caused an inadvertent production. The United States Court of Appeals for the Sixth Circuit has not yet addressed how clawback agreements and Rule 502(b) interlace—if at all—in a case like this. Without any such guidance, this Court looks outside the Circuit and reviews three approaches taken by courts across the country: (1) if a clawback is in place, it always trumps Rule 502(b); (2) a clawback agreement trumps Rule 502(b) unless the document production itself was completely reckless; and (3) a clawback agreement trumps Rule 502(b) only if the agreement provides concrete directives regarding each prong of Rule 502(b).[797]

The first approach cleaves to Judge Grimm's observations,[798] and follows the actual rule as enacted.[799] An agreement or order providing for plenary indulgence of

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795 *Id.* at ¶ 78.

796 East Coast Sheet Metal Fabricating Corp. v. Autodesk, Inc., No. 12–cv–517, 2014 WL 4627262, at *2 (D.N.H. Sept. 16, 2014) (lineation and citations omitted).

797 Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *7–8 (S.D. Ohio Aug. 2, 2017).

798 *See* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 68–70 (discussing *Rajala* as an exemplar of proper interpretation).

799 *E.g.*, Crissen v. Gupta, No. 12–CV–355, 2014 WL 1431653, at *4–5 (S.D. Ind. Apr. 14, 2014); BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09 CIV. 9783, 2013 WL 2322678, at *9 (S.D.N.Y. May 21, 2013); Rajala v. McGuire Woods, LLP, No. CIV.A. 08-2638, 2013 WL 50200, at *5 (D. Kan. Jan. 3, 2013); Tadayon v. Greyhound Lines, Inc., No. CIV. 10-1326, 2012 WL 2048257, at *1 (D.D.C. June 6, 2012); United States v. Sensient Colors, Inc., No.

all inadvertent waivers, without further requirements, "substitutes for any discovery or evidentiary rules which might otherwise apply,"[800] and "defeat[s] the default operation of Rule 502(b)."[801] It thus properly avoids effectively reading FRE 502(d) and (e) out of existence,[802] "on the theory that the time saved by not doing what the rule contemplates, at least in paragraph (b)(2), is lost if a careful review is still required."[803] After all, if a clawback order did not relax or enhance the requirements imposed to avoid waiver by default under FRE 502(b), it would serve only to restate the obvious.[804] The entire *raison d'être* of these provisions is to allow courts and litigants to depart from the strictures imposed by Congress in favor of procedures tailored to the particular controversy at hand.[805] Based on fundaments of statutory construction and legislative purpose, Judge Grimm is not the only commentator to find this the best—if not the only defensible—methodology.[806]

The second approach likely reflects the distaste in some courts of condoning sloppy legal work,[807] denying protections to parties who are "completely reckless" in their protection of the privilege.[808] To meet such a standard, "the producing party must have shown no regard for preserving the confidentiality of the privileged

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CIV. 07-1275, 2009 WL 2905474, at *2 n.6 (D.N.J. Sept. 9, 2009). *See also* Murphy, *supra* note 14, at 218–19 (predicting that rules of statutory construction will lead to consensus around this approach).

800 Northrop Grumman Sys. Corp. v. United States, 120 Fed. Cl. 436, 437 (Fed. Cl. 2015).

801 *Rajala*, 2013 WL 50200, at *5.

802 *See* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 79.

803 *Northrop Grumman*, 120 Fed. Cl. at 437.

804 *Id.*; Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 77, 79.

805 BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09 CIV. 9783, 2013 WL 2322678, at *9 (S.D.N.Y. May 21, 2013) ("[T]he parties intended, as that Rule permits, to displace the waiver text of that Rule with the more liberal clawback provisions of the Protective Order."); *see* FED. R. EVID. 502(d)-(e) advisory committee's note to 2008 amendment; Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 77, 79.

806 *See, e.g.*, Close, *supra* note 14, at 23-24; Murphy, *supra* note 14, at 218–19; *id.* at 230 (calling a contrary case "an aberration").

807 Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *10–11 (S.D. Ohio Aug. 2, 2017); *cf.* Dyson v. Amway Corp., No. G88-CV-60, 1990 WL 290683, at *2 (W.D. Mich. Nov. 15, 1990) (quoted *supra* note 323).

808 *E.g.*, Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Trust Co., No. 14-CV-04394, 2016 WL 2977175, at *3 (S.D.N.Y. May 20, 2016); United States v. Wells Fargo Bank, N.A., No. 12–CV–7527, 2015 WL 5051679, at *2 (S.D.N.Y. Aug. 26, 2015); U.S. Commodity Futures Trading Comm'n v. Parnon Energy Inc., No. 11 CV 3543, 2014 WL 2116147, at *4–5 (S.D.N.Y. May 14, 2014); Dover v. British Airways, PLC (UK), No. CV 2012–5567, 2014 WL 4065084, at *3–4 (E.D.N.Y. Aug. 15, 2014); HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 75 (S.D.N.Y. 2009).

documents."[809] The primary problem is this standard is imported from pre-FRE-502 case law concerning such agreements,[810] whereas FRE 502 conspicuously omits any mention of recklessness amongst its choices.[811] Courts following the first approach have thus rejoined that, given "no indication that the use of the word 'inadvertent,' which represents only the first of three requirements under Rule 502(b), transforms the clawback provision to one identical to the Rule 502(b) standard," the "addition of another definition term, 'recklessness' in the view of this Court adds nothing to the determination of waiver."[812] Beset by such criticism, this approach appears largely limited to the Second Circuit,[813] and even some courts there have pushed the standard closer to the textually-based first approach.[814]

The third approach is the most perplexing, but enjoys popularity in courts of the Fourth Circuit (and some elsewhere).[815] It acknowledges that the "requirements of Rule 502(b) may be superseded by an agreement between the parties, or by a clawback order," but only if the pact specifies "concrete directives regarding each prong of Rule 502(b)—*i.e.*, (1) what constitutes inadvertence; (2) what precautionary measures are required; and (3) what the privilege holder's post-production responsibilities are to escape waiver. In areas where the order or agreement lacks specifics, Rule 502(b) will control."[816] In cases where an order mirrors the language of FRE 502(b), applying

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809 *HSH Nordbank*, 259 F.R.D. at 75 (quoting Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., No. 96 Civ. 7590, 1997 WL 736726, at *4 (S.D.N.Y. Nov. 26, 1997)).

810 *See id.* (citing U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., No. 97 Civ. 6124, 2000 WL 744369, at *4 (S.D.N.Y. June 8, 2000) and *Prescient Partners*, 1997 WL 736726, at *4.

811 *See supra* notes 554–560 and accompanying text.

812 BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09 Civ. 9783, 2013 WL 2322678, at *9 (S.D.N.Y. May 21, 2013).

813 *See* United States v. Wells Fargo Bank, N.A., No. 12–CV–7527, 2015 WL 5051679, at *2 (S.D.N.Y. Aug. 26, 2015) (noting the analysis undertaken is that used by courts within the Second Circuit).

814 *E.g.*, Royal Park Invests. SA/NV v. Deutsche Bank Nat'l Trust Co., No. 14-CV-04394, 2016 WL 2977175, at *3 (S.D.N.Y. May 20, 2016) (assessing and failing to find recklessness but noting that "the advisory committee note to Rule 502(d) makes clear" that "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party.").

815 *See, e.g.*, Johnson v. Ford Motor Co., No. 3:13–cv–06529, 2015 WL 1650428, at *6 (S.D.W.V. Apr. 14, 2015); Maxtena, Inc. v. Marks, 289 F.R.D. 427, 444 n.16 (D. Md. 2012); U.S. Home Corp. v. Settlers Crossing, LLC, No. 08–1863, 2012 WL 3025111, at *5 (D. Md. July 23, 2012); Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 133 (S.D. W. Va. 2010) (analyzing compliance with clawback order by using FRE 502(b)); Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *4 (S.D. Cal. Jan. 13, 2010); United States v. Sensient Colors, Inc., No. 07–1275, 2009 WL 2905474 (D.N.J. Sept. 9, 2009). *See also* Northrop Grumman Sys. Corp. v. United States, 120 Fed. Cl. 436, 437 (2015) (assuming the third approach applies since it did not control under the facts at hand to "save[] our having to resolve a dispute in the case law").

816 *Johnson*, 2015 WL 1650428, at *6.

relevant precedent as to that language makes sense.[817] But this approach is frankly unintelligible as applied to orders entered under FRE 502(d) providing unconditionally that no waiver will result from inadvertent disclosures,[818] for in such cases the court would have knowingly issued an order unenforceable on its face, accomplishing nothing but misleading litigants into thinking the order modified the FRE 502(b) standard.[819] A court ordering a "general non-waiver provision for privileged or protected materials that are inadvertently disclosed," as in *U.S. Home Corp. v. Settlers Crossing, LLC*,[820] must mean *something* other than the default.[821] If the parties or court wish for precautionary or remedial tests, they may include them, but such requirements ought not be conjured from the air, as did *U.S. Home*.[822] Bafflingly, the court actually quoted Judge Grimm's article as supporting its approach.[823]

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817 *E.g.*, *id.* at *6–9.

818 *See, e.g.*, *Maxtena*, 289 F.R.D. at 444 n.16 ("Importantly, the Confidentiality Order does not define 'inadvertence' and is silent as to either the parties' precautionary or post-production responsibilities to avoid waiver. Hence, all three prongs of Rule 502(b) govern this dispute."); *U.S. Home*, 2012 WL 3025111, at *6 ("Importantly, the Confidentiality Order is silent as to either the parties' precautionary or post-production responsibilities to avoid waiver. Thus, when Judge Connelly interpreted the Confidentiality Order as directing that disputes over privilege or protection claims should be resolved pursuant to Rule 502(b) (see ECF No. 244 ¶ 21), a finding that was not vacated by the Reconsideration Order, it was not clearly erroneous or contrary to law for him to do so. All three prongs of Rule 502(b) govern this dispute.").

819 *See* East Coast Sheet Metal Fabricating Corp. v. Autodesk, Inc., No. 12–cv–517, 2014 WL 4627262, at *2 (D.N.H. Sept. 16, 2014) (quoted *supra* note 796); Correll, *supra* note 6, at 1068–71; Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 93.

820 *U.S. Home*, 2012 WL 3025111, at *6.

821 *See* U.S. Commodity Futures Trading Com'n v. Parnon Energy Inc., No. 11–CV–3543, 2014 WL 2116147, at *4 (S.D.N.Y. May 14, 2014) ("'Inadvertent disclosure provisions in stipulated protective orders are generally construed to provide heightened protection to producing parties,' as protective orders would serve little purpose if "the provisions applied only to documents deemed inadvertently produced under governing caselaw."); *see also* Barkett, *supra* note 14, at 1614–17 (discussing *U.S. Home*); Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 84–85.

822 *U.S. Home*, 2012 WL 3025111, at *6; *accord* Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 133 (S.D. W. Va. 2010) (analyzing compliance with clawback order by using FRE 502(b)); Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *4 (S.D. Cal. Jan. 13, 2010); United States v. Sensient Colors, Inc., No. 07–1275, 2009 WL 2905474, at *2 (D.N.J. Sept. 9, 2009); *see also* Correll, *supra* note 6, at 1068-71 (criticizing uncertainty of 502(d) enforcement); Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 80-92 (analyzing and criticizing *Luna* and *Mt. Hawley*).

823 *U.S. Home*, 2012 WL 3025111, at *6 n.15 ("In other words, the Confidentiality Order's inclusion of a claw-back provision only for inadvertently produced documents necessarily contemplated that some degree of precautionary measures be taken by the parties to avoid waiver.") (quoting Grimm, Bergstrom & Kraueter, *supra* note 14). Judge Grimm states just the opposite: "under Rule 502(d) orders and 502(e) agreements that provide otherwise, the parties need not take reasonable precautions to avoid disclosure of privileged or protected information, because the reasonableness requirements of Rule 502(b)(2) and (3) do not apply to disclosures

As for the relative merits of these approaches, the *Irth* court weighed them at length.[824] Looking to Judge Grimm's article, the court found it an "an abdication of the Court's role to interpret the parties' agreement" to do so in a fashion that would excuse any disclosure whatsoever.[825] It thus rejected the first approach, finding it would encourage sloppy or cursory draftsmanship, compromising the benefits to the parties of a clear and predictable regime.[826] If parties truly wish to eliminate the need for any degree of care, review, or remediation, they must do so explicitly—and the parties to the agreement in question had not.[827] As applying the second and third choice yielded the same result—waiver—there was no need to decide between them.[828] In passing, however, the court expressed sympathy for the third approach, for it ensured that parties could not rely on generic language without attending to the details a court would actually need to apply it.[829]

Ultimately, the *Irth* court was unwilling to permit parties to flout the sanctity of privilege by the expedient of reciprocal absolution, exhibiting some intimations of an unenumerated fourth approach.[830] Even under FRE 502(d) and (e), courts should "grant no greater protection to those who assert the privilege than their own precautions warrant."[831] This philosophy would decline to enforce a clawback agreement under FRE 502(d) or (e) under a more amorphous sense of the overarching purpose of privilege, perhaps implicitly contemplating some version of the fifth

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made pursuant to a Rule 502(d) order or Rule 502(e) agreement." Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 102.

824 Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *9–13 (S.D. Ohio Aug. 2, 2017).

825 *Id.*

826 *Id.*

827 *Id.* at *12–13; *see also* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 100–05.

828 *Irth*, 2017 WL 3276021, at *13–15.

829 *Id.* at *14 ("Instead, the Court views the third approach as appreciating the power of clawback agreements but providing an analytical mechanism for the court to revert back to Rule 502(b)'s requirements if an agreement is so perfunctory that its intentions are not clear. In other words, the third approach gives guidance to courts in reviewing cursory clawback agreements—like the one at issue in this case.").

830 *See id.* at *12 (rejecting the first approach because to "find otherwise would undermine the lawyer's responsibility to protect the sanctity of the attorney-client privilege"); *id.* at *14 ("[A]s the 'guardian' of the attorney-client privilege, it is a lawyer's responsibility to minimize the cracks through which privileged material might slip. The Court believes the second approach adequately recognizes an attorney's responsibility to guard that privilege, and holds an attorney accountable when normal cracks become chasms—as was the case here."); *see also infra* note 832.

831 *Irth*, 2017 WL 3276021, at *12 (quoting United States *ex rel.* Fry v. Health All. of Greater Cincinnati, No. 1:03-CV-167, 2009 WL 2004350, at *2 (S.D. Ohio July 7, 2009)).

Hydraflow factor.[832] *Irth* is not alone in seeking a fourth way: notwithstanding its own order that inadvertent production in the instant litigation "is not a waiver," a District of Massachusetts court disregarded its words and found work product had been waived because it had been "used in a manner contrary to the doctrine's purpose"—namely, inadvertently producing but then failing to claw back or move to seal the documents at issue.[833] Yet such a nebulous test—or indeed anything not anchored to the order or agreement itself—would seem to seriously undermine the certainty interests embodied in FRE 502(d)-(e) and affirmed by *Irth*.[834]

All of the above concerned inadvertent disclosures; what of the effect on intentional disclosures? A handful of courts have found that clawback agreements or orders "govern only waivers by inadvertent disclosure. They are intended to override the common law as to inadvertent disclosure, not displace the entire common law concerning privilege."[835] That, however, is not what the rule says:[836] by its terms, it permits agreements and orders determining the effect of *any* disclosure, not a subset.[837] The text is consistent with the Advisory Committee's guidance, which contemplated the rule would permit for "quick peek" agreements whereunder documents are *intentionally* provided to the opponent without screening on condition that any privileged materials are not waived.[838] Reluctance to permit for the clawback

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832 *See id.* at *11–12 (considering first and foremost "the rationale and purpose of the attorney-client privilege" and an "attorney's responsibility to protect the sanctity of that privilege").

833 Thomas & Betts Corp. v. New Albertson's, Inc., No. 10-11947, 2014 WL 11462825, at *4–5 (D. Mass. July 21, 2014). Perhaps *Thomas & Betts* gets it right after all, however, as the discloser had actually used the document in its case, which probably represents a new and intentional waiver of privilege notwithstanding its earlier inadvertence—if it was inadvertence at all. *See infra* Section VI-C.

834 *Irth*, 2017 WL 3276021, at *11–12; *see* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 99; Murphy, *supra* note 14, at 218–19.

835 Hologram USA, Inc. v. Pulse Evol. Corp., No. 2:14–v–00772, 2016 WL 3654285, at *2 (D. Nev. July 5, 2016) (citing Great-W. Life & Annuity Ins. Co. v. Am. Econ. Ins. Co., 2013 WL 5332410, *10 (D. Nev. Sept. 23, 2013)); *accord* Hostetler v. Dillard, No. 3:13–cv–351–DCB–MTP, 2014 WL 6871262, at *4 (S.D. Miss. Dec. 3, 2014); *see also* Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp., 218 F. Supp. 3d 197, 201 n.1 (E.D.N.Y. 2016) ("Some courts have expressly concluded that non-waiver provisions entered under Rules 502(d) and (e) apply only to inadvertent disclosures."); Potomac Elec. Power Co. v. United States, 107 Fed. Cl. 725, 731–32 (Fed. Cl. 2012).

836 *See* Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., 2009 WL 464989, at *4 (N.D. Tex. Feb. 23, 2009); *cf. In re* Cellular Telephone P'Ship Litig., No. 6885–VCL, 2017 WL 3769202, at *1 n.4 (Del. Ch. Aug. 29, 2017) (citing same); Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 71 ("The defendant [in *Whitaker*] incorrectly argued that the court only could issue such an order with regard to inadvertent disclosures."); *contra Potomac*, 107 Fed. Cl. at 731–32 (attempting to distinguish *Whitaker*).

837 FED. R. EVID. 502(d)–(e).

838 *Id.* advisory committee's note to 2008 amendment; *see* Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *12 (S.D. Ohio Aug. 2, 2017); *see*

of intentionally produced documents appears to stem from concerns it will encourage counsel to engage in sharp practice and tactical deployment of the privilege,[839] and courts have declined to issue such orders (as is their prerogative) under FRE 502(d).[840] There seems no basis to deny parties the right to agree to such tactics via FRE 502(e), however: such agreement can only bind the parties, and thus any disclosures will risk subject matter waiver under FRE 502(a) in any other context.[841]

Other courts have similarly rejected limiting agreements to inadvertent disclosures.[842] On a motion for reconsideration, the plaintiff Tri-State argued that "it is well-settled that 'claw-back provisions . . . govern only waivers by inadvertent disclosure.'"[843] The court was not impressed, as the "the authority Tri-State cites for this 'well-settled' proposition consists of three unpublished district court opinions from other districts, one of them not even in this circuit. This Court is not bound by those authorities."[844] The court accordingly confirmed that the clawback agreement in place prevented waiver even after the privilege's owner failed to object to the inadvertently produced document being offered as an exhibit,[845] a classic circumstance that would ordinarily cause waiver.[846] Notwithstanding that particular court's clemency, it seems many courts would find conduct *other* than an act of "disclosure" under FRE 502(d) and (e) may yet waive privilege,[847] most notably

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also Close, *supra* note 14, at 23; Correll, *supra* note 6, at 1064–65 (noting nothing about a quick-peek disclosure can be called "inadvertent").

839 *See* Correll, *supra* note 6, at 1067 ("This case presents an extreme example: parties were permitted to use Rule 502(d) to agree, some might even say collude, to engage in private discovery proceedings shielded from public view.").

840 *See, e.g.*, Smith v. Best Buy Stores, L.P., No. 4:16-cv-00296, 2017 WL 3484158, at *4 (D. Idaho Aug. 14, 2017); *Potomac* , 107 Fed. Cl. at 730.

841 FED. R. EVID. 502(e); *see* Meyers, *supra* note 9, at 1461.

842 *See* Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., 2009 WL 464989, at *4 (N.D. Tex. Feb. 23, 2009); *see, e.g.* Tri-State Generation & Transmission Ass'n Inc. v. Mitsubishi Int'l Corp., No. CV-14-08115, 2016 WL 7373360, at *1 (D. Ariz. Dec. 20, 2016); Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp., 218 F. Supp. 3d 197, 201 n.1 (E.D.N.Y. 2016); *see* Close, *supra* note 14, at 25 (finding that "parties can choose to waive any requirement for inadvertence, and permit claw-back of even intentionally produced documents under most circumstances").

843 *Tri-State*, 2016 WL 7373360, at *1 (alterations adopted).

844 *Id.*

845 *Id.* at *4.

846 *See* cases cited *supra* note 699.

847 *See* FED. R. EVID. 502 advisory committee's note to 2008 amendment ("The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product.").

putting a matter at issue, or failing to object to a document's use at deposition or trial.[848] What that means is explored in the final sections.

The World of Waiver That Could Be

V. THE LOST BOYS OF FRE 502: WHERE THE RULE FEARS TO TREAD

It is unsurprising FRE 502 did not address such conduct implicating waiver,[849] for it was intended to address ballooning costs in conducting reviews when disclosing documents,[850] and not to rewrite the entirety of privilege precedent,[851] an undertaking that had been decisively rejected in the 1970's.[852] It is more notable, however, that the rule left unaltered two expansive contexts where disclosure regularly occurs, by the limitation of FRE 502(a) and (b) to disclosures "in a federal proceeding": so-called extrajudicial disclosures made outside such a proceeding,[853] and even judicially overseen disclosures made in state proceedings.[854] How courts have responded in these free-for-all zones sheds valuable light on the influence of FRE 502 beyond its terms alone.

A. The Von Bulow *Enigma: The Peculiar Posture of Extrajudicial Disclosures*

The Second Circuit in *Von Bulow* proposed that extrajudicial disclosures usually enjoyed a different status than those in litigation.[855] And FRE 502 (taken together with FRCP 26(b)(5)(B)), whether fully wittingly or not, wrote such a distinction into

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848 *Id.*; Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp., 218 F. Supp. 3d 197, 201 (E.D.N.Y. 2016) ("By their terms, Rules 502(d) and (e) apply only to waiver in connection with *disclosures*, and say nothing of waiver by other means. Accordingly, while an appropriately worded protective order may prevent waiver due to a producing party's *disclosure* of privileged information, that party's subsequent failure to timely and specifically object to the *use* of that information—during a deposition, for example—*can* waive any applicable privilege."); *see, e.g.*, Hologram USA, Inc. v. Pulse Evol. Corp., No. 2:14–v–00772, 2016 WL 3654285, at *2 (D. Nev. July 5, 2016); Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *4–5 (S.D. Cal. Jan. 13, 2010).

849 *Lloyd's*, 218 F. Supp. 3d at 201; *see* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 726.

850 *See generally supra* Part III.

851 *See* FED. R. EVID. 502 advisory committee's note to 2008 amendment; *Hologram USA*, 2016 WL 3654285, at *2; McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 726.

852 *See supra* notes 388–396 and accompanying text.

853 *See infra* Section V-A.

854 *See infra* Section V-B.

855 *In re* Von Bulow, 828 F.2d 94, 101 (2d Cir. 1987).

federal law—but in a potentially contrary manner.[856] *Von Bulow*, it may be recalled, found that disclosures outside of litigation generally do not implicate the sort of tactical, misleading, or selective decision-making that would give rise to subject-matter waiver, at least so long as they are not resuscitated in the course of the lawsuit.[857] Yet, because FRE 502's revisions to the law of waiver are textually limited to disclosures made in a federal proceeding, it is the *protections* of FRE 502(a) and (b) that may not apply to such extrajudicial disclosures, potentially leaving them *more* exposed to waiver, both subject matter and simpliciter, than the same divulgence during discovery.[858]

Predictably, this peculiarity has puzzled courts. The Federal Circuit Court of Appeals took up the applicability of FRE 502(a) in *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*,[859] where a crucial legal opinion by Townsend had been provided to its competitor LG in an effort to persuade it to tender royalties long before the instant litigation commenced.[860] There was no debate that privilege had thus been waived; the vital question was the scope of waiver, which LG contended "should be broad, exposing to discovery a wide swath of attorney-client communications, both pre- and post-dating the Townsend letter."[861] On appeal, Townsend abandoned its position that FRE 502(a) dictated the answer, recognizing the disclosure occurred outside a federal proceeding, and instead arguing the district court had not properly balanced issues of fairness under the common law, which should *always* apply extrajudicially.[862] LG, staking out the opposite position, contended that "an extrajudicial waiver of the attorney-client privilege must always extend beyond the precise matter disclosed, regardless of the circumstances in which the waiver occurs and even when the waiver inures in no benefit whatsoever to the party waiving the privilege."[863]

Recognizing it had no occasion to evaluate FRE 502(a) *per se*, the court of appeals nonetheless felt the "rule illuminates the policy question presented by this appeal."[864] To that the court added the analysis of *Von Bulow*, which it observed had been cited favorably and with regularity in the Ninth Circuit, whose law of privilege

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856 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 736–38; Schaefer, *supra* note 14, at 228. *But see* FED. R. EVID. 502 advisory committee's note to 2008 amendment (indicating awareness that the rule was targeted solely at federal proceeding disclosures).

857 *Von Bulow*, 828 F.2d at 103 (quoted *supra* note 149); *accord* XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24 (1st Cir. 2003); *see* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 730–32 (discussing extrajudicial discloses and *Von Bulow*).

858 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 736–38; Schaefer, *supra* note 14, at 228–30.

859 Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364 (Fed. Cir. 2012).

860 *Id.* at 1366–67.

861 *Id.* at 1368–69.

862 *Id.* at 1369.

863 *Id.*

864 *Id.*

controlled.[865] After reviewing such cases at length, the court of appeals could conclude only that "between the two directions put forward by the parties—one requiring fairness balancing for extrajudicial disclosures, the other barring it—we conclude that the Ninth Circuit's cases support the former far better than the latter."[866] Importing the fairness inquiry from FRE 502(a) also avoided the purportedly poor public policy of differentially applying principles of overarching fairness to disclosures made before and during litigation, a distinction for which LG offered no intelligible rationale.[867] Nor is any apparent, as opting against assessment of fairness would almost by definition be unfair.[868] Declining to apply the required fairness assessment in the first instance, the court of appeals vacated and remanded.[869] *Wi-LAN*'s disposition has proven popular: in 2014, a court observed that "federal courts have held that, in addition to these generally accepted principles, 'fairness' must also be considered in determining whether the waiver should extend to nondisclosed material of the same subject matter, comparable to what Rule 502(a) now explicitly provides for waivers during judicial proceedings and to federal agencies."[870]

Wi-LAN only determined whether to export the fairness balancing test to extrajudicial disclosures under the common law.[871] It left "unresolved whether 'Rule 502(a) governs the scope of waiver resulting from . . . prelitigation disclosure" in the first place—that is, whether its intentionality test controlled.[872] It was left to the Court of Federal Claims to answer that question on its own.[873] First doing so in 2013, the court looked to pre-FRE-502 precedent to conclude that "it appears that subject matter waiver may continue to apply to inadvertent disclosures that occur prior to litigation, albeit in unusual circumstances"—namely, where the disclosure was later wielded

865 *Id.* at 1369–72.

866 *Id.* at 1373.

867 *Id.* ("Nor do the Ninth Circuit's cases suggest any policy reason why the fairness protections available for express disclosures in litigation should be unavailable to those who waive privilege pre-litigation. Such a rule, which LG promotes in this appeal, seems to us bad policy, and we decline to adopt it on the Ninth Circuit's behalf.").

868 *Id.*

869 *Id.*

870 North Dakota v. United States, 64 F. Supp. 3d 1314, 1345 (D.N.D. 2014); *accord Wi-LAN*, 684 F.3d. at 1373; STM Atl. N.V. v. Dong Yin Develop. (Holdings) Ltd., No. 2:18-cv-01269, 2018 WL 6265089, at *10 (C.D. Cal. June 8, 2018) (agreeing); Kan. City Power & Light Co. v. United States, 139 Fed. Cl. 546, 562 (Fed. Cl. 2018).

871 *Wi-LAN*, 684 F.3d. at 1369.

872 Kan. City Power & Light Co. v. United States, 139 Fed. Cl. 546, 562 (Fed. Cl. 2018) (quoting Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 109 (Fed. Cl. 2013)) (alterations reverted).

873 *See Kan. City Power*, 139 Fed. Cl. at 562; *Oasis*, 110 Fed. Cl. at 109-110.

unfairly in litigation to gain an advantage.[874] That inadvertent disclosures prior to litigation might later become susceptible to subject-matter waiver ordinarily foreclosed by FRE 502(a)(1) comported with the purpose of the rule, which was to minimize the costs of electronic discovery *in litigation* by providing a blanket immunity from such a severe penalty.[875] Even so, such waiver would only be available so far as fairness demanded.[876] Returning to the question in 2018, the court reaffirmed that in extrajudicial contexts "not explicitly contemplated by FRE 502(a), the weight of authority suggests that the scope of subject matter waivers are premised on fairness considerations akin to those required by the evidentiary rule."[877]

The Seventh Circuit weighed in as well in *Appleton Papers, Inc. v EPA*,[878] arising in the context of a Freedom of Information Act (FOIA) request.[879] The district court had permitted the EPA to withhold as work product the information underlying certain reports that had already been made public, applying FRE 502(a) to deny subject matter waiver because fairness did not demand the withheld materials be considered together with the reports.[880] Looking to common law, the court of appeals found nothing untoward with the government promulgating a final report whilst reserving inchoate drafts and analyses.[881] Appleton's contention the disclosure was misleading, selective, and unfair under FRE 502(a) was unavailing in a FOIA inquiry.[882] Appleton "cannot

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874 *Oasis*, 110 Fed. Cl. at 109–10 (discussing Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987) and Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 309 (Fed. Cl. 2002)).

875 *Id.*; *see* Sullivan v. Warminster Twp., 274 F.R.D. 147, 154 (E.D. Pa. 2011) ("Courts generally hold that disclosures that occur outside the context of a judicial proceeding do not implicitly waive the privilege as to all communications on the same subject matter."); *see also* Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC, No. 17 CVS 22738, 2018 WL 5892737, at *7 (N.C. Super. Nov. 8, 2018) (describing federal law).

876 *Oasis*, 110 Fed. Cl. at 110.

877 *Kan. City Power*, 139 Fed. Cl. at 562.

878 Appleton Paper, Inc. v. EPA, 702 F.3d 1018, 1026 (7th Cir. 2012).

879 *Id.* at 1020–22.

880 *Id.* at 1022 ("The district court next rejected API's argument that 'because some of the results of the consultant experts' were released in the consent decrees, work product immunity no longer applied to 'all of the underlying technical data and other materials underlying those results.' The district court cited Federal Rule of Evidence 502(a)(2). Under this rule, subject matter waiver occurs only if the undisclosed material 'ought in fairness be considered together' with the disclosed material. The district court applied the rule and found that the government's submissions in the consent decrees were passive and did not result in waiver.").

881 *Id.* at 1025–26 (discussing *In re* Sealed Case, 676 F.2d 793, 817 (D.C.Cir. 1982); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222 (4th Cir. 1976); United States v. Nobles, 422 U.S. 225, 238 n. 11 (1974)).

882 *Appleton*, 702 F.3d at 1026 ("API argues the district court erred by 'allowing the [g]overnment to use the portions of the consultant's opinions that it believes are helpful, while hiding the analysis and the complete opinions from the public view.' But these sorts of fairness concerns are not relevant to a FOIA inquiry.").

make this argument in a FOIA case; it must make it in an actual litigation," admonished the court, because FRE 502(a) only applies in active suits and "whether the undisclosed material ought to be considered with the disclosed material requires a case-specific analysis of the subject matter and adversaries," which is a question quite "beyond the purview of FOIA requests."[883] Thus all extrajudicial disclosures, advertent and inadvertent, may yield subject-matter waiver in any ensuing litigation should fairness so demand, functionally applying the FRE 502(a)(3) standard.[884]

There remained the reverse question of whether the FRE 502(b) standard might too be exported to excuse waiver entirely for inadvertent disclosures outside litigation where due care was demonstrated, arising most frequently in the context considered by the Seventh Circuit: public records laws such as FOIA.[885] As one court noted, "because the plain language of Evidence Rule 502(b) governs disclosures made 'in a federal proceeding,' and the disclosures at issue here were made initially in response to public records requests pursuant to Ohio Rev. Code § 149.43, the 'clawback' provision of Evidence Rule 502(b) arguably does not apply."[886] The court declined to decide, however, for the distinction made little difference: if FRE 502 did not apply, the court would simply look to the factors in place prior to FRE 502, which embodied the very test adopted by the rule itself.[887] Finding no evidence the government had taken any precautions to screen for privilege, and that their diligence in responding to the appearance of privileged documents was questionable, the court found waiver.[888]

In doing so, it followed *Eden Isle Marina, Inc. v. United States*, in which, prior to instituting suit against the government, plaintiff's counsel had providently made multiple FOIA requests, yielding fifteen boxes worth of material.[889] After a lawsuit was duly filed, however, it came to light that these productions had inadvertently contained privileged material.[890] Finding no guidance on what standard to apply to the presuit disclosures, the court adopted "a common-sense approach," concluding:

> that it should treat the documents disclosed by the Corps prior to suit as if they were disclosed while the suit was pending. This conclusion is reinforced by the fact that all of the documents disclosed by the Corps to plaintiff prior

883 *Id.*

884 *See id.*; Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1373 (Fed. Cir. 2012); Kan. City Power & Light Co. v. United States, 139 Fed. Cl. 546, 562 (Fed. Cl. 2018).

885 *E.g.*, Talismanic Props., LLC v. Tipp City, 309 F. Supp. 3d 488, 494 (S.D. Ohio 2017); De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *6 & n.6 (D.N.M. May 21, 2013), *objs. overruled*, 2013 WL 12330083 (D.N.M. June 26, 2013); Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 500–02 n.20 (Fed. Cl. 2009).

886 *Talismanic*, 309 F. Supp. 3d at 494.

887 *Id.* at 494–95.

888 *Id.*

889 *Eden Isle*, 89 Fed. Cl. at 489–90 ("Prior to instituting suit against the Corps, plaintiff's counsel performed due diligence by making 'multiple' Freedom of Information Act ('FOIA') requests to the Corps.").

890 *Id.* at 500.

> to plaintiff's institution of suit relate to the subject matter of the instant suit, as well as the fact that the parties involved in the prelitigation disclosure are identical to the parties in this suit.[891]

Thusly fortified with a rule of law, the court recited the tests of precautions and remediation taken under the newly-passed FRE 502(b),[892] and found the diligence evinced with respect nearly all of the inadvertently produced documents severely lacking, calling for waiver.[893] Indeed, construing (rather dubiously)[894] the government's conduct as "sufficiently careless and reckless to be intentional," the court also considered subject-matter waiver under FRE 502(a)(3), but ultimately demurred, finding the disclosures formed no "scheme to bolster its defense," "lacked any strategic value," and "have not adversely impacted plaintiff's ability to prosecute its case."[895]

Some are unpersuaded by *Eden Isle*'s "common-sense approach." The District Court of New Mexico in *De Los Santos v. City of Roswell* confronted privilege in a police report that had been disclosed to the plaintiff prior to the suit under a state public records statute, the Institutional Public Records Act (IPRA).[896] The court thought the question simple: it was not disclosed in a federal proceeding, and thus common law rather than FRE 502 applied.[897] Acknowledging its difference of opinion with *Eden Isle*, the court nonetheless maintained that "[b]ecause Rule 502 was not intended to replace the common law of waiver, I see no reason to treat the documents here as disclosed during the litigation. Under the common law, the disclosure of documents both before and during litigation can operate as waiver."[898] Discussing the three

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891 *Id.* at 500–01.

892 *Id.* at 501–02.

893 *Id.* at 520 ("Defendant failed to provide the court with sufficient information to evaluate its screening procedures for preventing disclosure. Indeed, the multiple disclosures of some of the documents suggest that defendant's screening procedures were inadequate. In addition, defendant permitted witnesses to continue to testify at deposition about the privileged documents, even after lodging objections to such testimony. And, defendant made inadequate efforts to rectify its disclosures upon discovery."); *see e.g.*, *id.* at 506–20 (discussing each document in depth).

894 *See supra* notes 554–566 and accompanying text (discussing how assessment of intent is binary).

895 *Eden Isle*, 89 Fed. Cl. at 520–21.

896 De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *6–7 (D.N.M. May 21, 2013), *objs. overruled*, 2013 WL 12330083 (D.N.M. June 26, 2013).

897 *De Los Santos*, 2013 WL 12330144, at *6–7 ("Because the police report was not disclosed in a federal proceeding or to a federal office or agency, Rule 502 does not apply to it. Instead, the common law governs.").

898 *Id.* at n.6. Ironically, it turned out that the police report had actually been produced in discovery as well, and to *that* disclosure FRE 502 unquestionably applied. The district court nonetheless overruled the objections to the magistrate's report, finding that De Los Santos had done such a deficient job of raising that point over numerous arguments that he had waived the argument. *See De Los Santos*, 2013 WL 12330083, at *3–4 (D.N.M. June 26, 2013).

twentieth-century schools of waiver, the court opted for the middle fork and found no waiver under the facts at hand.[899] Still, although the *De Los Santos* court's chosen test was tantamount to FRE 502(b)'s factors, its reasoning raises the possibility a strict or lenient court could deny the protections of FRE 502 to public records disclosures antecedent to litigation and revert to old habits.[900]

In the context of public records requests, it would encourage gamesmanship to permit a private litigant to file such a request prior to commencing a case in lieu of discovery during the case to gain advantage over a government opponent.[901] Asymmetrically, documents produced at the behest of the federal government fall expressly within FRE 502's protection even outside litigation or another federal proceeding.[902] Moreover, the burden and costs of complying with FOIA and its like are hardly different in kind or scope than any discovery request in litigation,[903] the central concern animating the adoption of FRE 502.[904] And It has long been settled law that "FOIA was not intended to supplement or displace the rule of discovery,"[905] yet that is exactly what the *De Los Santos* approach might incentivize if applied in courts quick to find waiver. Given all this, the *Eden Isle* approach importing the FRE 502(b) factors seems better and comports with the general trend towards harmonizing analyses of fairness under FRE 502 with those for disclosures occurring outside of federal proceedings.[906]

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899 *De Los Santos*, 2013 WL 12330144, at *8.

900 *Cf. id.* ("Courts have taken three different approaches to the issue. Some—most notably the D.C. Circuit—have held that any disclosure of privileged information, regardless of whether it was inadvertent, waives the privilege. Others have held that inadvertent disclosures never waive privilege. The majority of courts, however, have applied a fact-specific balancing approach.") (internal citations omitted).

901 *Cf.* Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 500–02 & n.20 (Fed. Cl. 2009).

902 FED. R. EVID. 502(a)-(b) (limiting rule to disclosures "made in a federal proceeding *or to a federal office or agency* . . .") (emphasis added).

903 *See, e.g.*, Williams & Connolly, 662 F.3d 1240, 1245 (D.C. Cir. 2011) (discussing applicability of work product waiver in the context of the burden imposed by the 600,000 FOIA requests received in 2010); Meeropol v. Meese, 790 F.2d 942, 945–56 (D.C. Cir. 1986) (discussing what was then "perhaps the most extensive FOIA request ever made" ultimately leading to review of half a million pages and production of 200,000 over ten years); Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973); *cf.* Dep't of Justice v. Tax Analysts, 492 U.S. 136, 156 (1989) (Blackmun, J., dissenting) ("The result of its now-successful effort in this litigation is to impose the cost of obtaining the court orders and opinions upon the Government and thus upon taxpayers generally. There is no question that this material is available elsewhere. But it is quicker and more convenient, and less 'frustrat[ing],' for respondent to have the Department do the work and search its files and produce the items.") (citation omitted).

904 *See, e.g.*, Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 109–10 (Fed. Cl. 2013).

905 John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

906 *Cf., e.g.*, Kan. City Power & Light Co. v. United States, 139 Fed. Cl. 546, 562 (Fed. Cl. 2018) (finding importation of fairness standard comports with common law); North Dakota v.

B. State Responses to Federal Developments

Notwithstanding the glaring issue posed by FOIA and equivalent laws, the greater lacuna in FRE 502's attempt at regularization of discovery is its lack of application to privilege in state proceedings. This presumably derives from Congress's impotence to dictate rules of law regarding privilege to states as sovereigns of their own judiciaries.[907] The Rule's drafters strove quite perceptibly to exercise all the power Congress had on the subject,[908] providing that disclosures qualifying under FRE 502 in state proceedings would not be treated as waived in subsequent federal venues absent a contrary state law or order, and that a federal court order under FRE 502(d) would bind a state court.[909] In doing so, the rule exempted itself from the universal limitation of the Federal Rules of Evidence to federal proceedings, and the ordinary deference to state rules of decision that would control elsewhere.[910] Indeed, Professor Henry S. Noyes of Chapman University, amongst others,[911] has argued cogently that FRE 502 exceeds Congress's power in attempting to regulate the definition of privilege and waiver thereof under state law, noting that states had historically possessed plenary and pervasive authority on the subject that Congress was now displacing.[912]

Belying any discomfort, quite a number of states and other jurisdictions have enacted cognate rules mirroring to a greater or lesser extent FRE 502.[913] State courts too have eagerly adopted federal common law appurtenances as well, particularly in the *Hydraflow* balancing factors to ascertain waiver following inadvertent

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United States, 64 F. Supp. 3d 1314, 1345 (D.N.D. 2014) (finding fairness consideration required under common law).

907 *See* Noyes, *supra* note 14, at 700–02; Meyers, *supra* note 9, at 1464–66; Broun & Capra, *supra* note 9, at 249.

908 *See* Broun & Capra, *supra* note 9, at 263 ("Ultimately, the Advisory Committee determined that it would be overreaching to try to control disclosures made at the state level, and that it should focus on the consequences of disclosures initially made in federal proceedings.").

909 FED. R. EVID. 502(c)-(d); *see* Noyes, *supra* note 14, at 695–97; Meyers, *supra* note 9, at 1463–65; Broun & Capra, *supra* note 9, at 218–19; *id.* at 240–46.

910 FED. R. EVID. 502(f); *cf. id.* at 101, 1101, 501.

911 *See, e.g.*, Emery, *supra* note 14, at 283–84; Meyers, *supra* note 9, at 1465–67.

912 *See* Noyes, *supra* note 14, at 700–42; *see also* Emery, *supra* note 14, at 285 (noting state plenary power over attorney regulations).

913 The Sedona Conference, *The Sedona Principles of Protection of Privileged ESI*, 17 SEDONA CONF. J. 99, 199–04 (2016) ("Since Federal Rule 502 was enacted in September 2008, a number of states have adopted versions of Federal Rule 502."); *see In re* Adoption of V.I. Rules of Evid., Prom. No. 2017-002, 2017 WL 1293843, at *8–9 (V.I. Apr. 3, 2017) ("*SOURCE: FRE Rule 502*. This provision has been adopted in the federal courts and many other jurisdictions because of the concerns over document production errors in 'heavy discovery' cases and the possibility of inadvertent disclosure of paper and electronic records.").

disclosure.[914] Although state rules often track their federal cognates,[915] some states have maintained divergences or provided interpretive notes addressing questions that have plagued their federal counterparts.[916] Massachusetts courts, for example, have made clear that a parties' own agreement overrides the default definition of inadvertence and requirements for clawbacks, short-circuiting the lengthy debates of Section IV-D.[917] The Supreme Court of Illinois, whilst acknowledging ambivalence in federal courts on subject-matter waiver in extrajudicial disclosures,[918] adopted the *Von Bulow* rule declining to order broad waiver as more persuasive.[919] The same questions remain open in other states; both state and federal courts have acknowledged that Texas's analogue rules do "not appear to govern the effect of disclosures that do not occur in discovery," leaving subject-matter waiver uncertain.[920] So too in Delaware chancery, where the court surveyed federal law on FRE 504(d) in finding its breadth virtually unlimited and designed to be tailored to "difficult discovery problems," and applied the same reasoning to its own counterpart.[921]

To take one example, Robert A. Brown has chronicled how Oklahoma acted directly after the passage of FRE 502 to amend its own law in response.[922] Its version of subparts (a) and (b) was virtually identical,[923] albeit reversing their order.[924] Brown

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914 *See, e.g.*, Tucker v. CompuDyne Corp., 18 N.E.3d 836, 842 & n.1 (Ohio Ct. App. 2014); Morris v. Scenera Research, LLC, No. 09 CVS 19678, 2011 WL 3808544, at *10 (N.C. Super. Ct. Aug. 26, 2011); *see* Walton v. Mid-Atlantic Spine Specialists, P.C., 694 S.E.2d 545, 550–51 & n.3 (Va. 2010); Sitterson v. Evergreen Sch. Dist. No. 114, 196 P.3d 735, 741–42 & n.8 (Wash. Ct. App. 2008).

915 *See* Sedona Conference, *supra* note 913, at 199–01; *e.g.*, Crespo v. Cooperativa de Ahorro, No. ISCI201500211, 2016 WL 5357410, at *5 n.29 (P.R. Trib. Apel. June 30, 2016) ("Esta regla proviene de la Regla 502 de Evidencia Federal..."); McAfee v. State, 467 S.W.3d 622, 643 n.4 (Tex. Ct. App. 2015) ("Effective April 1, 2015, Rule 511 was revised to conform with Federal Rule of Evidence 502.").

916 *See* Sedona Conference, *supra* note 913, at 202–04.

917 918 *See* Vigor Works, LLC v. White Skanska, JV, No. 16-02146, 2019 WL 1027891, at *2 (Mass. Super. Feb. 12, 2019) ("Consistent with the suggestion in the Reporter's Notes to the 2014 amendments the court will use the parties' own quite lengthy Clawback Agreement to measure inadvertence.").

918 *See* Ctr. Partners, Ltd. v. Growth Head GP, LLC, 981 N.E.2d 345, 363 n.5 (Ill. 2012).

919 *See id.* at 362–63.

920 *See In re* FEDD Wireless LLC, No. 14-18-00892-CV, 2019 WL 190704, at *4 n.5 (Tex. Ct. App. Jan. 15, 2019) (quoting Alpert v. Riley, 267 F.R.D. 202, 209 n.2 (S.D. Tex. 2010)).

921 *In re* Cellular Tel. P'Ship Litig., No. 6885-VCL, 2017 WL 3769202, at *1–2 (Del. Ch. Aug. 29, 2017).

922 Robert A. Brown, *The Amended Attorney-Client Privilege in Oklahoma: A Misstep in the Wrong Direction*, 63 OKLA. L. REV. 279 (2011).

923 12 OKLA. STAT. § 2502(E)-(F) (Supp. 2009).

924 *See* Brown, *supra* note 922, at 300–01.

predicted that the standards governing subject matter waiver would thus "result in application of the same test" as the federal rule.[925] Similarly, the mirrored text on inadvertent waiver "should mimic the Federal Rule of Evidence 502 approach and take the middle ground between never treating inadvertent disclosure as a waiver and always treating inadvertent disclosure as a waiver."[926] This was seemingly purposeful and felicitous: "the closer the new rule is to the Federal Rule, the more case law for persuasive precedent will be at the Oklahoma court's disposal."[927] On the other hand, the Oklahoma statute expressly embraced the selective waiver principle that had been rejected in FRE 502, limiting the scope of subject-matter waiver even further than the federal rule.[928] And it wholly omitted any analogue to FRE(d) and (e) approving of agreements and orders modifying the default standard.[929] Brown ultimately criticizes the legislative choices made,[930] but the empowering effect of FRE 502 seems clear in providing a national standard replete with ample interpretive law from which states can pick and choose the elements they find expedient: a jurisprudential buffet.[931]

States courts have generally been mindful of the interplay between state and federal privilege law. In *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*,[932] an Illinois appellate court assuaged the plaintiffs' concerns that the state protective order under consideration might be interpreted differently in related federal litigation, and any disclosure made pursuant thereto waived.[933] Such fears were "entirely baseless": the relevant law of privilege was well-established and similar in both fora; principles of comity would incline any federal court to defer to a state court order; and most importantly, FRE 502(c) expressly provided disclosures pursuant to state law would not implicate waiver in a federal proceeding.[934] Tilting even further towards consistency, a Massachusetts court simply adopted FRE 502(a) and (b) wholesale, finding the tests faithfully reflected state law and "basic fairness," echoing a distinctly *Mendenhall* view of waiver:[935] "It bears

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925 *Id.* at 303.

926 *Id.* at 306.

927 *Id.*

928 *Id.* at 304–06.

929 *Id.* at 310.

930 *Id.* at 310–14.

931 *Id.* at 280–81.

932 Robert R. McCormick Found. v. Arthur J. Gallagher Risk Mgmt. Servs., Inc., 110 N.E.3d 1081 (Ill. App. 2018).

933 *Id.* at 1087.

934 *Id.*

935 Greenleaf Arms Realty Trust I, LLC v. New Bos. Fund, Inc., 2012 WL 5316014, at *4–5 (Mass. Super. Aug. 8, 2012) ("Massachusetts has departed from 'traditional view . . . that, once the contents of a document had become public regardless of the means by which this came about, the document's confidentiality and privilege had been destroyed,' favoring instead the more '[m]odern' rule that 'the inadvertent loss, interception, or disclosure of privileged

remembering that the attorney-client privilege belongs to the *client*. That the client's representative has let the cat out of the bag, inadvertently and without authorization, should not entitle the adverse party to take the horse, the dog, the hamsters, and the goldfish too."[936]

The trend in state courts after FRE 502 has thus been away from Wigmore and generally towards the balanced approach endorsed by the rule.[937] In late 2018, a North Carolina superior court provided a thoughtful summary of the subject-matter waiver landscape with reference to the federal rule.[938] The plaintiff had argued for the "bright-line rule" that intentional disclosure mechanically yields subject matter waiver, a proposition that admittedly may "find support in some federal cases," and of course Wigmore, if the selective disclosure is patently misleading.[939] "Few courts would question this rationale" in the sword-and-shield context, but such a rule "loses its force" as applied to inadvertent disclosures or even intentional ones lacking prejudice, for then the broader waiver "would cure no harm" and could only be viewed as punitive.[940] Discerning that the "modern trend decidedly favors a balanced approach" after looking to the Federal Circuit in *Wi-LAN*, the court found the cabining of subject matter waiver in FRE 502(a) and the Advisory Committee note persuasive.[941] As no unfair advantage or prejudice was even intimated, the court held against subject matter waiver.[942]

The subject of waiver for inadvertent disclosure has received more august attention, from the Supreme Court of Virginia,[943] which took notice at the outset of the newly promulgated FRE 502(b) endorsing the *Lois Sportswear* and *Hartford Fire*

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communications does not destroy the privilege, so long as reasonable precautions against such disclosure are taken.'") (quoting *In re* Reorg. of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda), 681 N.E.2d 838, 841 (Mass. 1997)).

936 *Id.* at *4–5.

937 *See* Walton v. Mid-Atlantic Spine Specialists, P.C., 694 S.E.2d 545, 550–52 (Va. 2010) ("This approach avoids the extremes of an across-the-board rule of waiver when a communication has been produced, an approach often attributed to Dean Wigmore, or a blanket 'no waiver' rule which would hold that negligence by counsel or a producing party can never constitute waiver for lack of clear and intentional decision to waive protections."); *accord* Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC, No. 17 CVS 22738, 2018 WL 5892737, at *7 (N.C. Super. Nov. 8, 2018); Greenleaf Arms Realty Trust I, LLC v. New Bos. Fund, Inc., 2012 WL 5316014, at *4–5 (Mass. Super. Aug. 8, 2012).

938 Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC, No. 17 CVS 22738, 2018 WL 5892737, at *6–8.

939 *Id.* at *6.

940 *Id.* at *7.

941 *Id.*

942 *Id.* at *8 ("Here, too, the Court perceives no risk of unfair prejudice. N2 disclosed Schor's communication to Technetics outside of litigation and in the context of the parties' contract negotiations. Technetics does not argue that N2 has used the disclosure to gain an unfair advantage in this litigation, and the Court is not aware of any such advantage.").

943 Walton v. Mid-Atlantic Spine Specialists, P.C., 694 S.E.2d 545, 550–52 (Va. 2010).

factors.[944] Also recognizing that "inadvertent production of a privileged document is a specter that haunts every document intensive case," the court made clear that both knowingly (but mistakenly) and unknowingly producing a documents may qualify as inadvertent.[945] As for whether waiver ensues, the court embraced the language of FRE 502(b) nearly word for word, finding "waiver may occur if the disclosing party failed to take reasonable measures to ensure and maintain the document's confidentiality, or to take prompt and reasonable steps to rectify the error," along with the five factor test from *Lois Sportswear* for use in interpreting those tests.[946] Finding precautions deficient, a delay of eighteen months in remediating, and that the document's exclusion had allowed counsel to "engage in questioning that had significant potential to mislead the jury" without fear of impeachment, the high court held the failure to find waiver to be reversible error, sending the case back for retrial.[947]

VI. WHITHER WAIVER: THE PILGRIM'S PROGRESS TO A MORE PERFECT PRIVILEGE

As the Virginia disposition illustrates, all of these academic-seeming arguments about principles of privilege can have very real consequences: the outcome of a jury trial was overthrown and the suit sent back for a presumably expensive and time-consuming redo.[948] Yet the case did offer at least one salutary efficiency; thenceforth, Virginia courts confronting similar privilege scenarios would enjoy controlling guidance from the highest court in the state, ensuring a more predictable regime of privilege going forward.[949] That, at least, is how the American judicial system is supposed to work.[950]

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944 *Id.* at 550 n.3 ("We note that the recently promulgated Federal Rule of Evidence 502(b) adopts general standards concerning whether the party holding the privilege or protection took reasonable steps to prevent disclosure, and promptly took reasonable steps to rectify the error after inadvertent disclosure. The drafters state that they intend to make available for consideration the factors articulated in *Lois Sportswear* and *Hartford Fire Ins. Co. v. Garvey*.").

945 *Id.* at 551–52 (quoting New Bank of New England v. Marine Midland Realty Corp., 138 F.R.D. 479, 479–80 (E.D. Va. 1991)).

946 *Id.* at 552; *cf.* Fed. R. Evid. 502(a)(2)-(3) ("the holder of the privilege or protection took reasonable steps to prevent disclosure" and "the holder promptly took reasonable steps to rectify the error").

947 *Id.* at 555.

948 *Id.* at 554.

949 *See, e.g.*, Bergano v. City of Va. Beach, 821 S.E.2d 319, 322 (Va. 2018) (quoting *Walton*); N. Va. Real Estate, Inc. v. Martins, 720 S.E.2d 121, 136 (Va. 2012) (same).

950 *See* Columbia Broadcasting Sys. v. Am. Soc. of Composers, 620 F.2d 930, 934–35 (2d Cir. 1980) ("[C]ourts, especially appellate courts, have an entirely legitimate function of elucidating principles of law, fairly raised by litigation, even if the resulting pronouncements are not absolutely required for the precise decision reached."); Arizona *ex rel.* Pennartz v. Olcavage, 30 P.3d 649, 652 (Ariz. Ct. App. 2001); Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 177 (2005) ("Appellate courts should be key players in the consultative and interactive process of sentencing guidance and communication. Appellate

A. The Dogs That Didn't Bark:[951] *Addressing the Absence of Appellate Guidance*

In the federal law of privilege, however, a myriad misunderstandings and disagreements arise from a surprising lacuna: that the courts of appeals have virtually never taken up the minutiæ of privilege at issue under FRE 502.[952] District courts in every circuit are thus to be found prefacing analyses with the mantra that their respective court of appeals has not yet decided the issue, and thus they can look only to the precedent of their peers.[953] This inevitably leads to the promulgation of yet more precedents (of greater or lesser persuasiveness), which in turn multiplies divides as lower courts align with each gradation of school and subschool, uncorralled by a singular shepherd.[954] As the *De Los Santos* district court observed pointedly, absent

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review ought to be the fulcrum around which guided sentencing systems revolve."); David G. Post & Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1069, 1084 (1996) ("After all, appellate courts have expertise in formulating issues, and, we believe, providing guidance and usable precedent is their primary responsibility."); *see generally* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007).

951 "In Sir Arthur Conan Doyle's story, Inspector Gregory posited that a stranger had stolen a race horse from Colonel Ross's barn in the night. But Sherlock Holmes asked how he could explain the 'curious incident' of the guard dog's silence. Holmes later revealed that the dog was silent because the thief was the horse's trainer, a person familiar to the dog." United States v. Lopez, 518 F.3d 790, 798 n.2 (10th Cir. 2008) (citing SIR ARTHUR CONAN DOYLE, *The Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 7 (1894)).

952 *E.g.*, United States v. Broombraugh, No. 14-40005-10, 2017 WL 2734636, at *4 (D. Kan. June 26, 2017) ("Federal Rule of Evidence 502, still relatively new, resulted from a series of events dating back to 1975. Still, much remains unsettled about the rule. Indeed, the court could not locate a single case from our Circuit that has reviewed a district court's application of this rule.") (citations omitted); *see also infra* notes 996–1005 and accompanying text (reviewing the sparse precedent).

953 *See, e.g.*, *In re* Testosterone Replacement Therapy Prod. Litig., 301 F. Supp. 3d 917, 924–25 (N.D. Ill. 2018) ("The Seventh Circuit has not addressed this issue. Nor have courts in the Northern District of Illinois taken a uniform approach."); STM Atl. N.V. v. Dong Yin Develop. (Holdings) Ltd., No. 2:18-cv-01269, 2018 WL 6265089, at *10 (C.D. Cal. June 8, 2018); Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *9 (W.D. Va. Oct. 2, 2017); Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *9 (S.D. Ohio Aug. 2, 2017) ("The United States Court of Appeals for the Sixth Circuit has not yet addressed how clawback agreements and Rule 502(b) interlace—if at all—in a case like this. Without any such guidance, this Court looks outside the Circuit and reviews three approaches taken by courts across the country."); *Broombraugh*, 2017 WL 2734636, at *4; De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013); Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F. Supp. 2d 845, 850 (E.D. Mich. 2010); Grain v. Trinity Health, Mercy Healthy Servs., Inc., No. 03-72486, 2009 WL 1868543, at *6 (E.D. Mich. June 26, 2009).

954 *E.g.*, *Testosterone*, 301 F. Supp. 3d at 924–25; *Irth*, 2017 WL 3276021, at *9; *De Los Santos*, 2013 WL 12330083, at *5; *see* Correll, *supra* note 6, at 1076 (discussing how lack of appellate guidance on FRE 502 is problematic because "if more discretion is afforded to individual trial judges, then rulings could vary more significantly from judge to judge and from

controlling precedent, there is nothing beyond persuasiveness to guide a judge in following a sister court in Massachusetts, Iowa, or elsewhere.[955] Such a vicious cycle is not the way the law is supposed to develop or arguments are meant to proceed,[956] as one court explained with a tale about the problems attendant to privilege:

> The parties in this case have flung case law from all over the country at each other. I am reminded of the anecdote about an appellate court judge who, when counsel relied on a single, lonely district court case from another Circuit for his entire argument, interrupted the lawyer to say: "Counsel, you can find a district court in this country that will say anything." The point for counsel is that it should focus on what guidance the court of appeals for this Circuit has provided.[957]

What is one to make of the courts of appeals that haven't barked? The silence can be explained in part by the fact that an adverse decision on privilege is not entitled to interlocutory appeal.[958] Under the collateral order doctrine first enunciated in 1949,[959] to qualify for immediate appeal an order "must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'"[960] This is an exacting and narrow exception;[961] the Supreme Court has found denial of class certification,[962] disqualification of counsel,[963] and disregard of a forum selection

court to court"); *see also* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶ 99 (noting disarray in interpretation amongst courts).

955 *De Los Santos*, 2013 WL 12330083, at *5 ("[T]here is case law from other circuits that rely on this committee note. I see nothing clearly erroneous about the Judge Wormuth's reliance on these legal sources in lieu of cases from the Southern District of Iowa and the District of Massachusetts . . . . Since there is no published Tenth Circuit case discussing the elements of 'fairness,' Judge Wormuth was required to consider only that which he found to be the most persuasive in order to resolve this matter."); *accord Irth*, 2017 WL 3276021, at *9–13 (reviewing approaches by numerous courts around the country and choosing amongst them).

956 *Cf.* sources cited *supra* note 950.

957 D'Onofrio v. SFX Sports Grp., Inc., No. 06-687, 2010 WL 3324964, at *4 (D.D.C. Aug. 24, 2010).

958 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109–10 (2007); *see* Correll, *supra* note 6, at 1075–76; Murphy, *supra* note 14, at 232.

959 *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

960 Lauro Lines v. Chasser, 490 U.S. 495, 498 (1989) (quoting Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431 (1985) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

961 Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

962 *See Coopers & Lybrand*, 437 U.S. at 468–69.

963 *See Richardson-Merrell*, 472 U.S. at 439–41.

clause[964] all fall short—even if the order would sound the "death knell" of the litigation.[965] It appears only to have been consistently applied where the order works a deprivation of the right "not to be tried," as under double jeopardy, or absolute immunity from suit in a civil context, because the very continuance of proceedings works the harm.[966] Orders denying privilege never readily fit within that ambit,[967] especially as the Court progressively tightened the screws on the standard.[968] Finally, in 2009, the Court ruled squarely in *Mohawk Industries, Inc. v. Carpenter* that adverse privilege rulings cannot be entertained by interlocutory appeal.[969]

In doing so, it rejected the rationales of the minority of circuits that had theretofore allowed such appeals.[970] The Third Circuit had reasoned that an ordinary appeal "cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. At best, on appeal after final judgment, an appellate court could send the case back for re-trial without use of the protected materials. At that point, however, the cat is already out of the bag."[971] The Ninth Circuit agreed that "once privileged materials are ordered disclosed, the practical effect of the order is often 'irreparable by any subsequent appeal.' This case is one of those in which '[o]nce "[t]he cat is already out of the bag," it may not be possible to get back in.'"[972] And the D.C. Circuit observed that in the event of reversal and retrial, the privileged material "will have been disclosed to third parties, making the issue of privilege effectively moot," quoting its previous precedent holding that compelled divulgence "followed by appeal after final judgment is obviously not adequate in [privilege] cases—the cat is out of the bag."[973]

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964 *See Lauro*, 490 U.S. at 498.

965 *See Coopers & Lybrand*, 437 U.S. at 473–77.

966 *See Lauro*, 490 U.S. at 499 (collecting cases).

967 *Cf.* Midland Asphalt Corp. v. United States, 489 U.S. 794, 801–02 (1989) (declining to allow appeal denying dismissal based on violation of Fed. R. Crim. Proc. 6(e) forbidding disclosure of secret grand jury information).

968 *See* Dig. Equip. Corp v. Desktop Direct, Inc., 511 U.S. 863, 873–84 (1994) (discussing *Midland Asphalt* at length and emphasizing narrowness of the doctrine).

969 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109–10 (2009).

970 *See id.* at 105 n.1 ("Three Circuits have permitted collateral order appeals of attorney-client privilege rulings. The remaining Circuits to consider the question have found such orders nonappealable.") (citations omitted).

971 *In re* Ford Motor Co., 110 F.3d 954, 963–64 (3d Cir. 1997), *abrogated by Mohawk*, 558 U.S. at 105–09.

972 *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1088 (9th Cir. 2007) (citations omitted), *abrogated by Mohawk*, 558 U.S. at 105–09.

973United States v. Phillip Morris Inc., 314 F.3d 612, 619–20 (D.C. Cir. 2003) (quoting *In re* Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998)), *abrogated by Mohawk*, 558 U.S. at 105–09.

Absent interlocutory appeal, no appellate guidance would now be forthcoming until after the privilege has been forfeited and the case completed.[974] The Supreme Court offered a number of responses to this predicament.[975] First, the Court found no "discernible chill" on attorney-client communications given the remote chance a district court will wrongly deny privilege, as compared to the far greater "possibility that they will later be required by law to disclose their communications for a variety of reasons" not involving judicial error.[976] Second, there remained safety valves for worthy causes: courts of appeals retained the discretionary authority to authorize an interlocutory appeal on novel legal questions, as well as to correct manifest injustices via writ of mandamus.[977] Third, a party may "defy a disclosure order and incur court-imposed sanctions," permitting final judgment to be reached without the privileged material, albeit at potentially great cost.[978] And the sanction of criminal contempt can itself be appealed from directly.[979] But given the structural burden of allowing appeal as of right from every discovery order implicating privilege, the collateral order doctrine must bar it as a matter of course.[980]

The Seventh Circuit had its own explanation for the fact that "even orders to produce information over strong objections based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone."[981] (Indeed, in that circuit not even a fine for civil contempt occasioned by refusing court-ordered production is subject to interlocutory appeal,[982] although jurisdiction still lies should the conscientious objector be jailed for the contempt.)[983]

> It is too late in the day to waste words explaining why interlocutory orders, and discovery orders in particular, are not appealable despite their irreversible costs. Because almost all interlocutory appeals from discovery

974 *See* Correll, *supra* note 6, at 1075–76.

975 *Mohawk*, 558 U.S. at 109–13.

976 *Id.* at 110 ("The breadth of the privilege and the narrowness of its exceptions will thus tend to exert a much greater influence on the conduct of clients and counsel than the small risk that the law will be misapplied.").

977 *Id.* at 110–11.

978 *Id.* at 111 ("District courts have a range of sanctions from which to choose, including 'directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action,' 'prohibiting the disobedient party from supporting or opposing designated claims or defenses,' or 'striking pleadings in whole or in part.'") (citations omitted).

979 *Id.* at 111–12.

980 *Id.* at 112–13 ("Were this Court to approve collateral order appeals in the attorney-client privilege context, many more litigants would likely choose that route. They would also likely seek to extend such a ruling to disclosure orders implicating many other categories of sensitive information, raising an array of line-drawing difficulties.").

981 Reise v. Bd. of Regents, 957 F.2d 293, 295 (7th Cir. 1992).

982 *Id.* (citing Powers v. Chicago Transit Authority, 846 F.2d 1139 (7th Cir. 1988)).

983 *Id.* (citing Sibbach v. Wilson & Co., 312 U.S. 1 (1941)).

> orders would end in affirmance (the district court possesses discretion, and review is deferential), the costs of delay via appeal, and the costs to the judicial system of entertaining these appeals, exceed in the aggregate the costs of the few erroneous discovery orders that might be corrected were appeals available.[984]

The Supreme Court's fearful foreclosure of innumerable interlocutory appeals is perhaps understandable,[985] especially given the efflorescence of debate amongst the district courts on every aspect of FRE 502.[986] But the Seventh Circuit's sanguine view of predictable affirmances presupposes that the law of privilege is already well-settled and thus district courts know the standards to which they must adhere.[987] That is assuredly not the case with FRE 502, for the *Mohawk* opinion arrived just in time to cut off all interlocutory appeals of issues arising under the new rule.[988] Even after *Mohawk*, the D.C. Circuit has persevered in the belief that discovery orders of privileged information are "effectively unreviewable on appeal from a final judgment," for when "the information is disclosed, the 'cat is out of the bag' and appellate review is futile"[989]—though *Mohawk* now foreclosed more timely review.[990] rue, courts had taken up review of privilege decisions in mandamus,[991] a route left intact by the Supreme Court.[992] But mandamus is not available as of right, demands truly extraordinary circumstances, and thus affords only the most meager of chances of prompt appellate attention.[993]

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984 *Id.*

985 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109–13 (2009). It did, however, run athwart a strikingly similar assumption of interlocutory jurisdiction in a case of privilege some two decades earlier. *See infra* note 1067.

986 *See generally supra* Section IV.

987 *See* Reise v. Bd. of Regents, 957 F.2d 293, 295 (7th Cir. 1992).

988 FRE 502 entered into effect on September 19, 2008. *See supra* note 417, whilst *Mohawk* was decided just over a year later, on December 8, 2009. *Mohawk*, 558 U.S. at 100. Although in theory this might have afforded a small window through which an interlocutory appeal might slip, no cases did so before the bar was lowered.

989 Al Odah v. United States, 559 F.3d 539, 544 (D.C. Cir. 2009); *see also In re* Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998).

990 *Mohawk*, 558 U.S. at 109–10.

991 *See, e.g.*, Rhone–Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 861 (3d Cir.1994) (reviewing order forfeiting privilege in mandamus and collecting cases doing same).

992 *Mohawk*, 558 U.S. at 110–11; *see, e.g.*, *In re* OptumInsight, Inc., No. 2017-11, 2017 WL 3096300, at *3 (Fed. Cir. July 20, 2017); *In re* Pac. Pictures Corp., 679 F.3d 1121, 1128–29 (9th Cir. 2012).

993 *See Mohawk*, 558 U.S. at 111 & n.3 ("Mohawk itself petitioned the Eleventh Circuit for a writ of mandamus. It has not asked us to review the Court of Appeals' denial of that relief."); Correll, *supra* note 6, at 1075–76 ("Given the extraordinary difficulty attendant to securing mandamus relief and Rule 502(d)'s ability to ameliorate the worst superficial consequences of

The paucity of decisions addressing FRE 502 after final judgment confirms it is not serving as an effective avenue of review. It might have been explicable if odd that no court of appeals had formally opined on the FRE 502 factors a year or two after its promulgation,[994] but the fact that none has done so over ten years except the Seventh Circuit—and that only briefly[995]—is telling.[996] In 2017, a district court lamented "a dearth of authority in the Fourth Circuit, and in federal law generally, as to the definition of an 'inadvertent disclosure' under the meaning of Rule 502."[997] Of the grand total of *sixteen* appellate decisions in any posture even mentioning the rule over the decade from September 2008 to 2018, three noted the applicability of covenants on privilege in one sentence,[998] one simply confirmed a disclosure was never privileged at all,[999] one addressed successor corporation authority in privilege,[1000] two found FRE 502 did not apply given the extrajudicial context,[1001] and six offered no analysis of the rule whatsoever,[1002] leaving only three discussing the standards of FRE 502(a) or (b) that have animated battalions of lower court opinions.[1003] Of these last three, two were unreported, making the Seventh Circuit opinion in *Carmody* the

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compelled disclosure, district courts would ap pear to have virtually unreviewable authority to compel disclosures as they see fit.").

994 *See* Murphy, *supra* note 14, at 232 ("Accordingly, as of June 11, 2011, there is no reported federal appellate court opinion on FRE 502.").

995 Carmody v. Bd. of Trs., 893 F.3d 397, 405–06 & n.2 (7th Cir. 2018).

996 *See supra* notes 537–539 and accompanying text.

997 Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *9 (W.D. Va. Oct. 2, 2017).

998 *See In re* Grand Jury, 740 F. App'x 243, 248 (4th Cir. 2018); Auto. Sols. Corp. v. Paragon Data Sys., Inc., 756 F.3d 504, 518 n.6 (6th Cir. 2014); *In re* Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012).

999 *See* Sky Angel U.S., LLC v. Discovery Commc'ns, LLC, 885 F.3d 271, 276 (4th Cir. 2018).

1000 *See In re* OptumInsight, Inc., No. 2017-11, 2017 WL 3096300, at *3 (Fed. Cir. July 20, 2017).

1001 *See* Appleton Papers, Inc. v. EPA, 702 F.3d 1018, 1026 (7th Cir. 2012); Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1368–70 (Fed. Cir. 2012).

1002 *See* Ground Zero Ctr. For Non-Violent Action v. U.S. Dep't of Navy, 860 F.3d 1244, 1259 (9th Cir. 2017); *In re* Queen's Univ. at Kingston, 820 F.3d 1287, 1314 n.12 (Fed. Cir. 2016) (Reyna, J., dissenting); Greene v. Philadelphia Housing Auth., 484 F. App'x 681, 686 (3d Cir. 2012); Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 160 n.1 (3d Cir. 2012); Avgoutis v. Shinseki, 639 F.3d 1340, 1343 (Fed. Cir. 2011); Hernandez v. Tanninen, 604 F.3d 1095, 1100 n.1 (9th Cir. 2010).

1003 *See* Carmody v. Bd. of Trs., 893 F.3d 397, 405–06 & n.2 (7th Cir. 2018); Bayliss v. N.J. State Police, 622 F. App'x 182, 186 (3d Cir. 2015); New Phoenix Sunrise Corp. v. C.I.R., 408 F. App'x 908, 918–19 (6th Cir. 2010).

only precedential opinion in play.[1004] A majority of the courts of appeals never so much as cited FRE 502 in the ensuing decade, whether in dicta, footnote, dissent, or otherwise.[1005]

Moreover, of the sixteen cases, a third sounded in mandamus,[1006] whilst the other two-thirds arose on direct appeal,[1007] a peculiar proportion on the presumption that claims of privilege were to ordinarily be raised by the latter route.[1008] Are litigants simply failing to raise the many discrepancies in privilege approach amongst the district courts on appeal of final judgments?[1009] The result in one of the unreported decisions, *New Phoenix Sunrise Corp. v. C.I.R.*, may explain why.[1010] There, the district court had found disclosure of a tax opinion yielded subject-matter waiver on all related material as construed rather amply, admitting a number of such documents into evidence.[1011] On appeal, New Phoenix argued the waiver had been overly broad in compelling release of documents unrelated to the opinion, but the Sixth Circuit found it unnecessary to decide, for any overbreadth was "clearly harmless."[1012] The ordinary standard is decisive: there is little way for appellants to prove a trial court abused its discretion via a contrafactual hypothetical of how a case might have eventuated absent a wrongly imposed subject-matter waiver, for with the cat out of the bag, there is no way anyone will ever really know.[1013] Small wonder few have sought to meet such an imponderable burden even in cases of relatively clear error.[1014]

1004 *See* cases cited *supra* note 1003.

1005 Those would be the First, Second, Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits. *See* cases cited *supra* notes 998–1003.

1006 *Grand Jury*, 740 F. App'x 243; *OptumInsight*, 2017 WL 3096300; *Queen's Univ.*, 820 F.3d 1287; *Pac. Pictures*, 679 F.3d 1121; *Hernandez*, 604 F.3d 1095.

1007 *Sky Angel*, 885 F.3d 271; *Carmody*, 893 F.3d 397; *Ground Zero*, 860 F.3d 1244; *Bayliss*, 622 F. App'x 182; *Auto. Sols.*, 756 F.3d 504; *Appleton*, 702 F.3d 1018; *Wi-LAN*, 684 F.3d 1364; *Greene*, 484 Fed. App'x 681; *Race Tires*, 674 F.3d 158; *Avgoutis*, 639 F.3d 1340; *New Phoenix*, 408 F. App'x 908.

1008 *See* Reise v. Bd. of Regents, 957 F.2d 293, 295 (7th Cir. 1992).

1009 Apparently, the answer is yes. *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 705.

1010 *New Phoenix*, 408 F. App'x at 908.

1011 *Id.* at 918.

1012 *Id.* at 919–20.

1013 *See In re* Ford Motor Co., 110 F.3d 954, 963–64 (3d Cir. 1997) ("[T]he party will be similarly irremediably disadvantaged by erroneous disclosure. '[A]ttorneys cannot unlearn what has been disclosed to them in discovery'; they are likely to use such material for evidentiary leads, strategy decisions, or the like.") (quoting Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992)), *abrogated by* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 105–09 (2007).

1014 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 705 ("Rulings over attorney-client privilege are rarely appealed, and the standards of appellate review are typically

Courts of appeals seem to intuitively understand that waiting to resolve privilege disputes on appeal until after a case concludes means they may *never* be resolved.[1015] (According to the Seventh Circuit, of course, there is scarce *to* resolve.)[1016] Even before *Mohawk*,[1017] panels in circuits dubious of appeal under the collateral order doctrine had been struggling to somehow justify jurisdiction to address privilege claims contemporaneously, without first "letting the 'cat out of the bag' and precluding effective appellate review at a later stage."[1018] Thus in *Stolt-Nielsen SA v. Celanese AG*,[1019] the Second Circuit was first able to rationalize jurisdiction over an interlocutory appeal to an order directing a non-party attorney to testify on the better-accepted theory that a non-party "cannot be expected to risk a contempt citation rather than comply with the subpoena" simply because a party objects to the testimony.[1020] With that authority established, the court then assumed pendent jurisdiction over the ordinary *inter partes* privilege dispute that would be barred by the collateral order doctrine.[1021] Such machinations are clever indeed, but few cases will have a convenient third-party by which to bootstrap claims so long as *Mohawk* stands athwart review of run-of-the-mill privilege quarrels; indeed, it is not pellucid that the *Stolt-Neilsen* maneuver even survives *Mohawk*.[1022]

This state of affairs seems unlikely to abate soon, though one might optimistically presume the courts of appeals will *eventually* confront and decide amongst the many competing philosophies, however long that may take.[1023] But even that ostensible

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deferential. For example, in the Second Circuit, determinations about the scope of waiver are reviewed under the abuse of discretion standard.").

1015 *See, e.g.*, cases cited *supra* notes 971–973, 989.

1016 *See* Reise v. Bd. of Regents, 957 F.2d 293, 295 (7th Cir. 1992) (quoted *supra* note 984).

1017 *Cf.* cases cited *supra* note 970.

1018 *In re* Katz, 623 F.2d 122, 124 (2d Cir. 1980).

1019 Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 575–76 (2d Cir. 2005).

1020 *Id.* at 575 (citing *In re* Grand Jury Proceedings, 219 F.3d 175, 182 n.3 (2d Cir. 2000)).

1021 *Id.* at 575–76 ("Appellate jurisdiction over the order enforcing the Stolt subpoenas is less clear under traditional finality principles, for the reasons discussed above. However, because we have clear jurisdiction over Stolt's appeal involving the O'Brien subpoena, we may exercise pendent jurisdiction over the appeal involving the related Stolt subpoena.").

1022 *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 110–12 (2007) (providing several reasons beyond the ability to risk contempt by disobedience why interlocutory appeal is inappropriate in the case of privilege disputes); *cf. In re* Air Crash at Belle Harbor, N.Y., 490 F.3d 99, 104–08 (2d Cir. 2007) (distinguishing *Stolt-Neilsen* and finding an attorney to a party enjoys no exception to ordinary collateral order doctrine).

1023 *See, e.g.*, Murphy, *supra* note 14, at 232 ("As the substantive issues in these cases are tried and some of the cases are appealed, we will begin to have an indication about how U.S. appellate courts will interpret FRE 502."); *see also* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 705 ("The scope of Rule 502, and the ways in which the rule impacts the Classic and Modern Views (and vice versa), may not be addressed by the appellate courts for some time.").

inevitability is dubious: FRE 501 was enacted in the 1970s,[1024] and Wigmore penned his magnum opus establishing much of modern privilege law in 1904.[1025] Nevertheless, district courts still lament regularly in contexts outside FRE 502 that their courts of appeals had not yet provided direction on numerous crucial nuances of privilege—after the passage of over a century![1026] As surveyed above, most courts of appeals did not formally hold which of three great schools should be broadly followed, let alone the innumerable subschools and other gradations of privilege.[1027] District courts bickered amongst themselves in reading the tea leaves of cryptic appellate dicta and footnotes in vain attempts to prise out guidance from obscurity.[1028] It was precisely to such a state of confusion that FRE 502 addressed itself.[1029] If the future of privilege precedent from the courts of appeals is to look anything like the past, the new rule will suffer from the same dearth of clear appellate direction—and the omens so far are not auspicious.[1030]

1024 FED. R. EVID. 501; *see* Noyes, *supra* note 14, at 682–83.

1025 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Little, Brown & Co. 1904); *see* Edward J. Imwinkelried, *Introduction to the Treatise: The New Wigmore in Perspective*, *in* THE NEW WIGMORE: A TREATISE ON EVIDENCE (3d ed. 2019).

1026 *See, e.g.*, Gates Corp. v. CRP Indus., Inc., No. 1:16-cv-01145, 2018 WL 4697326, at *7 n.20 (D. Colo. Aug. 10, 2018) ("The federal case law in this circuit is more ambiguous on this point, implying perhaps that the burden remains always on the privilege holder to prove that waiver does not apply."); Logsdon v. BNSF Ry. Co., No. 8:15 CV 232, 2017 WL 1411500, at *2 (D. Neb. Apr. 19, 2017); Apple, Inc. v. Samsung Elecs. Co., 306 F.R.D. 234, 240 n.28 (N.D. Cal. 2015); Baylon v. Wells Fargo Bank, N.A., No. 12-0052, 2012 WL 12819981, at *4 (D.N.M. Dec. 21, 2012); TransWeb, LLC v. 3M Innovative Props. Co., No. 10-cv-4413, 2012 WL2878076, at *7 (D.N.J. Apr. 12, 2012); Clena Invs., Inc. v. XL Specialty Ins. Co., No. 0:10-CV-62028, 2011 WL 13217140, at *4 (S.D. Fla. Sept. 2, 2011); Terrell v. OTS, Inc., No. 1:09–CV–626, 2011 WL 864501, at *1 (N.D. Ga. Mar. 9, 2011); Traficante v. Homeq Servicing Corp., No. 9-746, 2010 WL 3167435, at *1 (W.D. Pa. Aug. 10, 2010); City of New York v. Coastal Oil N.Y., No. 96 Civ. 8667, 2000 WL 145748, at *2 (S.D.N.Y. Feb. 8, 2000); Chick-fil-A v. ExxonMobil Corp., 2009 WL 3763032, at *3 (S.D. Fla. Nov. 10, 2009) ("There is very little primary authority from the Eleventh Circuit Court of Appeals on what constitutes waiver of the work product privilege, but the overwhelming majority of persuasive authority from other circuits holds that voluntary disclosure of work product information to an adversary waives work product protection as to that information") (quoting Wood v. Archbold Med. Ctr., Inc., No. 7:07-CV-109, 2009 WL 3063392, at *2 (S.D. Ga. Sept. 17, 2009)); McCook Metals L.L.C., v. Alcoa Inc., 192 F.R.D. 242, 251 (N.D. Ill. 2000); *see also* Walker v. GEICO Indem. Co., No. 6:15-cv-1002, 2016 WL 11578803, at *10 (M.D. Fla. July 11, 2016) ("Counsel have not cited a case from the Eleventh Circuit stating which view it will follow.").

1027 *See supra* notes 284–295 and accompanying text.

1028 *See, e.g.*, *supra* note 292 (detailing differences of opinion on approach to privilege in the Tenth Circuit); *id.* at 293 (same in the Seventh Circuit); *id.* at 294–295 (same in the First Circuit).

1029 *See* FED. R. EVID. 502(b) advisory committee's note to 2008 amendment.

1030 *See* Correll, *supra* note 6, at 1076 ("The lack of interlocutory review occasioned by these orders presents two important problems. First, it again undermines the ability of clients to rely upon the privilege at the time they decide to share confidential information with their counsel. Second, it could destroy the uniformity and predictability Rule 502(d) was supposed to create.

B. The Cats That Lack a Sack: Balancing Privilege with the Search for Truth

The absence of appellate review is therefore particularly problematic where subject matter waiver is under consideration, for a court may wrongly compel the divulgence of strictly confidential material.[1031] Such orders advance the search for the truth, but only by running roughshod over privilege.[1032] Truth, however, can be a wily object, as in *United States v. Pinho*, where the defendant had testified that she had never spoken with her counsel regarding a pending subpoena after being directed to fabricate invoices that were later submitted to a grand jury.[1033] Later, the defendant resisted the peculiar notion that she had thereby waived privilege over her nonexistent conversation with counsel.[1034] Citing a parallel case from the Fourth Circuit, the court ordered waiver,[1035] for "if Defendant was telling the truth and no conversations occurred, she would have nothing to claim privilege over."[1036] On the other hand, if the "attorney would testify that he told Defendant about the subpoena or that the documents were going to be submitted to the grand jury, those statements would directly contradict the factual assertions that Defendant made in her direct examination about the contents of her communications with her attorney."[1037] With potential perjury in the air, the court found that the attorney could be compelled to testify to the truth.[1038]

After all, if more discretion is afforded to individual trial judges, then rulings could vary more significantly from judge to judge and from court to court."); Murphy, *supra* note 14, at 232; *see also* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 705. It need hardly be added that the Supreme Court itself has even more rarely addressed itself to privilege, whether before or under FRE 502, though such an intervention providing clear interpretation of FRE 502 would be most welcome.

1031 *E.g.*, cases cited *supra* notes 970–972.

1032 *See In re* Ford Motor Co., 110 F.3d 954, 963–64 (3d Cir. 1997) (quoted *supra* note 1013); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992) ("If opposing counsel is allowed access to information arguably protected by privilege before an adjudication as to whether privilege applies, a pertinent aspect of confidentiality will be lost, even though communications later deemed to be privileged will be inadmissible at trial," and that "attorneys cannot unlearn what has been disclosed to them in discovery."); *see also* D'Onofrio v. SFX Sports Grp., Inc. 256 F.R.D. 277, 280 (D.D.C. 2009).

1033 *See* United States v. Pinho, 2003 WL 2577243, at *1–2 (E.D. Pa. July 2, 2003).

1034 *Id.* at *3.

1035 Hawkins v. Stables, 148 F.3d 379 (4th Cir. 1998).

1036 *Pinho*, 2003 WL 2577243, at *4.

1037 *Id.*

1038 *Id.* ("In addition, we find Defendant's waiver in this case to be even more compelling than the waiver in *Hawkins*. Defendant affirmatively raised this issue at trial during her own direct examination. Repeatedly throughout her testimony, Defendant indicated that her counsel did not contact her about the subpoena. It was Defendant who purposefully injected this lack of

1. Privilege as an Exception to Truth-Seeking

By contrast, with inadvertent disclosures the cat is already out of the bag.[1039] In such cases, FRE 502's rejection of *Sealed Case* and Wigmore, and adoption of a standard that permits such mistakes to be clawed back, runs more vividly athwart the eternal search for truth.[1040] Once a document has been disclosed, it cannot be unread or unconsidered by opposing counsel;[1041] such was the straightforward lesson of Wigmore.[1042] A clawback, however, is meant precisely to "essentially 'undo' a document production."[1043] FRE 502 contemplates that clawbacks will be repossessed from the receiving party and their usage or entry into evidence foreclosed in the judicial proceeding at hand.[1044] An order under FRE 502(d) can ensure the inadvertent

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communication with counsel into the first trial. It would make little sense to now permit her to assert attorney-client privilege with regard to this subject.").

1039 *See* Stinson v. City of New York, No. 10 Civ. 4228, 2014 WL 5090031, at *3 (S.D.N.Y. Oct. 10, 2014) ("The Second Circuit in *Chase* was primarily concerned that attorneys could not 'unlearn what ha[d] been disclosed to them' and that in disclosing the documents, before an adjudication as to whether privilege applied, 'a pertinent aspect of confidentiality w[ould] be lost, even though communications later deemed to be privileged w[ould] be inadmissible at trial.' *Id*. Here, the 'bell has already been rung' as the Documents have already been produced to and seen by the Plaintiffs prior to Defendants' September 16 Letter seeking to claw back the Documents.") (discussing Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165–66 (2d Cir. 1992)); Emery, *supra* note 14, at 244.

1040 *See generally* Laura Catherine Daniel, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663 (2005); *cf.* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337 (2014) (critiquing broader right to confidentiality given burden on truth-seeking and other externalities); Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction*, 88 INT'L REV. RED CROSS 245 (2006) (examining in international context).

1041 *See Stinson*, 2014 WL 5090031, at *4; *Chase*, 964 F.2d at 165; FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992).

1042 *See* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464–65 (E.D. Mich. 1954) (quoted *supra* notes 61–62).

1043 Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582, at *3 (D. Kan. July 22, 2010); *accord* Thomas & Betts Corp. v. New Albertson's, No. 10-11947, 2014 WL 11462825 (D. Mass. July 21, 2014) (quoting same); Great-West Life & Annuity Co. v. Am. Econ. Ins. Co., No. 2:11-cv-02082, 2013 WL 5332410, at *10 (D. Nev. Sept. 23, 2013) (same); *see also* Noyes, *supra* note 14, at 757–58.

1044 FED. R. EVID. 502(b); *see, e.g.*, Cormack v. United States, 117 Fed. Cl. 392, 401 (Fed. Cl. 2014) ("Because the e-mail in question is protected under the work-product doctrine and Systems has not waived that protection, a claw-back order is appropriate. Pursuant to Fed. R. Evid. 502 (b) and RCFC 26(b)(5)(B), Mr. Cormack's counsel must destroy or return the sequestered copy of the e-mail. The filing containing Exhibit 3 will be stricken from the record, and Mr. Cormack is directed to resubmit that filing without reference to the e-mail."); *Great-West*, 2013 WL 5332410, at *10; *Rajala*, 2010 WL 2949582, at *3.

disclosure does not constitute waiver elsewhere.[1045] Protective orders may detail yet more byzantine structures if the situation warrants it by, for example, imposing something like a "fruit of the poisonous tree" bar,[1046] under which no discovery predicated on the privileged material may be sought.[1047]

Of course, courts exclude evidence from consideration all the time;[1048] weighty tracts of the Federal Rules of Evidence are devoted to detailing such procedures.[1049] The various categories of inadmissible hearsay, together with ramified exceptions and exemptions, have bedeviled many a law student and practitioner alike[1050]—in such cases, the concern is generally that the evidence is not suitably reliable for consideration.[1051] Other times, inadmissibility is due to impropriety or error in obtaining the evidence, as with the exclusionary rule barring documents or testimony obtained in violation of the Fourth Amendment.[1052] The impetus there is not reliability, but rather deterrence of state overreach and refusal to rely on tainted evidence.[1053] That species of inadmissibility seems closer philosophically to that contemplated by inadvertently disclosed privilege,[1054] where the client would

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1045 FED. R. EVID. 502(d); *see, e.g.*, *Great-West*, 2013 WL 5332410, at *10; Potomac Elec. Power Co. v. United States, 107 Fed. Cl. 725, 731–32 (Fed. Cl. 2012); *Rajala*, 2010 WL 2949582, at *4–5.

1046 The term "fruit of the poisonous tree," refers to the exclusion of evidence acquired because of an earlier constitutional violation, and has enjoyed a long history in Supreme Court cases after its coining in 1939. *See* Nardone v. United States, 303 U.S. 338, 340 (1939); *accord, e.g.*, Nix v. Williams, 467 U.S. 431, 441 (1986); Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

1047 *E.g.*, Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *15–17 (W.D. Va. Oct. 2, 2017).

1048 *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 153–54 (1945); *see also* Meyers, *supra* note 9, at 1442–43.

1049 *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 1:2 (4th ed. suppl. 2018).

1050 *See* FED. R. EVID. 801–807.

1051 *See* MUELLER & KIRKPATRICK, *supra* note 1049 § 8:1; MICHAEL H. GRAHAM, 6 HANDBOOK OF FEDERAL EVIDENCE § 801:0 (8th ed. suppl. 2018); *see also* Meyers, *supra* note 9, at 1443.

1052Mapp v. Ohio, 367 U.S. 643, 655–58 (1961); Weeks v. United States, 232 U.S. 383, 391–93 (1912).

1053 *See Mapp*, 367 U.S. at 656–60.

1054 *Compare, e.g.*, cases cited *supra* note 1046, *with* Harleysville Ins. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *15–17 (W.D. Va. Oct. 2, 2017) (applying similar exclusions of fruit of the poisonous tree), *and* Trammel v. United States, 445 U.S. 40, 50 (1980) (holding privilege applies only where it trumps the need for truth), *with Mapp*, 367 U.S. at 659 (applying similar principle in excluding evidence obtained illegally).

otherwise be unfairly deprived of its protections due to a mistake made by another.[1055] Privilege recognizes that sometimes a great principle must trump the search for truth.[1056] Nonetheless, as with other constructs of evidentiary exclusion,[1057] clawbacks for privilege would take a certain facility with Orwellian doublethink to "unknow" something that is, in fact, known to court and counsel.[1058]

This contrafactual construct that the privileged document's disclosure is somehow undone[1059] would be particularly offensive to truth-seeking in the context of impeaching false statements, as adumbrated in *Pinho*.[1060] Consider a recent hypothetical posed by Justice Samuel Alito in *Pena-Rodriguez v. Colorado* underscoring the sacrosanctity of privilege:

> Suppose that a prosecution witness gives devastating but false testimony against a defendant, and suppose that the witness's motivation is racial bias. Suppose that the witness admits this to his attorney, his spouse, and a member of the clergy. Suppose that the defendant, threatened with conviction for a serious crime and a lengthy term of imprisonment, seeks to compel the attorney, the spouse, or the member of the clergy to testify about the witness's admissions. Even though the constitutional rights of the defendant hang in the balance, the defendant's efforts to obtain the testimony would fail.[1061]

1055 *See* Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990); Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982).

1056 *See Trammel*, 445 U.S. at 50 (holding privilege is to recognized "only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"); Fisher v. United States, 425 U.S. 391, 403 (1976); *cf.* Ullmann v. United States, 350 U.S. 422, 428 (1956) ("No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.").

1057 *See, e.g.*, *Mapp*, 367 U.S. at 659 ("There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered.' In some cases this will undoubtedly be the result.") (quoting New York v. Defore, 150 N.E. 585, 587 (N.Y. 1926), *abrogation recognized by* Linkletter v. Walker, 381 U.S. 618, 633–34 (1965)).

1058 *See* Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992); FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) (Once "persons not within the ambit of the confidential relationship have knowledge of the communication, that knowledge cannot be undone. One cannot 'unring' a bell."); *cf.* Microsoft Corp. v. Commonwealth Sci. & Indus. Res. Org., No. 6:06 CV 549, 2009 WL 440608, at *3 (E.D. Tex. Feb. 23, 2009) ("[O]nce Cisco's confidential information is known by Healy and Redfern through this discovery, it will be impossible for them to 'unknow' it during the negotiations.").

1059 Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582, at *3 (D. Kan. July 22, 2010).

1060 *Cf.* United States v. Pinho, 2003 WL 2577243, at *3–4 (E.D. Pa. July 2, 2003).

1061 Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 875 (2017) (Alito, J., dissenting); *cf.* Sunshine, *Uncertain Junction*, *supra* note 36, at 562–63 (discussing the implications of the

That result, although perhaps shocking to the conscience, is what privilege *means*; sometimes the search for truth will bow to secrecy, however, disquieting that may be in a given case.[1062] The Supreme Court itself has wrestled with these questions of privilege's burden, notably in *Pennsylvania v. Ritchie*.[1063] The defendant, charged with the rape of his daughter, had subpoenaed state records from the youth protective service agency statutorily protected by privilege allegedly containing statements by his daughter, but the trial court declined to order the subpoena honored, notwithstanding a statutory allowance that the privilege would yield to court order.[1064] On appeal, Ritchie contended that this denial was unconstitutional under the Confrontation Clause insofar as it foreclosed his ability to impeach the testimony of his primary accuser by showing her courtroom testimony was false (or at least inconsistent); the Pennsylvania Supreme Court agreed and vacated the conviction to permit for retrial.[1065] Bespeaking the importance of the principle, the Supreme Court granted certiorari without noting any division of authority, observing the "substantial and conflicting interests" of the parties.[1066]

After assuring itself of jurisdiction,[1067] the Supreme Court affirmed in part and reversed in part, splitting the baby.[1068] It rejected Ritchie's proposal that "statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony."[1069] The right to confront adverse witnesses was to be measured by the latitude permitted in their questioning, not the documentary evidence available to do so; to hold otherwise would constitutionalize the entire practice of discovery,

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hypothetical). *N.b.*, although the petitioner's surname was Peña-Rodriguez, the case caption replaced the eñe with an en.

1062 *See Pena-Rodriguez*, 137 S. Ct. at 875; Swidler & Berlin v. United States, 524 U.S. 399, 407–09 (2002); Emery, *supra* note 14, at 244; Correll, *supra* note 6, at 1033–34 & n.13.

1063 Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

1064 *Id.* at 43–44.

1065 *Id.* at 45–46.

1066 *Id.* at 46; *see* 476 U.S. 1139 (1986).

1067 *Id.* at 47–50. For what it is worth, the Court's reasoning in accepting an interlocutory appeal is at odds with its later ruling in *Mohawk* discussed above: "We thus cannot agree with the suggestion in Justice STEVENS' dissent that if we were to dismiss this case and it was resolved on other grounds after disclosure of the file, 'the Commonwealth would not have been harmed.' This hardly could be true, because of the acknowledged public interest in ensuring the confidentiality of CYS records. Although this consideration is not dispositive, we have noted that 'statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.'" *Id.* at 49–50 (citations omitted).

1068 *Id.* at 61.

1069 *Id.* at 52.

privilege and all.[1070] Nonetheless, the Court found Ritchie's Compulsory Process Clause claims more (ahem) compelling, and ordered the trial judge to review the file *in camera* and determine whether any material was relevant to give the lie to the daughter's testimony.[1071] In doing so, however, it relied heavily on the fact the privilege in question was qualified rather than absolute, contemplating disclosure in numerous circumstances.[1072] This comported with *Clark v. United States* in 1933, where the Court approved penetration of the juror deliberative privilege in order to confront perjury by the venirewoman, for there the Court found the jury deliberation privilege was only conditional[1073]—just like the majority opinion in *Pena-Rodriguez* from which Justice Alito was dissenting.[1074] Were the privilege in question absolute, however, the *Ritchie* Court intimated (though judiciously did not hold)[1075] that no compelled disclosure would be proper, notwithstanding the gravest of interests at stake.[1076]

[1070] *Id.* at 52–53 ("If we were to accept this broad interpretation of Davis, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.") (citations omitted).

[1071] *Id.* at 57–61.

[1072] *Id.* at 57–58.

[1073] Clark v. United States, 289 U.S. 1, 10–14 (1933) ("But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision. Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued.") (lineation omitted).

[1074] Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 873–74 (2017).

[1075] *Ritchie*, 480 U.S. at 57 n.14.

[1076] *Id.* 57–58 ("Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. This is not a case where a state statute grants CYS the absolute authority to shield its files from all eyes. Rather, the Pennsylvania law provides that the information shall be disclosed in certain circumstances, including when CYS is directed to do so by court order. Given that the Pennsylvania Legislature contemplated some use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions. In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not be disclosed when a court of competent

To close the circle, that is exactly what the lower courts have found attorney-client privilege to mean, being an absolute bar to discovery even in the face of mistruths—so long as it remains unwaived and intact:

> [I]t is perfectly legitimate for a party to disclose a non-privileged communication but to decline to disclose a privileged communication, even though the privileged communication would prove that the party is lying through his teeth. While that may be unfair, it is how any privilege works. The search for the truth yields to a privilege when the common law determines that the effectuation of the purpose of the privilege must do so. Only if the disclosure is of privileged information can it justify the forced disclosure of additional privileged information.[1077]

Oddly enough, attorneys learning that a client intends to perjure herself *before* the testimony must not abet the client's scheme, may threaten to report the intended falsehood if committed,[1078] and may even break privilege to inform the court if the client cannot be dissuaded.[1079] Yet attorneys hearing a confession of such behavior after the fact must seal their lips, just as Justice Alito described.[1080] The latter, at least, arises from the Supreme Court's recognition that "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide

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jurisdiction determines that the information is 'material' to the defense of the accused.") (citations omitted).

[1077] Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc., 266 F.R.D. 1, 10 (D.D.C. 2010); *see* Finjan, Inc. v. Sonicwall, Inc., No. 17-cv-04467, 2018 WL 4998149, at *4 (N.D. Cal. Oct. 15, 2018) ("A party may not obtain an adversary's privileged communications simply because it believes those communications would bear on—or even contradict—its adversary's allegations."); N. River Ins. Co. v. Phila. Reinsurance Corp., 797 F. Supp. 363, 370–71 (D.N.J. 1992) (rejecting claim of waiver where the challenger's "primary goal in seeking production of privileged documents is so that it can test the veracity and completeness of North River's disclosure to it as to the facts of the underlying claim dispute"). *See also* Murphy, *supra* note 14, at 225 (quoting *Electrical Workers*).

[1078] *See* Nix v. Whiteside, 475 U.S. 157, 170–75 (1986).

[1079] *See* New York v. DePallo, 754 N.E.2d 751, 753–54 (N.Y. 2001).

[1080] *See* Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (2002) ("The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged."); *cf.* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 875 (2017) (Alito, J., dissenting).

in his lawyer and it would be difficult to obtain fully informed legal advice."[1081] This had been recognized as early as 1888 when the Court wrote that the privilege is founded upon necessity to the very administration of justice.[1082] And the Court has affirmed and reaffirmed that an absolute privilege, not one subject to fiddly balancing tests, is the only way to ensure its vitality.[1083] Plainly, few would confess their past sins to their attorney (or priest,[1084] or spouse,[1085] to take Justice Alito's point[1086]) if the state could force the tongue of the confessor and thereby expose their secrets or sidestep the right against self-incrimination.[1087] So understood, privilege is not eliminating evidence that would otherwise have been available, for absent the privilege, the confession would never had occurred at all.[1088]

2. The Impossibility of Putting the Cat Back in the Bag

But now tweak Justice Alito's hypothetical to contemplate an FRE 502(b) situation: what if the attorney, despite irreproachable precautions, inadvertently disclosed during trial a single page from his confidential case notes recording his conversation with his client and laying bare the latter's invidiously motivated perjury, discovering the error shortly after its transmission and immediately demanding its return? Is defense counsel to take no notice of exculpatory evidence that could free the defendant in a trice? Is the judge to close her eyes to bigotry, perjury, and fraud upon the court in steadfast deference to the privilege? Both would have unwittingly done so absent the mistaken divulgence, and one might think FRE 502(b) inexorably demands that an excusably accidental disclosure is juridically a nonevent, and certainly can be no waiver. Somehow, however, the adjusted hypothetical seems worse: to stoically endure the exclusion of some modicum of evidence to permit for

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1081 Fisher v. United States, 425 U.S. 391, 403 (1976); *accord* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980).

1082 Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

1083 *See Swidler & Berlin*, 524 U.S. at 409 ("Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.") (citing *Upjohn*, 449 U.S. at 393 and Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996)).

1084 *See In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971).

1085 *See* Sexton v. Sexton 105 N.W. 314, 315–16 (Iowa 1905) (cited in Wolfle v. United States, 291 U.S. 7, 14 (1934)).

1086 *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 875 (2017).

1087 *See* cases cited *supra* notes 1080–1086; *see generally* Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988).

1088 *Swidler & Berlin*, 524 U.S. at 408 ("In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.") (citing *Jaffee*, 518 U.S. at 12 and *Fisher*, 425 U.S. at 403); *see* Correll, *supra* note 6, at 1035–36 n.26 ("Absent the privilege, however, the communications very likely would not exist.").

privilege is one thing; to wittingly whistle past the graveyard of truth is quite another. It is indeed for this reason that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."[1089]

Such situations had been contemplated prior to *Pena-Rodriguez*. In *Starway v. Independent School District No. 625*,[1090] a crucial memorandum had been inadvertently disclosed, and thus the court proceeded to review under the *Hydraflow* factors in use at the time.[1091] The crux of the argument rested on the fifth factor, overarching fairness: the defendant laid great emphasis on the importance of the attorney-client privilege, whilst the plaintiff stressed the document was necessary to prove its case and impeach a defense witness.[1092] But the court found scarce evidence that the document was actually necessary to demonstrate perjury: "While the document may be favorable to the plaintiff, the court does not find that the document contains evidence of fraud or crime and finds no implicit support for the unexplained assertion that it may prove helpful in establishing that someone lied under oath."[1093] This sufficed to decide the case, for justice does not otherwise militate against the denial of "something to which he was never entitled."[1094] Lest anyone misunderstand, however, the court observed that the impossibility of unringing the bell sufficed to protect against perjury:

> While the court may be granting defendant school district the relief it seeks in this motion, no one should be under the delusion that the cat has been put back into the bag. Plaintiff is not entitled to keep a copy of the privileged memorandum, but knowledge cannot be so easily erased. This court has no doubt that any significant and meaningful discrepancies between the memorandum and testimony under oath will be brought to the trial court's attention.[1095]

(The cat: now making cameos as guardian of the truth.)

After the passage of FRE 502, an ordinary inadvertent disclosure where there is no sword-and-shield gamesmanship—or worse yet, the specter of perjury—does not compel the penalty of waiver simply because the disclosed document may have some value for impeachment.[1096] With the cat out of the bag, the ordinary crucible of

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1089 United States v. Nixon, 418 U.S. 683, 710 (1974).

1090 Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595 (D. Minn. 1999).

1091 *Id.* at 597–98.

1092 *Id.* at 598.

1093 *Id.*

1094 *Id.*

1095 *Id.* n.6.

1096 Finjan, Inc. v. Sonicwall, Inc., No. 17-cv-04467, 2018 WL 4998149, at *4 (N.D. Cal. Oct. 15, 2018) ("SonicWall argues that it should at least be permitted to use the emails for impeachment purposes. However, the cases on which SonicWall relies for this remedy concern circumstances where the attorney-client privilege or work product doctrine is used as a sword

litigation suffices to uproot any untruths, or indeed "may reveal that there is nothing to impeach."[1097] Courts continuing to apply the *Hydraflow* factors have thus found the inadmissibility of an inadvertently produced document for impeachment purposes to be in the interests of justice where there is no "unfair prejudice," even if "some hardship" does result.[1098] One would expect, however, that a court would *not* find the interests of justice served by excusing an inadvertent disclosure showing plainly that a client engaged in perjury or committed fraud upon the court.[1099] To mangle the Seventh Circuit, such an oversight would be surely be a doozy, but the point of Rule 502(b) is *not* to protect clients from such a fortunate accident.[1100] The state has forced no tongues when the disclosure is an unforced error,[1101] preserving the core value of privilege.[1102]

The nuance and flexibility of the FRE 502(b) factors thus provide an answer to the embellishment on Justice Alito's hypothetical.[1103] Such nuance in balancing truth and privilege was on evidence in far less flagrant circumstances in *Community Bank v.*

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and shield . . . . These cases do not address the inadvertent disclosure of privileged communications during discovery.").

1097 *Id.* at *5.

1098 Pick v. City of Remsen, No. 13-4041, 2014 WL 4585732, at *5 (N.D. Iowa Sept. 15, 2014) ("The attorney-client privilege promotes the just resolution of disputes by facilitating forthright communication between counsel and client. This interest of justice would be harmed here by permitting Pick to use the email at trial. Remedying defense counsel's mistake undoubtedly results in some hardship for Pick at trial, since the email will be unavailable for him to use for possible impeachment purposes. This hardship, however, does not negate the injustice that will occur if the email is stripped of its privileged status as a result of its inadvertent disclosure under the circumstances.").

1099 *Cf.* Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 166 (E.D.N.Y. 2005) ("The two e-mails contain admissions regarding the number of graphic processors ordered from SAI that differ markedly from the factual position plaintiff has taken in this action . . . . Given the claim and defenses asserted in this action, defendant may be prejudiced by restoring immunity to the inadvertently disclosed e-mails."); Noyes, *supra* note 14, at 754 ("Also, the privileged document may provide reasonable grounds to impeach a witness- -directly or indirectly.").

1100 *See* Carmody v. Bd. of Trs., 893 F.3d 397, 406 (7th Cir. 2018) (quoted *supra* note 739).

1101 "An unforced error occurs when the opponent has time to set up mentally and physically for the shot and the opponent makes an error." NICK BOLLETTIERI, BOLLETTIERI'S TENNIS HANDBOOK 166 (2001); *cf. supra* text accompanying note 1087.

1102 *See* Hunt v. Blackburn, 128 U.S. 464, 470–71 (1888); *supra* notes 1080–1087 and accompanying text.

1103 *But see* Grimm, Bergstrom & Kraeuter, *supra* note 14, at 43–45 (questioning whether fairness could override clear adherence to the text of the rule notwithstanding its status as a *Hydraflow* factor); Meyers, *supra* note 9, at 1484 ("The Advisory Committee Notes to subsection (b) specifically name this consideration and state that '[t]he rule is flexible enough to consider any of these factors.' Yet the issue of fairness tells us little about whether precautions or responses were reasonable.").

Progressive Casualty Insurance Co.,[1104] where Community's counsel had allowed Progressive unmitigated access to its files, privileged or not, and permitted their copying without review.[1105] Despite an immediate objection when privileged documents appeared at a deposition, the magistrate judge thus found precautions lacking under FRE 502(b)(2).[1106] But because Progressive went on to use the documents in a motion for summary judgment whilst the question of privilege was pending, in violation of Rule 26(b)(5)(B), the magistrate excluded the documents as substantive evidence after all as a sanction[1107]—yet, in a final flourish, "still permit[ted] Progressive to use these items for impeachment purposes to promote the truth-seeking function of litigation."[1108] On review, the district court cautioned that should Community offer testimony by counsel, justice "may well require credibility determinations best made without procedural limits on the fact finder's truth-seeking function."[1109]

Properly deployed, therefore, both main subparts of FRE 502 should therefore work to balance robust protection of privilege with fortifications against the "sly attempt to gain advantage using truth garbling tactics."[1110] A court in 1990 explained of this evocative term:

> The term "truth garbling" comes to us from academia to describe two types of impermissible uses of privileged material. In one situation, a party furnishes the other side with false evidence while depriving it of the means of detecting the imposition. In the second, a party engages in selective disclosure, disclosing the favorable while withholding the unfavorable.[1111]

As if by design, each subpart provides the balancing test for one of these species of abuse. FRE 502(a) combats selective, misleading, and unfair disclosures by directing judges to compel the production of those documents needed (and only those needed) to level the playing field and deny any advantage to such sharp tactics.[1112]

1104 Cmty. Bank v. Progressive Cas. Ins. Co., No. 1:08-cv-01443, 2010 WL 1435368 (S.D. Ind. Apr. 8, 2010), *objs. overruled in part and aff'd in part*, 2010 WL 2484306 (S.D. Ind. June 14, 2010).

1105 *Id.* at *1.

1106 *Id.* at *4.

1107 *Id.* ("Progressive offers no defense for its misconduct, and the Court sees none. Because Progressive impermissibly resorted to self-help to try and avoid the risk that Progressive couldn't use the disputed materials as evidence in this matter, the Court will impose an appropriate and proportional sanction.").

1108 *Id.* at *5 n.6.

1109 *Cmty. Bank*, 2010 WL 2484306, at *2.

1110 Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 207 (N.D. Ind. 1990).

1111 *Id.* n.8 (citing Richard L. Marcus, *The Perils of Privilege: Waiver and Litigation*, 84 MICH. L. REV. 1605, 1636 (1986)).

1112 *See* cases cited *supra* notes 622–623.

Meanwhile, FRE 502(a) recognizes that reasonable but mistaken disclosures should not compromise the adversarial process protected by privilege;[1113] but at the same time the rule is malleable enough to enforce a waiver if the clawback would work grave injustice on that selfsame system.[1114] Perhaps most importantly, in the event of inadvertent disclosure, the cat is already out of the bag, and courts and counsel are under no Orwellian compulsion to expunge its very memory from their minds.[1115] The earlier courts wrote often of the need to strictly circumscribe the privilege because it stood athwart the search for truth, resulting in the stunted safeguards of the world of waiver that was.[1116] To its credit, FRE 502 seems set to cut with a far finer scalpel and strike a happier balance between the eternally warring imperatives of secrecy and disclosure.[1117]

C. The Pilgrim's Progress and the Hodós[1118]

Accordingly, let it never be said that no progress has been made since Wigmore reigned supreme.[1119] Recall that in the 1981 case *Suburban Sew 'N Sweep*, the district

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1113 *See* Pick v. City of Remsen, No. 13-4041, 2014 WL 4585732, at *5 (N.D. Iowa Sept. 15, 2014); *see also* cases cited *supra* note 537 (recognizing use of tests of reasonableness).

1114 *Pick*, 2014 WL 4585732, at *5.

1115 *See* Stinson v. City of New York, No. 10 Civ. 4228, 2014 WL 5090031, at *4 (S.D.N.Y. Oct. 10, 2014); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 598 n.6 (D. Minn. 1999); *see also* D'Onofrio v. SFX Sports Grp, Inc. 256 F.R.D. 277, 280 (D.D.C. 2009) (declining to allow review of privileged materials because "while I believe that plaintiff, were she given access to these documents, would take all appropriate steps to put anything she learns out of her mind, it is a simple fact that it is difficult to unlearn something once it is learned"); *see also* Noyes, *supra* note 14, at 753–54; Cavaneau, *supra* note 14, at 11–12.

1116 *See, e.g.*, Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862–63 (D.C. Cir. 1980) (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (citing People's Bank v. Brown, 112 F. 652 (3d Cir. 1902)).

1117 *See* United States v. Nixon, 418 U.S. 683, 710 (1974); Imwinkelried, *supra* note 14, at 188–89; Cavaneau, *supra* note 14, at 12.

1118 *Hodós* is a Greek term literally meaning "road" that is used frequently in the New Testament to describe the path taken by a traveler, or metaphorically, a continuing course of conduct or manner of thinking or deciding. *See* POPE EMERITUS BENEDICT XVI, THE CHURCH AND THE SCANDAL OF SEXUAL ABUSE (Catholic News Agency trans., Apr. 10, 2019) ("Greek for a road, in the New Testament often used in the sense of a path of progress."), https://www.catholicnewsagency.com/news/full-text-of-benedict-xvi-the-church-and-the-scandal-of-sexual-abuse-59639; CARL LUDWIG WILBALD GRIMM, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT 437–38 (Harper 1887).

1119 *See* Imwinkelried, *supra* note 14, at 172–76; Correll, *supra* note 6, at 1033–34 (narrating the shift away from Wigmore to modern practice and concluding that the "addition of Rule 502(d) orders to this pantheon may signal the final step in the slow demise of the requirement for maintained confidentiality as it adds an element of predictability as well as legislative and judicial approval to abandoning Wigmore's theory").

court enforced waiver despite the fact that the relevant legal memoranda had been pilfered from a dumpster, admitting that the invasion was incredibly unlikely and risked criminal punishments, and moreover that the onus that the adopted rule of waiver placed on the holders of privilege could be seen as "extreme."[1120] Not so two decades later at the turn of the millennium, when the district court in *McCafferty's, Inc. v. Bank of Glen Burnie* found the opposite:

> I must determine whether it was reasonable for Joyner to have concluded that by tearing up the confidential memo and throwing it away in a private location—from which it would be further mingled with other trash from BGB, before being thrown into a dumpster posted with a warning that it was for the exclusive use of BGB, located on BGB's private parking lot—she was continuing to preserve the confidentiality of the memo against disclosure to third persons. I find that it was.
>
> To be sure, there were additional precautions which Joyner could have taken. As suggested by the court in *Suburban*, BGB could have used a paper shredder. Joyner could have burned the pieces of the memo before throwing the ashes away. She could have torn it into smaller pieces, or distributed the pieces into several trash cans in different locations. *However, the issue is not whether every conceivable precaution which could have been taken was taken, but whether reasonable precautions were taken*. Under the facts of this case, Joyner would have had to anticipate that someone would trespass onto BGB's private property, look through an entire dumpster of trash, remove sealed bags of garbage, sift through them looking for torn up documents, and then piece them together. Even in an age where commercial espionage is increasingly common, the likelihood that someone will go to the unseemly lengths which Mariner did to obtain the Serotte memo is not sufficiently great that I can conclude that the precautions Joyner took were not reasonable. Although the precautions taken in this case were not perfect, they were sufficient to preserve the attorney-client privilege against the clandestine assault by Mariner's "dumpster diver."[1121]

As the emphasis highlights, the difference in result derived from a welcome difference in standard: *Sealed Case* and its ilk had demanded that "all possible precautions" be deployed.[1122] That standard placed those seeking to protect privilege between Scylla and Charybdis—and they were sailing without a steersman given the fact that the question of whether every precaution had been taken was unknown until a court said so.[1123] But that was true of whether *reasonable* precautions had been taken as well, as the middle-of-the-road court in *McCafferty's* asked (and

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[1120] *See* Suburban Sew 'N Sweep, Inc. v. Swiss-Bernia, Inc. 91 F.R.D. 254, 261 (N.D. Ill. 1981) (discussed *supra* notes 67–69).

[1121] McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 169–70 (D. Md. 1998) (emphasis added).

[1122] *In re* Sealed Case, 877 F.2d 976, 980 n.5 (D.C. Cir. 1989).

[1123] *See supra* Section I-C.

answered).[1124] To be sure, asking the question of what a normal person would do will yield better and more predictable answers than questioning whether a court could imagine some outré or exorbitant safeguard that had gone unimplemented.[1125] One judge tried to liken the modern balancing test to other areas of law, reasoning that "'reasonable' precautions are not necessarily foolproof. Just as a tort defendant who acts in a reasonably prudent manner avoids liability despite the occurrence of an accident, so an attorney who takes reasonable precautions in discovery may avoid waiver even though he inadvertently discloses a privileged document."[1126] The *Hydraflow* factors and their analogues might even direct such analyses into familiar channels.[1127]

Nevertheless, the answer to what a reasonable person would have done remained irreducibly indeterminate until a judge decided,[1128] as a 1995 case observed in confessing that the "balancing approach results in an uncertain privilege. That is, the protection of the privilege will depend on courts reviewing and making judgments on a broad array of facts."[1129] That was the situation that no less a tribunal than the Supreme Court had declared would "eviscerate" the privilege entirely.[1130] Questions could be picayune and yet dispositive: "were five hundred pages of documents copied or five thousand, and is two days, three days, or ten days too long a delay in taking steps to rectify the error?"[1131] Different courts reached different results based on the same material facts.[1132] Given such uncertainty, the balancing test inherently invited motion practice over every jot and tittle of privilege, as either party might prevail in all but the most obvious cases.[1133] Judges of the time lamented that litigants were

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1124 *McCafferty's*, 179 F.R.D. at 169.

1125 *See* cases cited *supra* notes 319–325 and accompanying text.

1126 Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) ("Courts following this inadvertent disclosure doctrine engage in a multifactor analysis to judge whether counsel acted reasonably to safeguard the privilege or so recklessly that waiver should be implied.").

1127 *E.g.*, *id.* ("The elements considered include (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify any error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) overriding issues of fairness. *See, e.g.*, *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993); Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985). This analysis may now be applied to the facts presented here.").

1128 *See* Meyers, *supra* note 9, at 1449.

1129 Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 262 (D. Del. 1995); *see also* Rice, *Continuing Confusion*, *supra* note 39, at 998–99.

1130 *See* Jaffee v. Redmond, 518 U.S. 1, 17 (1996) (quoted *supra* note 191).

1131 *Berg*, 875 F. Supp. at 263.

1132 *See* Meyers, *supra* note 9, at 1449.

1133 *Berg*, 875 F. Supp. at 263 ("This approach also has the disadvantage of inviting parties to litigate almost every dispute where there is a claim of an inadvertent waiver, as it suggests

indeed turning to the court too readily to balance the relevant factors in hopes of an advantageous ruling, instead of being "resolved amicably by counsel returning documents which are obviously privileged and inadvertently produced."[1134]

FRE 502(b) did nothing to displace this regime, instead installing the existing middle-of-the-road balancing test as federal law.[1135] In the 2016 revised edition of her standard hornbook, Epstein noted that the case-by-case analysis involves "a tremendous amount of judicial discretion," is "far less predictable," and "ensures that virtually each inadvertent disclosure will be litigated and must be ruled on by a court. What one court would deem excusable mistake, another will call 'gross negligence.'"[1136] Before setting forth on their analyses, various courts have noted that Advisory Committee "consciously chose not to codify any factors in the rule because the analysis should be flexible and applied on a case by case basis,"[1137] even whilst endorsing the *Hartford Fire* and *Lois Sportswear* factors as guideposts.[1138] Unsurprisingly, this lack of change has done little to curb uncertainty,[1139] or prodigal motion practice on privilege.[1140] One recent court addressing privilege logs noted a

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the decision on whether the protection of the privilege has been lost will be made on a case by case basis and will depend on a particular court's judgment on whether it would be reasonable to find a waiver in the context of the facts and circumstances of that case."); *see also* Rice, *Continuing Confusion*, *supra* note 39, at 996.

1134 United States v. Pepper's Steel & Alloys, Inc., 742 F. Supp. 641, 645 (S.D. Fla. 1990) ("Mistakes of this type are likely to occur in cases with voluminous discovery. At best, these situations are resolved amicably, by counsel returning documents which are obviously privileged and inadvertently produced. It is unfortunate that such could not be the case here and that the Court was forced to expend a great deal of time on this relatively minor matter. However, such has been the case throughout the course of this litigation."); *see also* Rice, *Continuing Confusion*, *supra* note 39, at 996; Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1606–07 (1986).

1135 Schaefer, *supra* note 14, at 219–20 ("Thus the new FRE 502(b) approach incorporates the same uncertainty and possibility of waiver that exists in balancing jurisdictions."); *see* FED. R. EVID. 502(b) advisory committee's note to 2008 amendment; *see* Liles v. Stuart Weitzman, LLC, No. 09-61448, 2010 WL 11505149, at *2 n.1 (S.D. Fla. June 15, 2010); Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 53 (D.D.C. 2009); *see also supra* note 535 (citing secondary sources confirming or arguing against FRE 502's adoption of the previous balancing standard).

1136 EPSTEIN, *supra* note 3, at 574.

1137 *Liles*, 2010 WL 11505149, at *2 n.9; *accord Amobi*, 262 F.R.D. at 54.

1138 *See Amobi*, 262 F.R.D. at 54; *see* FED. R. EVID. 502(b) advisory committee's note to 2008 amendment.

1139 *See* Barkett, *supra* note 14, at 1595–96 (noting case-by-case approach); Murphy, *supra* note 14, at 217 ("This illustrates the fact that each case is decided based upon each judge's particular analysis. The sought after uniformity may not be achieved under their approach."); Meyers, *supra* note 9, at 1458–59 (observing idiosyncratic application); Outlaw, *supra* note 14, at 7 (predicting rule would yield greater uncertainty and costs).

1140 *See, e.g.*, Baez-Eliza v. Instituto Psicoterapeutica de P.R., 275 F.R.D. 65, 67–70 (D.P.R. 2011); *see also* Star Ins. Co. v. Cont'l Res., Inc., 2013 WL 1702653, at *3 & n.1 (D.N.D. Apr. 19, 2013) (observing in trying to head off "intractable" privilege disputes that in its last case of the sort, "the parties spent tens of thousands of dollars in attorney's fees arguing over what

lack of guidance as to the timeliness of privilege assertions, remarking mildly that the "cases are not harmonious."[1141] After surveying divisions of opinion on essentially identical facts, the court could conclude only: "It is ultimately a discretionary decision, and thus, as we have shown, cases holding one way or the other are not conclusive, for '[t]he very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates.'"[1142]

Such a state of affairs represents a missed opportunity in the promulgation of FRE 502(b).[1143] The Supreme Court had written only six years prior that a balancing test "introduces substantial uncertainty into the privilege's application" and that "[f]or just that reason, we have rejected use of a balancing test in defining the contours of the privilege."[1144] Had FRE 502(b) simply provided that an inadvertent disclosure does not work waiver—full stop—much uncertainty might have been curtailed.[1145] The logic of *Mendenhall* is compelling: waiver should only attach when a client knowingly and intentionally opts to waive privilege by revealing a document, acquiescing that such use will make the document (and perhaps others too) fair game.[1146] That is, after all, exactly what waiver *means*.[1147] Such a construction would at last remove the jurisprudential irritant that waiver in matters of privilege is for some reason different from waiver in other spheres of the law.[1148] This stilted misuse of the word apparently arose to align itself with the stringencies demanded by Wigmore in protecting the privilege against all interlopers—even thieves!—by whatever means necessary.[1149]

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documents were subject to attorney-client privilege and work product. After several weeks of work, the court was making the final edits on its order ruling on the eighty-eight documents requiring in camera inspection when the parties called and advised the case had been settled"); Murphy, *supra* note 14, at 225 ("This type of reasoning certainly provides a disincentive for parties to work together, as they would never be able to predict how a judge would rule on their agreement. This is not advisable in our current environment of high-cost litigation.").

1141 Surgery Ctr. at 900 N. Mich. Ave., LLC v. Am. Physicians Assurance Corp., Inc., 317 F.R.D. 620, 632 (N.D. Ill. 2016).

1142 *Id.* (quoting McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985), *aff'd*, 481 U.S. 279, 289–90 (1987)); *see also* Murphy, *supra* note 14, at 235 ("It is a test of reasonableness, so of course reasonable minds may differ.").

1143 *See* Barkett, *supra* note 14, at 1595 (noting FRE 502(b) involves "a fact-specific inquiry to be made on a case-by- case basis"); Murphy, *supra* note 14, at 217; Meyers, *supra* note 9, at 1457–58; Outlaw, *supra* note 14, at 7–8.

1144 Swidler & Berlin v. United States, 524 U.S. 399, 409 (2002) (citing *Upjohn*, 449 U.S. at 393 and Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996)).

1145 *But see supra* Section IV-A-3 (discussing varying interpretations of how to assess the meaning of inadvertence itself).

1146 Mendenhall v. Barber-Green Co., 531 F. Supp. 951, 954–55 (N.D. Ill. 1982).

1147 *Id.* at 955; *accord* sources cited *supra* notes 79 & 84.

1148 *Cf.* EPSTEIN, *supra* note 3, at 508–09; John Doe Co. v. United States (*In re* Grand Jury), 350 F.3d 299, 302 (2d Cir. 2003).

1149 *See* Gergacz, *supra* note 14, at 16 ("Under privilege law, waiver uses the term, 'intentional,' in a limited way. It is not a question of whether the disclosure itself was intended.

With that atavism rejected,[1150] there is little principled reason why waiver should not revert to its ordinary meaning, bringing greater consistency to jurisprudence as a whole.[1151]

Moreover, the observation from Wigmore that few would freely profess to such intent does not shake that logic:[1152] intent to *waive* is easily discernible should a party cite, introduce, or otherwise rely on a privileged document in litigation (regardless of how it came to be disclosed), as numerous courts have noted.[1153] FRE 502(b) aimed to avoid ceaseless litigation over whether privileged documents adverse to the discloser—clearly inadvertently released—must nonetheless be treated as waived based on some *a posteriori* judgment of counsel's diligence;[1154] the *Mendenhall* rule actually achieves that aim, however, unlike FRE 502.[1155] True, clawback of such documents retards the search for truth, but that is what privilege *means*:[1156] once the principle of privilege is accepted, the interests of justice are not generally served by denying the clawback from an opponent of "something to which he was never

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After all, a waiver may arise if a thief absconds with a document."); *e.g.*, Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 263 (D. Del. 1995) (quoted *supra* note 274); Smith v. Armour Pharmaceutical Co., 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) (quoted *supra* note 275).

1150 *See* Explanatory Note on Evidence Rule 502, FED. R. EVID. 502(b) (revised Nov. 28, 2007).

1151 *See* Gergacz, *supra* note 14, at 16 ("Instead, what is intended is the relinquishment of the privilege. This is assessed by evaluating whether the loss of confidentiality has compromised the goals of the privilege. Thus, a 'waiver intent' is linked to the privilege policies. It does not arise merely because the act of disclosure itself was voluntary.").

1152 WIGMORE, *supra* note 38, at 638 (quoted *supra* note 104).

1153 *See, e.g.*, Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959, at *13–14 (D. Colo. Dec. 14, 2009); *see also* Cross & Nagendra, *supra* note 14, at 3 (discussing *Silverstein* and noting that "failure to remedy *disclosure* of privileged information, even if inadvertent, supported an inference of intentional *waiver*") (emphases added).

1154 *See* Diamond Car Care, LLC v. Scottsdale Ins. Co., No. 16-Civ-20813, 2017 WL 1293249, at *5 (S.D. Fla. Jan. 10, 2017) ("The purpose of this rule is to resolve 'longstanding disputes in the courts about inadvertent disclosure issues" and "provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection.'") (quoting United States v. Sigman, No. 11–80155–CR, 2013 WL 5890714, at *4 (S.D. Fla. Nov. 4, 2013)); Explanatory Note on Evidence Rule 502, FED. R. EVID. 502(b) (revised Nov. 28, 2007); Broun & Capra, *supra* note 9, at 252.

1155 *Cf.* Outlaw, *supra* note 14, at 7–8 (criticizing such *a posteriori* analysis as counterproductive).

1156 *See* sources cited *supra* notes 1061 & 1077.

entitled."[1157] Why should an adversarial system turn on such random windfalls?[1158] A future revision to FRE 502(b) tracking *Mendenhall* would advance greater predictability in privilege and avoid taxing judicial resources.[1159] As it stands now, parties must inefficiently seek an order via FRE 502(d) in every case if they wish the benefit of the better rule.[1160]

Nor would adoption of the *Mendenhall* rule permit unfairly selective disclosures through the back door of selective clawbacks.[1161] In the first place, FRE 502(b) as written and the balancing tests that preceded it already must be defended against such behavior.[1162] The foxy firm that sought to claw back only the opinion letter adverse to its position whilst allowing the letter's helpful counterpart to languish was thus readily rejected.[1163] Even addressing such situations under the balancing test for inadvertent disclosures is probably not as philosophically rigorous as could be.

1157 Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 227 (E.D. Pa. 2008) (holding that "denying these documents to Defendants is not prejudicial to Defendants because, in the first place, they have no right or expectation to any of Rhoads's privileged communications"); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 598 (D. Minn. 1999); *see also* Correll, *supra* note 6, at 1079 ("Quite simply, the disclosed material has been privileged since its creation and that privilege has never been interrupted.").

1158 *See* Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1614–15 & n.50 (1986) ("Beyond that, broad waiver doctrines will tempt parties to press claims of waiver even where chances of success are small, owing to the potential windfall that success would bring.") (citing Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 891 (1983)); EPSTEIN, *supra* note 3, at 835 ("If genuinely inadvertent rather than strategic, what policy purpose is served by being unduly punitive?"). *But see* Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 55 (D.D.C. 2009) (citing holding that "given the extent of the disclosure, fairness dictates that the non-disclosing party be allowed to utilize its windfall") (citing Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 209 (N.D. Ind. 1990)).

1159 Perhaps the best rejoinder is that the flexibility of FRE 502(b) as it stands permits some allowance for courts to treat an inadvertently produced document as waived in extraordinary circumstances such as the perjury and fraud upon the court imagined by Justice Alito. Facing a rule that denied waiver in every case of inadvertence, the critical evidence that the witness had lied would be inadmissible, and a witness already having lied once will hardly be dissuaded in being confronted by defense counsel with the lie upon recall to the stand, absent documentation. But precedent again rides to the rescue, for now that the witness's potentially repeated perjury is in the future rather than a confession of the past, counsel may have some ambit—and perhaps obligation—to breach privilege to prevent such a miscarriage of justice. *See* Nix v. Whiteside, 475 U.S. 157, 171–75 (1986); New York v. DePallo, 754 N.E.2d 751, 753–54 (N.Y. 2001).

1160 *See* Barkett, *supra* note 14, at 1619–20 (recommending parties do exactly that); Correll, *supra* note 6, at 1068-75 (discussing such a regime); Murphy, *supra* note 14, at 235 (recommending parties do exactly that).

1161 *But see* Broun & Capra, *supra* note 9, at 249 (citing sloppiness or gamesmanship as reasons Committee opted against the *Mendenhall* rule).

1162 *See supra* notes 715–730 and accompanying text.

1163 *In re* Recombinant DNA Tech. Patent & Contract Litig., MDL No. 912, 1994 WL 270712, at *39 (S.D. Ind. 1993) (discussed *supra* notes 716–720).

Regardless of why a document was disclosed, once the disclosing party decides to use the document in the litigation to its own advantage, rather than clawing it back, it has knowingly and intentionally waived its privilege.[1164] That conclusion means that subject matter waiver precedent came into effect, allowing the court to deny the clawback of related documents that ought to in fairness be considered alongside.[1165] That was, indeed, the very reasoning of the court confronting the foxy firm, although it did not quite say that the adversarial use of the purportedly inadvertent disclosure rendered it intentional *per se*.[1166]

Finally, to the objection that allowing the liberal use of clawbacks as to any unintentional disclosure would encourage sloppy work by counsel and document dumps,[1167] that old cat has an answer. Privileged documents disclosed inadvertently may be clawed back, but they cannot be unremembered.[1168] It is difficult to imagine that responsible counsel would opt against at least elementary and economical measures to withhold the most vital privileged materials, for fear of compromising their case[1169]—and if they do, then opposing counsel are free to formulate whatever

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1164 Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 CONG. REC. H7818–H7819 (Sept. 8, 2008) ("[T]he party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed."); Murphy, *supra* note 14, at 208 ("Therefore, a party may not advertently disclose a protected document and later claim an inadvertent disclosure when the document is used by the opposing party."); *see, e.g.*, Johns Hopkins Univ. v. Alcon Labs., Inc., No. 15-525, 2017 WL 3013249, at *2–3 (D. Del. July 14, 2017); Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471, 2009 WL 4949959, at *13–14 (D. Colo. Dec. 14, 2009); F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 71–74 (D. Md. 1998).

1165 Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 CONG. REC. H7818–H7819 (Sept. 8, 2008); *see Johns Hopkins*, 2017 WL 3013249, at *2–3; *Silverstein*, 2009 WL 4949959, at *13–15; *F.C. Cycles*, 184 F.R.D. at 74–80.

1166 *See supra* note 720 and accompanying text (quoting the relevant language).

1167 *See, e.g.*, Gray v. Bicknell, 86 F.3d 1472, 1482–84 (8th Cir. 1996); United States v. Gangi, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998); Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991); Dyson v. Amway Corp., No. G88-CV-60, 1990 WL 290683, at *2 (W.D. Mich. Nov. 15, 1990); *see also* Correll, *supra* note 6, at 1068–70 (addressing concerns regarding cost shifting); Noyes, *supra* note 14, at 752–53 (criticizing the rule shifting of costs of review onto the receiving party); Broun & Capra, *supra* note 9, at 249 (citing sloppiness or gamesmanship as reasons Committee opted against the *Mendenhall* rule).

1168 *See In re* Ford Motor Co., 110 F.3d 954, 963–64 (3d Cir. 1997); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 165 (2d Cir. 1992); Stinson v. City of N.Y.C., No. 10 Civ. 4228, 2014 WL 5090031, at *4 (S.D.N.Y. Oct. 10, 2014); D'Onofrio v. SFX Sports Grp, Inc. 256 F.R.D. 277, 280 (D.D.C. 2009); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 598 n.6 (D. Minn. 1999); Correll, *supra* note 6, at 1073–75; Noyes, *supra* note 14, at 753–54; Cavaneau, *supra* note 14, at 11–12.

1169 *See* Correll, *supra* note 6, at 1071 ("Either disclosing parties must be permitted to safely abandon all privilege review (*not that they actually will do so*) without fear of later consequences, or, alternatively, courts must specifically identify in a given order what steps a disclosing party must take.") (emphasis added); Cavaneau, *supra* note 14, at 11 ("Third, and

strategies they may from the privileged material before it is clawed back.[1170] To the extent that the *Mendenhall* rule encourages counsel to perform only such measures as needed to identify the most obvious and compromising privileged materials—understanding that less relevant or damaging privileged documents may be released inadvertently—that is *exactly what FRE 502 was supposed to encourage*.[1171] Fear of waiver previously encouraged the expense of inordinate sums of money to identify punctiliously each and every word that might be subject to privilege, however meaningless that privilege may be to the case at hand.[1172] Such expenditures continue,[1173] albeit perhaps with some minor efficiencies.[1174] By demurring from the

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perhaps most significantly, in most cases, mere disclosure of protected information could be quite prejudicial to the disclosing party even if there was no waiver and even if the information could not be used directly. Opposing counsel would have seen the material. It would be impossible to erase that knowledge and perhaps impossible for counsel to avoid capitalizing on it, if only subconsciously . . . . These considerations will lead counsel, in many cases, to advise a painstaking and expensive pre-production review of relevant materials").

1170 *See Ford Motor*, 110 F.3d at 963–64; *Chase*, 964 F.2d at 165; *Starway*, 187 F.R.D. at 598 n.6; Correll, *supra* note 6, at 1073–75; Schaefer, *supra* note 14, at 226; Noyes, *supra* note 14, at 753–54 ("Once privileged or work product protected information is reviewed by the Receiving Party, it will provide a virtual roadmap to follow up discovery to learn the underlying facts or data that are not protected by the privilege."); Cavaneau, *supra* note 14, at 11–12 ("For example, if counsel has seen work product that includes important information about opposition strategy and thinking, it would be impossible (and perhaps a failure to adequately represent the client) if that information is not taken into account in structuring presentation of the case. Another example would be that the information could be used in formulating discovery requests."). *But cf. D'Onofrio*, 256 F.R.D. at 280 (suggesting the recipient of clawbacks should *attempt* to put such information out of mind, although recognizing that task is impossible).

1171 Cross & Nagendra, *supra* note 14, at 7 ("Litigants can perhaps save manual review and logging for those relatively few documents that really need it, such as those belonging to custodians who regularly communicate with counsel about sensitive matters. For other custodians, litigants generally can feel comfortable that any disclosed privilege information should not lead to subject matter waiver, and thus the privileged information that really matters should remain protected."); Cavaneau, *supra* note 14, at 11–12; *see also* Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 227 (E.D. Pa. 2008) (holding that even after FRE 502, "[a]n understandable desire to minimize costs of litigation and to be frugal in spending a client's money cannot be an after-the-fact excuse for a failed screening of privileged documents.").

1172 *See* Stamps.com, Inc. v. Endicia, Inc., No. CV 06–7499–ODW, 2008 WL 11338241, at *2 (C.D. Cal. Oct. 6, 2008) (quoting S. Rep. 110–264, at 2 (2008)) (first case applying FRE 502 explaining Congressional purpose); Cross & Nagendra, *supra* note 14, at 1 ("Capturing the specific details about each document to prepare a defensible log is akin to writing a phone book, in terms of its structure, detail, and the joy the task brings to the authors."); *id.* at 7; *see also* sources cited *supra* note 15 (elaborating on the disproportionate efforts and costs occasioned by former waiver doctrine).

1173 *See* Correll, *supra* note 6, at 1068–71; Murphy, *supra* note 14, at 238 ("Rule 502 is not a 'get-out-of- jail-free' provision for attorneys. Thus far, there has not been any evidence of cost savings."); Cavaneau, *supra* note 14, at 12 ("These considerations will lead counsel, in many cases, to advise a painstaking and expensive pre-production review of relevant materials").

1174 *See* Cross & Nagendra, *supra* note 14, at 7.

philosophically sound rule of *Mendenhall*, FRE 502(b) has failed to achieve the economies it sought.[1175]

On the other hand, FRE 502(a) has mitigated the grossly disproportionate regime of subject matter waiver applied at times before its advent.[1176] Even the harsh district court of the D.C. Circuit has admitted as much: "an inadvertent disclosure no longer carries with it the cruel cost of subject-matter waiver."[1177] So too in the severe Federal Circuit: the rule "is limited to situations in which a party intentionally puts protect information into the litigation in a selective, misleading, and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."[1178] Commentators on the rule have thus predicted hopefully that the rule "may finally knockout the much-dreaded subject matter waiver bugaboo."[1179] Yet the manifest ambiguity of FRE 501(a) has allowed a vestigial school of harsh waiver to persist with intentional disclosures as though the rule's guarantee of fairness had not come along at all, reflexively imposing broad waivers absent some saving grace.[1180] And without direction from the courts of appeals, parties cannot know whether their court will adhere to the majority view or chart a more dangerous course.[1181]

Moreover, serious challenges remain even as to subject matter waiver based on a legacy of entangled waiver doctrines. By applying itself only to disclosures, FRE 502 purportedly left untouched such philosophically discrete doctrines as waiver by failure to object and by placing subject matter at issue in litigation.[1182] Yet both of those

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1175 *See generally* Correll, *supra* note 6 (discussing economies of installing a *Mendenhall*-like regime under FRE 502(d)).

1176 *See* Explanatory Note on Evidence Rule 502, FED. R. EVID. 502(b) (revised Nov. 28, 2007) ("The rule rejects the result in *In re* Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.").

1177 Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 52 (D.D.C. 2009); *accord* Trs. Of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc., 266 F.R.D. 1, 10–16 (D.D.C. 2010) (quoted *supra* note 446).

1178 Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 109 (Ct. Cl. 2013).

1179 Correll, *supra* note 6, at 1081.

1180 *See, e.g.*, cases cited *supra* note 631.

1181 *See supra* Section VI-A, *e.g.*, De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013) (describing how a judge considered both subject-matter-waiver approaches before, absent appellate direction, making his own decision as to which he wanted to follow).

1182 *See* Explanatory Note on Evidence Rule 502, FED. R. EVID. 502(b) (revised Nov. 28, 2007) (noting the rule "does not purport to supplant applicable waiver doctrine generally"); Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 CONG. REC. H7818–H7819 (Sept. 8, 2008); *e.g.*, Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp., 218 F. Supp. 3d 197, 201 (E.D.N.Y. 2016) (explaining the rule does not displace waiver by failure to object); McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 726.

doctrines usually arise from disclosures, where FRE 502 does govern and displace prior law.[1183] For example, any disclosed document may later become an exhibit at deposition or at trial: even if no waiver arises from *disclosure*, inordinate expenditures may remain necessary to avoid privileged documents being *introduced* and thus waiving the privilege notwithstanding inadvertence.[1184] Even under FRE 502 itself, an overly demanding test for depositions is unsound.[1185] One court ordering waiver admitted that the producing party demanded return of the privileged memorandum at the end of the deposition.[1186] Indeed, counsel objected *during* the deposition, but the objection was held inadequate because it cited mediation rather than attorney-client privilege.[1187] Moreover, scolded the court, counsel had not peppered the record with objections to every subsequent question, or "attempt[ed] to get the court on the phone to resolve the issue."[1188] Although there was no question of inadvertence, remediation under FRE 502(b)(3) was found lacking.[1189]

Similarly, disclosures of information in negotiations, filings, and open court inherently put *some* topic into play; how is FRE 502 to have any operation if the party challenging privilege can claim privilege waived on all related matters not by the disclosure *per se* but because the "subject matter" was put at issue?[1190] *Pinho*, it may be recalled, invoked a fear of perjury to allow counsel to testify whether his client had

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1183 *See* FED. R. EVID. 502(b) advisory committee's note to 2008 amendment ("The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product *where no disclosure has been made*.") (emphasis added).

1184 *See* cases cited *supra* notes 699–700, 705; *cf.* Noyes, *supra* note 14, at 759 ("For example, assume that the document containing privileged information is used at a deposition and the Producing Party fails to object to the use of privileged information. Has the privilege been waived, even if the court previously entered a 502(d) order?").

1185 *See* Noyes, *supra* note 14, at 758–59.

1186 Stewart Title Guar. Co. v. Owlett & Lewis, P.C., 297 F.R.D. 232, 241 (M.D. Pa. 2013).

1187 *Id.* at 241–42.

1188 *Id.* Most courts, needless to say, are not eager to be haled onto the phone for every objection lodged at a deposition.

1189 *Id.*

1190 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 726–29; *cf.* N. River Ins. Co. v. Phila. Reins. Corp., 797 F. Supp. 363, 371 (D.N.J. 1992) ("The *Remington Arms* court convincingly rejected this ground for abrogating the attorney-client privilege by explaining that such a construction of the 'in issue' doctrine would seemingly apply to any litigant offering evidence in a case on any issue that he has discussed with his attorney, and would drastically alter the traditional boundaries of the privilege.") (citing Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 415–416 (D. Del. 1992)). This author does not mean to challenge cases where the content of the privileged relationship is dispositive, as in a claim of inadequate advice of counsel or malpractice, *e.g.*, Deutsche Bank Tr. Co. v. Tri-Links Inv. Tr., 837 N.Y.S.2d 15, 23 (N.Y. App. Div. 2007) (legal malpractice); *see* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 724–25, but where some particular conversation with counsel is collaterally implicated, as in the ensuing example.

in fact discussed a certain matter she had squarely denied discussing under oath.[1191] But an FRE-502-era court transmuted such logic into freewheeling subject-matter waiver in holding all conversations with counsel during the relevant period waived because the client had entered a declaration to the court that he had not discussed a particularized topic with counsel.[1192] Another thought that waiver from a disclosed opinion in a patent case evaded FRE 502(a) entirely because "the rules state that in this specific area of patent law, there is a broad subject-matter waiver that is not subject to fairness balancing as applied elsewhere in the rules."[1193] But what the court quoted was the Statement of Congressional Intent,[1194] not the rule,[1195] and in any event, the Statement seemingly suggests that FRE 502(a)(3) does provide the proper schema of analysis, albeit not in so many words.[1196] As intimated in discussing selective clawbacks, the interplay between disclosure under FRE 502 and the *use* of that disclosure is less than pellucid.[1197]

Modesty has long been rightly held a virtue in those charged with administering the law,[1198] but in declining to promulgate a more comprehensive regime addressing waiver of privilege in all its circumstances,[1199] FRE 502 left dangerously uncertain exemptions from its protections that undermine its efficacy in reducing the burdens of discovery.[1200] So too is prudence a virtue,[1201] but the incrementalism and reflexive

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1191 United States v. Pinho, 2003 WL 2577243, at *3–4 (E.D. Pa. July 2, 2003) (discussed *supra* notes 1033–1040 and accompanying text).

1192 *See* Hughes v. Abell, No. 09-0220, 2012 WL 13054819, at *3–5 (D.D.C. Mar. 7, 2012) (discussed *supra* note 451–452 and accompanying text).

1193 Johns Hopkins Univ. v. Alcon Labs., Inc., No. 15-525, 2017 WL 3013249, at *2–3 (D. Del. July 14, 2017).

1194 *Id.*

1195 *See* Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43, 48–49 (D. Mass. 2011).

1196 Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 CONG. REC. H7818–H7819 (Sept. 8, 2008) ("One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication *to its advantage* in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter . . . .") (emphasis added).

1197 *See supra* notes 1161–1166 and accompanying text.

1198 *See* SIR PHILIP WARWICK, RULES OF GOVERNMENT: A TRUE BALANCE BETWEEN SOVEREIGNTY AND LIBERTY 45–47 (Bernard Lintott 1710).

1199 *See* Broun & Capra, *supra* note 9, at 258–60.

1200 *See* Correll, *supra* note 6, at 1070–71; Noyes, *supra* note 14, at 760; Outlaw, *supra* note 14, at 8.

1201 *See* WARWICK, *supra* note 1198, at 52–53; *e.g.*, United States v. Harris, 154 F.3d 1082, 1085 (9th Cir. 1998) (Noonan, J., concurring).

adherence to past practice recommended by the precautionary principle can be a stumbling block as well.[1202] Ralph Waldo Emerson, that great philosopher of the natural virtues, denounced a "foolish consistency" maintained by statesmen,[1203] yet his renowned *bon mot* cuts both ways: in order to craft a more consistently sound privilege, a good measure of (thoughtful) inconsistency is required to break from the past.[1204] Although much progress has been made, especially in diluting the venom of subject-matter waiver,[1205] a yet longer road beckons on the perhaps quixotic quest for the perfect realization of age-old privilege.[1206]

VII. A RECOMMENDATION FOR THE FUTURE APPLICATION OF FRE 502

Nevertheless, the preceding Part is more philosophical and thus aspirational; what remains is the law as it exists today. Imagining another revolution in privilege law in the offing would disregard the history of desultory advancements over the meandering path of progress to date.[1207] To distill into a concise set of principles the various

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1202 *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 653 (1980); CTIA v. San Francisco, 827 F. Supp. 1054, 1060–61 (N.D. Cal. 2011); *In re* Kukui (Molokai), Inc., 174 P.3d 320, 338–39 (Haw. 2007).

1203 RALPH WALDO EMERSON, THE ESSAY ON SELF-RELIANCE 23 (Roycrofters 1908) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Out upon your guarded lips! Sew them up with packthread, do. Else, if you would be a man, speak what you think to-day in words as hard as cannon-balls, and to-morrow speak what to-morrow thinks in hard words again, though it contradict everything you said to-day."). It should go without saying that this author wishes merely to accord Emerson his due voice, rather than to cast aspersion on any statesman, philosopher, divine, or any other, holding in the highest esteem all those statesmen and jurists who have spent such time offering their best judgments on matters of privilege.

1204 *See, e.g.*, Gergacz, *supra* note 14, at 2 ("Case law has created three conflicting tests and even the one used by the majority of courts has predictability problems. Federal Rules of Evidence 502 was enacted to clear up the confusion. Unfortunately, some courts' constructions of Rule 502 have sown the seeds, that if allowed to sprout, will entangle Rule 502 in its own variety of unpredictability and confusion. This article will replant the garden.").

1205 *See supra* notes 1176–1179 and accompanying text.

1206 *See* Murphy, *supra* note 14, at 238 ("More work needs to be done, to ensure that clients, lawyers, and courts have reasonable ways to resolve conflicts in the digital age. Certainly Rule 502 is an improvement over past law on the waiver of privileges and protections, but much work needs to be done to protect attorneys and their clients.").

1207 *See* Rice, *Continuing Confusion*, *supra* note 39, at 1005 ("Fortunately, the legal community is not dependent upon the glacial revision processes of either Congress or the Judicial Conference's Advisory Committee on the Federal Rules of Evidence. Privilege is the only subject within the Federal Rules of Evidence that was left to develop under the common law. Therefore, change, for better or for worse, will likely continue on a case-by-case basis.").

suggestions and recommendations interlarded throughout the Article,[1208] adoption of the best interpretations of the new regime under FRE 502, in light of reason and experience,[1209] would entail the following—

- The prongs testing intent in FRE 502(a)(1) and (b)(1) should be applied first, as the gateway to determining FRE 502's treatment of a disclosure,[1210] and each prong should
    - depend on subjective mental state and not be judged based on objective factors of reasonable precautions or remediation;[1211] *and*
    - be binary and exclusive, such that a discloser's mental state is either intentional or inadvertent—*i.e.*, not intentional—with no standard of negligence or recklessness;[1212] *and*
    - assess the intent to waive a known privilege, not the intent to disclose, crucially rendering genuine mistakes of law as to privileged status inadvertent.[1213]
- The latter prongs in FRE 502(b)(2)-(3) should be analyzed by an objective standard under the expansive precedent deriving from *Hartford Fire*, *Lois Sportswear*, and *Hydraflow*.[1214]
    - The reasonableness of precautions under FRE 502(b)(2) should not demand *all* possible reasonable precautions but rather take

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[1208] One scholar attempted a similar undertaking in 2009 just after FRE 502 was passed, and this author has taken due note of many of the fine suggestions made there. *See* Meyers, *supra* note 9, at 1481–85.

[1209] *See* FED. R. EVID. 501; Rice, *Continuing Confusion*, *supra* note 39, at 1005 & n.133.

[1210] *See* Correll, *supra* note 6, at 1057 ("Again, though an obvious conclusion, it reflects a budding belief that each of these provisions can be seen as a discrete unit subject to their own case law and interpretive guidance. Therefore, the various provisions of the rule, or at least the operative provisions, may be seen as truly discrete rules notwithstanding their nominal combination under a single rule."); *see also* Gergacz, *supra* note 14, at 10 ("One approach, called the 'prerequisite approach,' requires that the disclosure be deemed 'inadvertent' before the confidentiality safeguards that were in place or the steps taken after the disclosure are evaluated.").

[1211] *E.g.*, cases cited *supra* notes 493 & 548; *see* Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 36–38. *Contra, e.g.*, cases cited *supra* note 544.

[1212] *E.g.*, cases cited *supra* notes 554, 566 & 568. *But see, e.g.*, cases cited *supra* note 544.

[1213] *E.g.*, cases cited *supra* note 577; *see also* Cross & Nagendra, *supra* note 14, at 2; Grimm, Bergstrom & Kraueter, *supra* note 14, ¶¶ 26–27; Gergacz, *supra* note 14, at 16. *Contra, e.g.*, cases cited *supra* note 573.

[1214] *E.g.*, cases cited *supra* note 537; *see also* sources cited *supra* note 535. *But see, e.g.*, Roe v. St. Louis Univ., No. 4:08CV1474, 2010 WL 199948, at *2 (E.D. Mo. Jan. 14, 2010); *see also* sources cited *supra* note 536.

into account the size and speed of the production schedule to accurately assess the burdens on the producing party.[1215]

- The reasonableness of remediation under FRE 502(b)(3) should evaluate promptness from both actual notice of and constructive knowledge of likely errors,[1216] but should not be judged by hindsight,[1217] and should require only practical punctuality under the circumstances, not virtual immediacy.[1218]
- Clawbacks should be denied where the initial production was inadvertent when pattern or practice indicates the producing party's attempt to gain tactical advantage or effect unfairly selective disclosure, rendering the party's remediation unreasonable.[1219]
- Sharp and unfair tactics by the receiving party in abetting or concealing inadvertent disclosures should weigh commensurately against finding inadvertent waiver, as such behavior mitigates any unreasonableness of the producing party's conduct.[1220]

- The latter prongs in FRE 502(a)(2)–(3) should be satisfied with particularity to support a subject matter waiver; only where a disclosure is selective, misleading, and unfair in light of related undisclosed material should any subject matter waiver arise.[1221]
- The language of an order or agreement under FRE 502(d) or (e) should be applied as entered or executed, without embroidery by the court to reflect best practices or notions of fairness, because such writings are

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1215 FED. R. EVID. 502(b) advisory committee's note to 2008 amendment (specifying factors regarding size and time); *e.g.*, Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1040 (N.D. Ill. 2009); cases cited *supra* note 537. *Contra* Relion, Inc. v. Hydra Fuel Cell Corp., No. CV06-607-HU, 2008 WL 5122828, at *2–3 (D. Or. Dec. 4, 2008). *See generally* Correll, *supra* note 6, at 1052-53 (comparing and contrasting *Coburn* and *Relion*).

1216 *E.g.*, cases cited *supra* notes 683 & 687.

1217 *E.g.*, cases cited *supra* note 696.

1218 *E.g.*, cases cited *supra* note 702. *Contra, e.g.*, cases cited *supra* note 700–701.

1219 *E.g.*, *In re* Recombinant DNA Tech. Patent & Contract Litig., MDL No. 912, 1994 WL 270712, at *40–41 (S.D. Ind. 1993); cases cited *supra* notes 721 & 1164.

1220 *See, e.g.*, cases cited *supra* note 740, 742 & 745. *But see also* sources cited *supra* note 1103.

1221 *E.g.*, cases cited *supra* notes 622–623; *see also* sources cited *supra* note 641. *Contra, e.g.*, cases cited *supra* note 631; *see also* Correll, *supra* note 6, at 1056 ("This methodology fatally undermines the twin goals of cost reduction and uniformity that underpin the rule.").

relied upon—and bargained for at least in the case of 502(e)— by the parties, superseding the normative operation of waiver by disclosure.[1222]

- Courts should continue to seek to apply standards of fairness analogous to FRE 502(a)(3) to extrajudicial disclosures to achieve parity,[1223] and should consider subjecting interparty disclosures prior to litigation that are later used in litigation to standards analogous to FRE 502(b) in order to avoid gamesmanship.[1224]

Although particular emphasis is laid on the guidance provided by the Advisory Committee,[1225] these interpretive guidelines are proposed based on ease and straightforwardness of application, faithfulness to the rule's stated purposes, assessment of trends and reasoning in the district courts, scholarly commentary, and, in the end, this author's humble opinions on equity and fair play. The opinions that ultimately matter in creating consistency, of course, are those of the courts of appeals and Supreme Court.[1226] Regardless of whether these or other rules of decision are adopted, the future force of privilege rests in the hands of the appellate judges oathbound for life to provide the fidelity, uniformity, and predictability that the law of privilege has for so long been held to demand.[1227]

CONCLUSION

One might be forgiven, after the profusion of allusions to swords, shields, jewels, and mythical monsters, to imagine the subject of privilege to be some sort of swashbuckling adventure undertaken by lawyers voyaging the heady seas of jurisprudence. Swashbuckling it may be—on account of the dangerously enigmatic

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1222 *E.g.*, cases cited *supra* note 799; *see also* Correll, *supra* note 6, at 1060; Grimm, Bergstrom & Krauter, *supra* note 14, ¶¶ 77–79. *Contra, e.g.*, Irth Sols., LLC v. Windstream Commc'ns LLC, No. 2:16-cv-219, 2017 WL 3276021, at *9–13 (S.D. Ohio Aug. 2, 2017); cases cited *supra* notes 808 & 815.

1223 *E.g.*, cases cited *supra* note 870.

1224 *See* Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 500–02 & n.20 (Fed. Cl. 2009). *Contra* De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330144, at *6–7 (D.N.M. May 21, 2013), *objs. overruled*, 2013 WL 12330083 (D.N.M. June 26, 2013).

1225 *See, e.g.*, De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013) (quoted *supra* note 639); Cross & Nagendra, *supra* note 14, at 2 ("Many courts have looked to the Advisory Committee's Note to Rule 502 for guidance"); Correll, *supra* note 6, at 1050, 1055 (observing courts interpreting FRE 502(a) and (b) have exhibited "extraordinary" reliance on and afforded "unusual and disproportionate" weight to the Advisory Committee note); Grimm, Bergstrom & Krauter, *supra* note 14, ¶ 21. *But see* Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43, 49 (D. Mass. 2011) (discounting guidance of the Advisory Committee).

1226 *See, e.g.*, Murphy, *supra* note 14, at 232 ("Hopefully appellate courts will enthusiastically endorse agreements amongst the parties; this will lead to cost savings and predictability—the very reasons for the creation and addition of Rule 502 to the Federal Rules of Evidence.").

1227 *See* cases cited *supra* note 191.

precedential territory in which it occurs.[1228] But privilege is fundamental to the rights of citizens, long predating the Constitution itself,[1229] and ought not be the uncharted expanse at the periphery of jurisprudence whereon is scrawled "here be dragons" and aught more, an ocean only sailed by courageous explorers.[1230] Scylla and Charybdis may have been partly tamed, but a new generation of monsters hungrily awaits unwary seafarers.[1231] The promise of FRE 502 was to commission cartographers to map those distant tides and install the comfortable and predictable machinery of the law.[1232] That potential has not yet been realized, in roughly equal measures because of unchecked judicial momentum, a dearth of guidance from controlling authorities, and ambiguities in the text of the rule itself.[1233] As one article grimly predicted in 2012, exploring the inherent tensions and contradictions in FRE 502's application "is therefore necessary because navigating these waters may be an uncertain enterprise for a long time."[1234]

Beyond the swords, shields, and other allegorical folderol, there is the eternal cat. Odd it is that the preferred—indeed, nigh ubiquitous—metaphor for privilege itself is the cat.[1235] Courts might as well have chosen a mythological creature akin to Scylla

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1228 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 705–06; *id*. at 751–52; Meyers, *supra* note 9, at 1446–47.

1229 *See* Imwinkelried, *supra* note 14, at 168–69 (quoting Rules of Evidence: Hearing Before the Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary, 93th Cong. 142, 143-44 (1973) (testimony of Hon. Arthur H. Goldberg)); RICE, *ACPITUS*, *supra* note 39, §§ 1:1-4; *see also* Geoffrey C. Hazard Jr., *An Historical Perspective on the Lawyer-Client Privilege*, 66 CALIF. L. REV. 1061, 1071–72 (1978) (discussing history of the attorney-client privilege); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 487–89 (1928) (same); *cf.* Sunshine, *Uncertain Junction*, *supra* note 36, at 547-48 (discussing Hazard and Radin).

1230 Meeri Kim, *Oldest Globe to Depict the New World May Have Been Discovered*, WASH. POST, Aug. 19, 2013 ("The globe's lone sentence, above the coast of Southeast Asia, is 'Hic Sunt Dracones.' '"Here be dragons," a very interesting sentence,' said Thomas Sander, editor of the *Portolan*, the journal of the Washington Map Society . . . . 'In early maps, you would see images of sea monsters; it was a way to say there's bad stuff out there.'").

1231 *Compare supra* Section I-C *with* Section VI-C.

1232 *See* Broun & Capra, *supra* note 9, at 271–73.

1233 *See* McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 751–52 (concluding that the strict and lenient schools essentially persevered in their preexisting philosophies); Grimm, Bergstrom & Kraueter, *supra* note 14, at ¶ 99 ("The framework exists for Rule 502 to function as intended, but thus far it has not fulfilled its purpose, mainly because parties have overlooked it and courts have not construed it consistently with its purpose—or consistently with each other—such that counsel and litigants are left without the protections and uniform set of standards that the rule should provide.").

1234 McLoughlin, Bloomfield, Miller & Mercer, *supra* note 14, at 706.

1235 *See, e.g.*, Al Odah v. United States, 559 F.3d 539, 544 (D.C. Cir. 2009); *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1088 (9th Cir. 2007) (citations omitted), *abrogated by* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 105–09 (2009); United States v. Philip Morris, Inc., 314 F.3d 612, 619–620 (D.C. Cir. 2003) (quoting *In re* Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998)), *abrogated by Mohawk*, 558 U.S. at 105–09; *In re* Ford Motor Co., 110 F.3d 954, 963 (3d Cir. 1997), *abrogated by Mohawk*, 558 U.S. at 105–09; Reise v. Bd. of Regents,

and Charybdis: "letting the proverbial genie out of the bottle."[1236] Or they might have looked to another farmyard animal in likening waived privilege to the legendary equine escapee, after which locking the barn or stable door accomplishes nothing.[1237] Those of a more meditative bent might see once-confidential material in the hands of the adversary as "water over the dam" or "water under the bridge"—in either case, insusceptible of return.[1238] Also available to courts preferring inanimate subjects as metaphors is the temporally impossible unringing of the bell.[1239] One court of appeals, after citing the cat, professed there were more vivid alternatives to its favored allusion: "[m]ore colorfully, there is no way to unscramble the egg scrambled by the disclosure; the baby has been thrown out with the bath water."[1240] Nevertheless, it is to the cat that courts perennially return in describing that most elusive of entities, the privilege itself.[1241]

"But"—at the risk of rousing a zombified corpse of *Sealed Case*, which uttered the phrase—"that is as it should be."[1242] The cat is a superlative symbol of treacherous uncertainty.[1243] Look, for instance, to Schrödinger's cat, existing in an indeterminate

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957 F.2d 293, 295 (7th Cir. 1992); Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990); *In re* Von Bulow, 828 F.2d 94, 103 (2d Cir. 1987); *In re* Katz, 623 F.2d 122, 124 (2d Cir. 1980). The list could go on at great length—not least by the inclusion of district courts—but at 1235 overstuffed footnotes and counting, this Article will practice a rare parsimony.

1236 Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 (2d Cir. 2004) ("The genie is out of the bottle, albeit because of what we consider to be the district court's error. We have not the means to put the genie back."); *In re* Subpoena No. 22, 709 A.2d 385, 392 (Pa. Super. Ct. 1998) (addressing context of waiver of psychiatrist-patient privilege with the metaphor); Noyes, *supra* note 14, at 679 ("May a federal court enter an order with retroactive effect—to put the waiver genie back in the privilege bottle?").

1237 *Cf.* United States v. Barnes, 604 F.2d 121, 137 (2d Cir. 1979) ("Cases need not be cited to prove the adage of the futility of locking the barn door after the horse has escaped."); Sykes v. Jenny Wren Co., 78 F.2d 729, 735 (D.C. Cir. 1935) ("It is the equivalent of locking the stable door after the horse is gone.").

1238 *Cf.* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 545 (1991) (White, J., concurring) ("Third, even if—as JUSTICE O'CONNOR now argues—the Court was quite wrong in doing so, *post*, at 553–559, that is water over the dam, irretrievably it seems to me."); Minn. Assoc. of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1053 (8th Cir. 2002) ("water under the bridge").

1239 FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992).

1240 *In re* Ford Motor Co., 110 F.3d 954, 963 (3d Cir. 1997).

1241 *See* cases cited *supra* note 1235.

1242 *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

1243 *Cf.* M.A. Pershina, *English and Spanish Phraseological Units with Zoonimal Component «cat»/«gato»*, 3 ВОПРОСЫ ТРАНСФОРМАЦИИ ОБРАЗОВАНИЯ [LINGUISTICS AND INTERCULT. COMMC'N] 226, 229 (2016) (noting "the cat symbolizes deception, fraud and cheating"); *id.* at 230 (also noting "a cat represents two opposite concepts of trouble and luck"); Gertrude M. Yeager & Lisa Zimmerman, *Introduction*, *in* CONFRONTING CHANGE, CHALLENGING TRADITION: WOMEN IN LATIN AMERICAN HISTORY xi, xiii ("In traditional folktales the cat symbolizes evil, treachery, and cunning.") (Gertrude Yeager ed. SR Books

state of simultaneous life and unlife, death and undeath, awaiting the observation of a decisive observer to determine its fate.[1244] This is an animal well known to the judiciary, as narrated by the Seventh Circuit: "In a famous *gedanken* experiment of quantum mechanics, Schrodinger's [*sic*] cat remains suspended between life and death in a box, neither alive nor dead until the box is opened and uncertainty about the decay of a radioactive particle is resolved."[1245] What better metaphor could there be for privilege—perhaps waived, perhaps preserved—awaiting opening of that black box and a judgment as to its validity?[1246] Under the current regime, decisions are to be made on a case-by-case basis, and thus it is the contemporaneous predilection of whichever judge happens to inherit the motion that will determine the crucial decision as to whether the privilege (or cat) lives or dies.[1247]

Spare also a thought for the Cheshire Cat of Lewis Carroll's Wonderland, by whose words Alice's hopes to avoid consorting with madmen were shattered, because "you can't help that . . . we're all mad here. I'm mad. You're mad."[1248] Such hopes are oft similarly forlorn for those seeking predictability or even lucidity in the often freewheeling application of privilege law.[1249] One might consider too the Cat's sagacious advice to Alice that "it doesn't matter" which road she takes if she didn't

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1994); *see also* Kamran Pashaei Fakhri, Rogayeh Mahmudivand Bakhtiari & Parvaneh Adelzadeh, *Sanctity and Malevolence of Cat in World Mythology and Persian Prose and Verse*, ARABIAN J. BUS. MGMT. REV., vol.1, no. 7 (2013); SANDRA CHORON, HARRY CHORON & ARDEN MOORE, PLANET CAT: A CAT-ALOG 15, (Houghton Mifflin Harcourt 2007) (listing eighteen concepts that the cat symbolizes).

1244 Erwin Schrödinger, *Die Gegenwärtige Situation in der Quantenmechanik*, 23 DIE NATURWISSENSCHAFTEN 807–12, 823–28, 844–49 (1935); *see also* TKO Equip. v. C&G Coal Co., 863 F.2d 541, 545 (7th Cir. 1988) (discussing same); Denke v. Shoemaker, 198 P.3d 284, 302 n.2 (Mont. 2008) (same); Hardin Cty. Schs. v. Foster, 40 S.W.3d 865, 872 & n.6 (Ky. 2001) (same).

1245 *E.g.*, *TKO*, 863 F.2d at 545; *accord, e.g.*, Mont. Cannabis Ind. Ass'n v. Montana, 286 P.3d 1161, 1170 n.3 (Mont. 2012); *Denke*, 198 P.3d at 302 n.2; *Hardin*, 40 S.W.3d at 872 & n.6.

1246 *See* Surgery Ctr. at 900 N. Mich. Ave., LLC v. Am. Physicians Assurance Corp., 317 F.R.D. 620, 632 (N.D. Ill. 2016); Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261, 263 (D. Del. 1995).

1247 *See supra* notes 1135–1142 and accompanying text.

1248 LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 90 (Lee & Shephard 1869).

1249 *See, e.g.*, *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294–95 (6th Cir. 2002) ("The prevailing view is that once a client waives the privilege to one party, the privilege is waived en toto. However, as evidenced by the instant case, some courts have recognized that a client may 'selectively' waive the privilege. And, unfortunately, 'the case law addressing the issue of limited waiver [is] in a state of "hopeless confusion."' Indeed, as will be discussed infra, some courts have even taken internally inconsistent opinions.") (citations and lineation omitted); *see also* BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc., 326 F.R.D. 176, 182–83 (N.D. Ill. 2018) (noting that "courts have reached varied results in assessing whether and when communications with a third-party consultant assisting the client results in a waiver of the attorney-client privilege" and that such judgments are based on a "complex inquiry based on intractable factual variables").

much care where she ended up so long as it was *somewhere*: "you're sure to do that . . . if you only walk long enough."[1250] Such counsel might be equally apt to the many district courts selecting amongst clashing interpretations of FRE 502's various subparts without appellate guidance.[1251] At least one, attempting to unpack ramified layers of inconsistent arguments regarding privilege, has found itself empathizing with Alice: "It then gets, as Alice in Wonderland put it, 'curioser and curioser.'"[1252] Like privilege at times,[1253] just when one thinks one has a firm grasp on it, the Cat vanishes,

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1250 CARROLL, *supra* note 1248, at 89–90; *cf.* Sowsonicut v. Roosevelt City, No. 2:03-cv-676, at *17 (D. Utah Mar. 29, 2005), https://casetext.com/case/sowsonicut-v-roosevelt-city-2 ("It is as if Plaintiffs have come to a fork in the road and do not know which way to go. Perhaps then, as the wise Cheshire cat eloquently stated in Lewis Carroll's timeless classic Alice in Wonderland, 'it doesn't matter.'").

1251 *See, e.g.*, *In re* Testosterone Replacement Therapy Prod. Litig., 301 F. Supp. 3d 917, 924–25 (N.D. Ill. 2018); United States v. Broombraugh, No. 14-40005-10, 2017 WL 2734636, at *4 (D. Kan. June 26, 2017); De Los Santos v. City of Roswell, No. 12-375, 2013 WL 12330083, at *5 (D.N.M. June 26, 2013).

1252 Intervet, Inc. v. Merial Ltd., 252 F.R.D. 47, 52 (D.D.C. 2008) ("Thus, in the perfect converse of the ordinary situation, the titular holder of the privilege, Intervet, is insisting that the documents are not privileged while Merial is insisting they are. It then gets, as Alice in Wonderland put it, 'curioser and curioser;' Intervet, claiming that Exhibits 64 and 67 are not privileged, nevertheless 'clawed them back' under a provision of a Protective Order, pertaining to the production of privileged material. It then produced them in a redacted form, even though Merial had already seen them in an unredacted form, and used them during the deposition."). Alice in Wonderland did not in fact put it quite that way, for the court misspelt "curiouser," perhaps understandably, as Carroll had invented the word, as he had so many others. *See* CARROLL, *supra* note 1248, at 15 ("'Curiouser and curiouser!' cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English).").

1253 *See* Clark v. United States, 289 U.S. 1, 16 (1933) ("A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney."); Ingo v. Koch, 127 F.2d 667, 672 (2d Cir. 1942) ("Many a privilege, however, is conditional: the privilege vanishes, being abused, if the purpose or intent of the conduct is not to further the interest which is the basis of the privilege."); Alexander v. FBI, 193 F.R.D. 1, 9–10 (D.D.C. 2000) (holding that "once a sufficient showing of a crime has been made, as it has here, 'the privilege vanishes as to all material related to the ongoing violation.'") (quoting *In re* Sealed Case, 676 F.2d 793, 811 n.67 (D.C. Cir. 1982)).

leaving only a mischievous grin behind.[1254] And also like privilege,[1255] this Cat has "*very* long claws and a great many teeth," demanding a healthy respect.[1256]

So, in the end, has FRE 502 actually advanced the voyage over the seas of privilege, or simply created more churn in the water? Ten years after its passage, a verdict remains elusive; indeed, it is improbable there will ever be a final verdict, for time will undoubtedly see future amendments and additions in this peculiar nexus where principles of privacy, rules of evidence, and standards of ethics intersect.[1257] Challenges to the underpinnings of privilege continue to mount. The Third Circuit observed that, *in 2011 alone*, some 1.8 zettabytes of data had been created[1258]—for those unfamiliar with that metric prefix, a zettabyte is one sextillion bytes, equating to 383 quintillion (383,000,000,000,000,000,000) words,[1259] or 2,788 trillion copies of the New Testament:[1260] roughly four hundred thousand scriptures for every man, woman, and child then quick on Earth.[1261]

FRE 502 represents just one of many modern forays to address such an incomprehensible order of magnitude.[1262] Future technological advancements

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1254 CARROLL, *supra* note 1248, at 89 ("It looked good-natured, she thought: still it had *very* long claws and a great many teeth, so she felt that it ought to be treated with respect.").

1255 *See* Alexis N. Simpson, *The Monster in the Closet: Declawing the Inequitable Conduct Beast in the Attorney-Client Privilege Arena*, 25 GA. ST. U. L. REV. 735, 743 n.56 (2009) (stating that FRE 502 "limit[s] waiver of attorney-client privilege for inadvertent disclosures and disclosures made in state proceedings, while giving teeth to court orders and party agreements governing the scope of the waiver"); *id.* at 735–36 (setting forth how present law has not yet declawed a principle of privilege waiver forced upon patent attorneys); *cf.* Nancy Leong, Note, *Attorney Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. L. & ETHICS 163, 186 (2007) (discussing how, although many localities have rules that moot privilege, it still has teeth in those that do not).

1256 CARROLL, *supra* note 1248, at 89 ("It looked good-natured, she thought: still it had *very* long claws and a great many teeth, so she felt that it ought to be treated with respect.").

1257 *See, e.g.*, Schaefer, *supra* note 14, at 232–60 (noting the intersection and proposing new standards).

1258 Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 160 n.1 (3d Cir. 2012).

1259 This assumes one character per byte and an average of 4.7 characters per word. *See* Joel Pynte & Alan Kennedy, *An Influence over Eye Movements in Reading Exerted from Beyond the Level of the Word: Evidence from Reading English and French*, 46 VISION RESEARCH 3786, 3788 (2006).

1260 A ready-made textual corpus, the NT Corpus, has conveniently counted the length of each book in the original Greek. *See* Helmut Pruscha, *Statistical Models for Vocabulary and Text Length with an Application to the NT Corpus*, 13 LITERARY & LINGUISTIC COMPUTING 195, 196 (1998).

1261 This figure takes the estimated human population of 2011 to be seven billion. WORLD POPULATION BUREAU, 2011 WORLD POPULATION DATA SHEET, https://www.prb.org/2011-world-population-data-sheet-2/.

1262 *Race Tires*, 674 F.3d at 160 n.1; Murphy, *supra* note 14, at 196–200; *see* Henry S. Noyes, *Is E-Discovery So Different that It Requires New Discovery Rules? An Analysis of*

unfathomable at present will surely revolutionize evidentiary discovery as much (if not more) as has the exponential bourgeoning of electronically stored information over the last three decades.[1263] To the question of whether FRE 502 did the right thing, and whether everything will work out in the end, one can therefore only echo the answer of Alan Moore's magnum opus *Watchmen* to such an enquiry: "Nothing ever ends."[1264] What remains certain is that the protection of privilege, an isomorphism of civil society's protection of the individual, is worth the effort.[1265] For all his inequable talents, Wigmore was only a waypoint, albeit a monumental one, towards the goal in view.[1266] The quest for a more perfect privilege balancing the supreme goals of privacy and truth will go ever on, as it has for centuries.[1267] The future, in short, promises many more decennial—and indeed centennial—assessments.[1268]

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Proposed Amendments to the Federal Rules of Civil Procedure, 71 TENN. L. REV. 585, 617–54 (2004).

1263 Some advances are already on the horizon, notably in artificial intelligence. *See, e.g.*, Julie Sobowale, *Beyond Imagination: How Artificial Intelligence Is Transforming the Legal Profession*, 102 A.B.A. J. 47 (2016); Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on "Information Inflation" and Current Issues In E-Discovery Search*, XVII RICH. J. L. & TECH. 17 (2011); Jack G. Conrad, *E-Discovery Revisited: The Need for Artificial Intelligence Beyond Information Retrieval*, 18 ARTIFICIAL INTELL. & L. 321 (2010); Kevin D. Ashley & Will Bridewell, *Emerging AI & Law Approaches to Automating Analysis and Retrieval of Electronically Stored Information in Discovery Proceedings*, 18 ARTIFICIAL INTELL. & L. 311 (2010).

1264 ALAN MOORE, DAVID GIBBONS & JOHN HIGGINS, WATCHMEN ch. 12, p.27 (DC Comics 1987).

1265 *See* Imwinkelried, *supra* note 14, at 168–69.

1266 *See id.* at 172–76; Correll, *supra* note 6, at 1033–34.

1267 *See* sources cited *supra* note 1229.

1268 *Cf., e.g.*, Felix J. Frankfurter, *John Henry Wigmore: A Centennial Tribute*, 58 NW. U. L. REV. 443, 443 (1964) ("I am grateful for the long, happy friendship that I had with John Henry Wigmore throughout my professional life, and am honored to pay tribute to that great man's contribution to the law on the centennial of his birth.").