

**INADVERTENT PRODUCTION OF PRIVILEGED INFORMATION IN  
DISCOVERY IN FEDERAL COURT:  
THE NEED FOR WELL-DRAFTED CLAWBACK AGREEMENTS**

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## I. INTRODUCTION

We all know that the use of modern technology is transforming the practice of law. Indeed, when ABA President Carolyn Lamm created the Ethics 20/20 Commission in 2009, she said:

Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.<sup>1</sup>

One of the most important ways in which technology is affecting the practice of law is in the area of electronic discovery.<sup>2</sup> E-discovery poses a wide range of issues, but one that is of paramount importance to lawyers is the need to maintain attorney–client privilege (ACP) and work-product protection (WPP) when producing information in response to discovery requests.

Issues surrounding the inadvertent production of privileged information in discovery<sup>3</sup> (IPPI) have existed for quite some time.<sup>4</sup> However, the development of modern technological devices and applications, which have produced a vast amount of electronically stored information (ESI), has increased the importance

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1. Press Release, Am. Bar Ass'n, ABA President Carolyn B. Lamm Creates Ethics Comm'n to Address Tech. & Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), [http://apps.americanbar.org/abanet/media/release/news\\_release.cfm?releaseid=730](http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730).

2. See Damian Vargas, Note, *Electronic Discovery: 2006 Amendments to the Federal Rules of Civil Procedure*, 34 RUTGERS COMPUTER & TECH. L.J. 396, 397 (2008) (citing THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE, at vi (Ragan et al. eds., 2005), available at <https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records> (access required)) (discussing how technological advances such as digital information storage have changed traditional discovery practices).

3. This Article is limited to inadvertent disclosure of privileged information in discovery in federal court, where Federal Rule of Evidence 502 applies. See FED. R. EVID. 502. Different issues arise in state court where Rule 502 is not applicable, absent a federal court order that would be binding on state courts, or in transactional matters. FED. R. EVID. 502(d); see Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 196 (2010). However, the central thesis of this Article—recommending that lawyers prepare carefully drafted clawback agreements—could be applied to both litigation outside of the federal courts and to transactional matters.

4. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992) (advising that when a lawyer receives materials that appear on their face to be privileged or otherwise confidential and that were clearly not intended for the lawyer, the lawyer should not examine the materials, should notify the sender, and should comply with the sender's instructions regarding the materials). In 2002, the ABA adopted Model Rule 4.4(b), which reduces the obligations on the receiving lawyer. See MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2012) (requiring that the receiving lawyer "shall promptly notify the sender" upon receipt of privileged or confidential information).

of the issue.<sup>5</sup> In the last few years, important changes in ethical, evidentiary, and procedural rules have gone into effect, changing the way lawyers must deal with issues arising from IPPI.<sup>6</sup> However, the scope, application, and interaction of these rule changes can be complex and confusing. This Article focuses on practical problems that lawyers face in protecting against IPPI in federal court and in dealing with such disclosures once they occur.

This Article is divided into five parts: Part II discusses ACP and WPP—which this Article refers to collectively as privileges—in both federal and state court. Part III is an overview of Federal Rule of Evidence (FRE) 502, which deals with when IPPI amounts to a waiver of privileges,<sup>7</sup> and Federal Rule of Civil Procedure (FRCP) 26(b)(5)(B), which deals with the rights and obligations of a parties who make or receive an IPPI.<sup>8</sup> Part IV focuses on lawyers' ethical obligations. Part IV.A outlines the various ethical obligations generally applicable to lawyers when dealing with IPPI. Part IV.B discusses the major ethical issues that lawyers face in dealing with IPPI and argues that a well-drafted clawback order is a major tool for dealing with these issues. Unfortunately, there are a number of legal and practical questions surrounding clawback orders.<sup>9</sup> Part V analyzes the legal issues clouding the use of clawback orders. Part V.A discusses court decisions that have adopted a narrow view of court authority to issue clawback orders under Rule 502(b). Part V.B examines the specific issues arising from the case law. Part V.C considers cases where clawback agreements have failed to achieve their purpose. Part VI discusses how lawyers can draft clawback agreements and orders to comply with governing case law. Appendices to the Article provide examples of clawback orders and agreements for lawyers and judges to consider.

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5. See Schaefer, *supra* note 3, at 195.

6. See, e.g., *id.* at 205 (citing MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2009) (amended 2012)) (ethical rule requiring lawyer who receives IPPI to promptly notify the sender); Ann M. Murphy, *Federal Rule of Evidence 502: The "Get Out of Jail Free" Provision—or Is It?*, 41 N.M. L. REV. 193, 200–03 (2011) (discussing the history of Federal Rule of Evidence 502); Vargas, *supra* note 2, at 396 & n.1 (identifying the 2006 amendment to the Federal Rule of Civil Procedure 26 as one of the "E-discovery Amendments").

7. See FED. R. EVID. 502.

8. See FED. R. CIV. P. 26(b)(5)(B).

9. See D. Patricia Wallace, *What Every Attorney Needs to Know About Electronic Technology*, 82 FLA. B.J. 23, 30 (2008) ("Clawback agreements sound like a good idea, but like so many good ideas, such agreements pose problems.").

## II. THE ATTORNEY–CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE IN FEDERAL AND STATE COURT

Federal law recognizes both ACP<sup>10</sup> and WPP.<sup>11</sup> Federal Rule of Evidence 501 states that “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege.”<sup>12</sup> The rule contains an exception for cases in which state law determines the existence of the privilege: “But in a civil case, state law governs privilege regarding a claim or defense for which state law applies the rule of decision.”<sup>13</sup> In cases involving both federal and state claims, federal courts have generally held that federal law controls the existence of any privilege, although the Supreme Court has not decided the question.<sup>14</sup>

Federal Rule of Civil Procedure 26(b)(3) provides for WPP:

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.<sup>15</sup>

State law, either by court decision or by rule, generally recognizes both ACP and WPP, although the scope of these doctrines in state court may vary significantly from the federal rules.<sup>16</sup> For example, federal law is likely to be

10. FED. R. CIV. P. 26(b)(1); *see also* *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining the purpose of ACP and the important role it plays in the administration of justice).

11. FED. R. CIV. P. 26(b)(3); *see also* *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (“Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”).

12. FED. R. EVID. 501.

13. *Id.*

14. *See* *Alpert v. Riley*, 267 F.R.D. 202, 207–08 (S.D. Tex. 2010) (citing *Ferko v. Nat’l Ass’n for Stock Car Auto Racing*, 218 F.R.D. 125, 133 (E.D. Tex. 2003); *First Fed. Sav. & Loan Ass’n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 560 (S.D.N.Y. 1986)).

15. FED. R. CIV. P. 26(b)(3).

16. *Compare* *Upjohn Co. v. United States*, 449 U.S. 383, 396–97 (1981) (adopting a case-by-case approach to privilege, and concluding “that the narrow ‘control group test’ sanctioned by the Court of Appeals” was inconsistent with the FRE), *with* *Consolidation Coal Co. v. Bucyrus–Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982) (“The control-group test appears to us to strike a reasonable balance . . .”).

more protective of ACP for corporations than state law.<sup>17</sup> Some states limit the corporate ACP to communications between lawyers for the corporation and members of the control group.<sup>18</sup> Under the principles applied in *Upjohn Co. v. United States*,<sup>19</sup> the ACP in federal court applies to communications between lawyers and any employee of the corporation if the purpose of the communication is to facilitate the giving of legal advice by the lawyer to the corporation.<sup>20</sup> This includes the gathering of factual information by the lawyers from the employees.<sup>21</sup>

### III. AN OVERVIEW OF FEDERAL RULE OF EVIDENCE 502 AND FEDERAL RULE OF CIVIL PROCEDURE 26(b)(5)(B)

#### A. *Scope of Federal Rule of Evidence 502*

Under federal and state law, both ACP and WPP can be waived.<sup>22</sup> When disclosure of information subject to ACP or WPP is “made in a federal proceeding or to a federal office or agency,” FRE 502 determines whether ACP or WPP has been waived.<sup>23</sup> Rule 502 applies to proceedings in federal court and to federal court-annexed and mandated arbitration.<sup>24</sup> However, Rule 502 extends beyond federal proceedings. Under section (f), the rule applies in state court proceedings “in the circumstances set out in the rule,” and this is true “even if state law provides the rule of decision.”<sup>25</sup> Under section (d), if a federal court orders that a disclosure connected with litigation before the court is not a waiver,

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17. See Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 105–06 (discussing the difference between federal and state ACP protections).

18. See, e.g., *Consolidation Coal*, 432 N.E.2d at 257 (“The control-group test appears to us to strike a reasonable balance . . .”).

19. 449 U.S. 383 (1981).

20. *Id.* at 394–95.

21. *Id.* at 394. In *Upjohn*, the lawyers sent a question to lower-level employees to obtain information regarding questionable payments to foreign officials. *Id.*

22. See FED. R. EVID. 502; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78 (2000) (waiver of ACP); *id.* § 91 (waiver of WPP by voluntary act); *id.* § 92 (waiver of WPP by use in litigation). However, the standards for waiver of WPP are different from those for ACP. See Hon. Paul W. Grimm et al., *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J.L. & TECH., no. 3, 2011, at 1, 14 (noting that waiver of ACP and WPP “result from different circumstances”). Disclosure of information to any third party may amount to a waiver of ACP, but it will only operate as a waiver of WPP if the disclosure is inconsistent with preserving the secrecy of the information from an adversary. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91(4).

23. FED. R. EVID. 502(a). The rule does not apply to other privileges but courts could extend the rule by analogy to deal with waivers of other privileges. See, e.g., *Sikorsky Aircraft Corp. v. United States*, 106 Fed. Cl. 571, 583 (2012) (citing FED. R. EVID. 502(b)) (applies FRE 502(b) to waiver of the “deliberative process privilege”).

24. FED. R. EVID. 502(f).

25. *Id.*

then the order applies “in any other federal or state proceeding.”<sup>26</sup> Thus, there are at least two significant circumstances in which Rule 502 will override state law. First, in federal proceedings where state law controls—principally diversity cases—Rule 502, not state law, will determine if a waiver of ACP or WPP has occurred.<sup>27</sup> Second, if a federal court finds that a disclosure did not operate as a waiver, that decision will be binding on all state courts even in cases where state law applies.<sup>28</sup> In addition, if a

disclosure is made in a state proceeding and is not the subject of a state-court order . . . the disclosure does not operate as a waiver in a federal proceeding if . . . it would not be a waiver under [Rule 502] or is not a waiver under the law of the state where the disclosure occurred.<sup>29</sup>

Rule 502 only applies with regard to the issue of waiver, not with regard to scope of ACP or WPP.<sup>30</sup> The Statement of Congressional Intent regarding Rule 502 states: “The rule does not alter the substantive law regarding attorney–client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it.”<sup>31</sup> Thus, a court must determine whether ACP or WPP applies to certain materials based on applicable state or federal law.<sup>32</sup> If ACP or WPP does not apply, then Rule 502 provides no protection to the party who is resisting production of or seeking to reacquire the material as to which there is a claim of ACP or WPP.<sup>33</sup>

In order for Rule 502 to apply, the disclosure must be made “in a federal proceeding or to a federal office or agency.”<sup>34</sup> If the disclosure is not in connection with such a proceeding, then the Rule does not apply and common law principles will determine whether a waiver has occurred.<sup>35</sup> For example,

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26. FED. R. EVID. 502(d).

27. *See* FED. R. EVID. 502(f).

28. *See* FED. R. EVID. 502(d).

29. FED. R. EVID. 502(c).

30. 154 CONG. REC. 18016 (2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

31. *Id.*

32. *See Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009) (“In a diversity action . . . state law governs the scope of the attorney–client privilege.”); *see, e.g., Amobi v. D.C. Dep’t of Corr.*, 262 F.R.D. 45, 51–52 (D.D.C. 2009) (finding that a memorandum prepared by attorney was not subject to ACP because, in the D.C. Circuit, ACP only covers communications that include confidential information received by the attorney from the client, not third parties; however, memorandum was subject to WPP because it contained attorney mental impressions and was prepared in anticipation of litigation).

33. *See* FED. R. EVID. 502 advisory committee’s note (“The rule governs only certain waivers by disclosure.”).

34. FED. R. EVID. 502(a).

35. Grimm et al., *supra* note 22, at 19–20 (citing FED. R. EVID. 502 & advisory committee’s note).

*Alpert v. Riley*<sup>36</sup> involved litigation over whether the defendant, Riley, improperly used his position as trustee of trusts created by Alpert.<sup>37</sup> At issue in the case was whether Riley had waived ACP and WPP with regard to various “legal” documents he placed on his partner’s computer.<sup>38</sup> The court held that Rule 502 did not apply because Riley placed the files on the computer before the start of any litigation with Alpert and he did not produce the files in connection with any other litigation.<sup>39</sup> If he had disclosed the materials in connection with state proceedings and there was no state order with regard to the disclosure, then Rule 502—in particular Rule 502(c)—would have applied.<sup>40</sup> Similarly, if the materials are being used outside of the evidentiary context, Rule 502 does not apply.<sup>41</sup>

Rule 502 only applies when the claim of waiver is based on *disclosure* of material.<sup>42</sup> A party may waive ACP or WPP by placing the advice of counsel in issue, but that form of waiver is not governed by Rule 502.<sup>43</sup>

### B. *Purposes and Provisions of Federal Rule of Evidence 502*

Prior to the adoption of Federal Rule of Evidence 502 in 2006,<sup>44</sup> uncertainty with regard to waiver of ACP and WPP existed on two major issues. First, under what circumstances did disclosure of privileged material amount to a waiver of privileges? Prior to the adoption of Rule 502, three approaches could be found in the case law.<sup>45</sup> Under the strict approach, any disclosure to a third person amounted to a waiver because privileged information had been released to a party outside the attorney–client relationship.<sup>46</sup> Other courts took the opposite

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36. 267 F.R.D. 202 (S.D. Tex. 2010).

37. *Id.* at 205.

38. *Id.*

39. *Id.* at 210.

40. *See* FED. R. EVID. 502(c).

41. 154 CONG. REC. 18016 (2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence) (“[I]t is not intended to alter the rules and practices governing use of information outside this evidentiary context.”).

42. *See* FED. R. EVID. 502 (“The following provisions apply, in the circumstances set out, to *disclosure* of a communication or information covered by the attorney-client privilege or work-product protection.” (emphasis added)).

43. *See* *Henry v. Quicken Loans, Inc.*, 263 F.R.D. 458, 469 (E.D. Mich. 2008) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); *Chevron Corp. v. Penzoil Co.*, 974 F.2d 1156, 1162–63 (9th Cir. 1992)).

44. For a detailed discussion of Rule 502 and a criticism of some decisions that are inconsistent with the purposes of the section, see Grimm et al., *supra* note 22, at 8.

45. Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1318 (2001) (“Federal courts have developed three divergent approaches to inadvertent disclosure of privileged documents during discovery.”).

46. *See* FED. R. EVID. 502(b) advisory committee’s note (“[A] few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client

view, holding that disclosure amounted to a waiver only if the party intended to disclose privileged information.<sup>47</sup> Most courts, however, adopted a middle ground in which the determination of whether a waiver occurred depended on the precautions taken.<sup>48</sup> Rule 502(b) adopts the majority view.<sup>49</sup>

Second, when does a waiver of a privilege apply beyond the particular document in question to cover other documents that are part of the same subject matter?<sup>50</sup> Rule 502(a) resolves this question by limiting subject matter waiver to situations where the waiver was intentional and other requirements are met.<sup>51</sup> The Advisory Committee's Notes to the Rule state that the purpose of the rule was to resolve these issues and also to reduce the costs necessary to protect against waivers of the privilege:<sup>52</sup>

This new rule has two major purposes:

(1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.

(2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.<sup>53</sup>

Rule 502 is divided into seven subsections.<sup>54</sup> Subsection (a) deals with the issue of subject matter waiver—i.e., when a waiver of the ACP or WPP as to a disclosed communication applies to other undisclosed communications.<sup>55</sup> The section provides for subject matter waiver only when the waiver of the disclosed

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privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure.”) (citing *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 235 (D. Md. 2005)).

47. *Id.* (“A few courts find that a disclosure must be intentional to be a waiver.”).

48. *Id.* (“Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner.”).

49. *Murphy*, *supra* note 6, at 207 (citing FED. R. EVID. 502(b) advisory committee's note) (noting that Congress adopted the “middle ground” approach).

50. 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, 224 (2006) (“Under existing federal case law, a decision that an inadvertent disclosure results in waiver with respect to the disclosed document may also waive the privilege with regard to all communications dealing with the same subject matter. Similar to determining the effect of an inadvertent disclosure, courts have used various approaches to the issue of subject matter waiver.”).

51. FED. R. EVID. 502(b) advisory committee's note (“[S]ubject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner.”).

52. FED. R. EVID. 502 advisory committee's note.

53. *Id.*

54. *See* FED. R. EVID. 502(a)–(g).

55. FED. R. EVID. 502(a).

communication was “intentional” and other requirements are met, including when the communications “ought in fairness to be considered together.”<sup>56</sup> The Advisory Committee’s Note indicates that the fairness requirement exists “in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.”<sup>57</sup>

Rule 502(b) deals with situations of “inadvertent” rather than intentional disclosure.<sup>58</sup> Under this rule, if a disclosure is “made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver” of ACP or WPP if the disclosure was “inadvertent” and two other requirements are met: the privilege-holder took reasonable precautions to prevent disclosure and acted promptly to rectify the error once it was discovered.<sup>59</sup> As discussed below, courts are divided on the meaning of an “inadvertent” disclosure.<sup>60</sup>

Rule 502(c) answers the question of when disclosure in a state proceeding amounts to a waiver of privilege in a federal proceeding.<sup>61</sup> The rule is based on the principle of maximum protection of the privileges.<sup>62</sup> Therefore, a disclosure in a state proceeding does not operate as a waiver in a federal proceeding if the disclosure would not be a waiver under *either* Rule 502 or the law of the state where the disclosure occurred.<sup>63</sup>

As discussed more fully below, Rule 502(d) provides an important avenue for protection of privileges from waiver by disclosure.<sup>64</sup> A court may order that disclosure of a communication does not operate as a waiver.<sup>65</sup> The order applies not only to the case pending before the court, but it also has a broader effect: “[T]he disclosure is also not a waiver in any other federal or state proceeding.”<sup>66</sup>

Rule 502(e) deals with the effect of a party agreement with regard to the consequences of a disclosure of privileged material in a federal proceeding.<sup>67</sup> The agreement is binding on the parties but has no further effect “unless it is incorporated into a court order.”<sup>68</sup>

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56. FED. R. EVID. 502(a)(1)–(3).

57. FED. R. EVID. 502(a) advisory committee’s note.

58. FED. R. EVID. 502(b).

59. FED. R. EVID. 502(b)(1)–(3).

60. *See infra* Part IV.B.

61. FED. R. EVID. 502(c).

62. *See* FED. R. EVID. 502(c) advisory committee’s note (“The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product.”).

63. *See* U.S. Fire Ins. Co. v. City of Warren, No. 2:10 CV 13128, 2012 WL 1454008 (E.D. Mich. Apr. 26, 2012) (citing FED. R. EVID. 502) (holding that under FRE 502(c), the Michigan rule with regard to waiver of privilege rather than FRE 502(b) applied because waiver occurred in connection with a state proceeding).

64. *See infra* Part V.A.

65. FED. R. EVID. 502(d).

66. *Id.*

67. FED. R. EVID. 502(e).

68. *Id.*

Rule 502(f) states that the rule applies in both state and federal proceedings to the extent set forth in the rule.<sup>69</sup> In addition, it applies to federal court-annexed and federal court-mandated proceedings.<sup>70</sup> The rule is clear that it “applies even if state law provides the rule of decision.”<sup>71</sup> Thus, Rule 502 applies in federal cases in which jurisdiction is based on diversity of citizenship.<sup>72</sup> Subsection (g) contains definitions.<sup>73</sup>

C. *Federal Rule of Civil Procedure 26(b)(5)(B)*

Federal Rule of Civil Procedure 26(b)(5)(B) provides a method for a party who has produced information that is subject to a claim of either ACP or WPP to prevent use or dissemination of the material pending a resolution of the claim.<sup>74</sup> Under the rule, a producing party may notify the receiving party of its claim of ACP or WPP and the basis of the claim.<sup>75</sup> On receipt of the notice, the receiving “party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; [and] must take reasonable steps to retrieve the information if the party disclosed it before being notified.”<sup>76</sup> The receiving party has the option of filing a motion under seal seeking a determination of whether ACP or WPP applies to the material, or the receiving party can await action by the producing party.<sup>77</sup> If the information has been returned to the producing party, that party must preserve the material pending a judicial determination of the claim of privilege.<sup>78</sup> Rule 26(b)(5)(B) ties in with Rule 502 because one of the requirements to avoid a waiver of ACP or WPP under Rule 502(b) is that the producing party “promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”<sup>79</sup>

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69. FED. R. EVID. 502(f).

70. *Id.*

71. *Id.*

72. *See* FED. R. EVID. 502(f) advisory committee’s note (“[T]he rule applies to state law causes of action brought in federal court.”).

73. FED. R. EVID. 502(g).

74. FED. R. CIV. P. 26(b)(5)(B).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. FED. R. EVID. 502(b)(3).

## IV. ETHICAL OBLIGATIONS AND ISSUES FACING LAWYERS DEALING WITH INADVERTENT PRODUCTION OF PRIVILEGED INFORMATION (IPPI)

A. *Ethics Rules Applicable to IPPI*

A number of ethics rules are involved in the topic of IPPI.<sup>80</sup> With regard to producing parties, Rule 1.1 of the ABA Model Rules of Professional Conduct (ABA Model Rules) imposes on lawyers a duty of competency.<sup>81</sup> Rule 1.6 incorporates the duty of competency of Rule 1.1 regarding communications where a claim of privilege is or may be made.<sup>82</sup> Amendments to the comments to Rule 1.1 adopted by the ABA in 2012 state that the duty of competency requires lawyers to keep abreast of technological developments.<sup>83</sup> Comment 8 to Rule 1.1 states: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .”<sup>84</sup>

With regard to confidentiality of client information, Comment 18 to Rule 1.6 now states:

The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures

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80. See generally John M. Barkett, More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review (2012) (unpublished paper), available at [http://law.duke.edu/sites/default/files/centers/judicialstudies/TAR\\_conference/Panel\\_5-Original\\_Paper.pdf](http://law.duke.edu/sites/default/files/centers/judicialstudies/TAR_conference/Panel_5-Original_Paper.pdf) (generally discussing the ethical and legal obligations facing counsel regarding e-discovery issues).

81. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012). This Article uses the ABA Model Rules of Professional Conduct as the basis for lawyers’ ethical obligations. Most states’ courts have adopted rules of conduct based on the ABA Model Rules although almost all have adopted variations from the ABA Rules. Quintin Johnstone, *An Overview of the Legal Profession in the United States, How that Profession Recently Has Been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 752 (2008). Federal courts generally adopt the conduct rules of the state in which they sit. *Id.*

82. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18 (2012).

83. *Id.* R. 1.1 cmt. 8.

84. *Id.*

that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]–[4].<sup>85</sup>

Both producing and receiving lawyers have a broad duty of communication to their clients under Model Rule 1.4 with regard to significant aspects of the relationship.<sup>86</sup> As for nonlawyer providers of services, such as e-discovery vendors, Rule 5.3 imposes a duty on lawyers of reasonable supervision of their conduct.<sup>87</sup>

Rule 4.4(b) deals specifically with the obligations of recipients of privileged material.<sup>88</sup> Under the rule, if a lawyer "receives a document or electronically stored information relating to the representation of a lawyer's client," and the lawyer either "knows or reasonably should know" that the material was inadvertently sent, then the lawyer should promptly notify the sender.<sup>89</sup> The purpose of the rule is to allow the sender an opportunity to take protective measures, such as seeking a court order requiring return of the material under FRCP 26(b)(5)(B) or equivalent state rules.<sup>90</sup> Whether the lawyer is required to do anything more, such as return the document, is a legal rather than an ethical matter.<sup>91</sup> If the law does not require return of a document, the decision whether or not to do so is a matter of professional judgment "ordinarily reserved to the lawyer."<sup>92</sup>

#### B. *Ethical Issues Facing Lawyers Dealing with IPPI*

Lawyers handling discovery in federal court face a number of ethical problems regarding the risk of disclosure of privileged information.<sup>93</sup> Under Rule 26(f) of the Federal Rules of Civil Procedure, lawyers are required to meet and confer on various aspects of the litigation at least twenty-one days before a scheduling order is due under Rule 16(b).<sup>94</sup> The rule requires the parties to

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85. *Id.* R. 1.6 cmt. 18.

86. *See id.* R. 1.4.

87. *See id.* R. 5.3.

88. *See id.* R. 4.4(b).

89. *Id.*

90. *Id.* R. 4.4(b) cmt. 2.

91. *Id.* R. 4.4(b) cmt. 3.

92. *Id.*

93. *See* Barkett, *supra* note 80, at 32.

94. FED. R. CIV. P. 26(f)(1).

“develop a proposed discovery plan.”<sup>95</sup> Rule 26(f)(3)(D) requires that the discovery plan state: “[A]ny issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order.”<sup>96</sup> To engage in negotiations with opposing counsel to develop a discovery plan, lawyers need to be competent<sup>97</sup> about ways in which discovery, particularly e-discovery, can be conducted, including ways in which privileged material can be separated from responsive material and an appropriate privilege log can be developed.<sup>98</sup>

There are a wide variety of ways in which discovery plans can be developed, with different degrees of cost and risk of production of privileged material.<sup>99</sup> Therefore, attorneys must communicate<sup>100</sup> with their clients about the benefits, costs, and risks associated with these options so that clients can make informed decisions about the authority that they will give their lawyers with regard to discovery plans.<sup>101</sup> Communication with clients must obviously occur before lawyers meet and confer but will likely continue throughout the case as discovery issues develop.<sup>102</sup> In connection with their duty to communicate, lawyers should inform clients of the following principles: First, federal judges

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95. FED. R. CIV. P. 26(f)(2).

96. FED. R. CIV. P. 26(f)(3)(D).

97. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

98. See Barkett, *supra* note 80, at 32–33.

99. See, e.g., *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 444 (D.N.J. 2002) (regarding the development of a discovery plan in today's electronic society, the discovery plan “should include a discussion on whether each side possesses information in electronic form, whether they intend to produce such material, whether each other's software is compatible, whether there exists any privilege issue requiring redaction, and how to allocate costs involved with each of the foregoing”).

100. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4 (2012) (requiring communication between lawyer and client).

101. For an example of the problems that can result when lawyers fail to pay appropriate attention and to counsel their clients about the costs involved in document review, see *In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009). In that case, the Office of Federal Housing Enterprise Oversight (OFHEO)—a nonparty to the litigation—stipulated to produce documents in accordance with search terms determined by the requesting party and to waive any claim for cost-shifting under Federal Rule of Civil Procedure 45. *Id.* at 821–22. As a result, OFHEO had to hire fifty contract attorneys to review documents at a cost of \$6 million, which was more than 9% of its annual budget. *Id.* at 817. Also, see *I-Med Pharma Inc. v. Biomatrix, Inc.*, No. 03 3677 (DRD), 2011 WL 6140658 (D.N.J. Dec. 9, 2011), where the plaintiff had agreed to a forensic examination of its computer system. *Id.* at \*2. Defendants hired a forensic expert who used very broad search terms, including “profit,” “loss,” and “revenue.” *Id.* at \*2 n.3. The search terms produced ninety-five million pages of data and the plaintiff objected to doing a privilege review of that much material. *Id.* at \*2. Fortunately, the judge granted relief but pointed out that the plaintiff should have known better than to agree to the search terms that were used. *Id.* at \*6.

102. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.4 (2012) (emphasizing that a lawyer's duty to communicate with his or her client extends throughout the representation and includes discussing matters involving litigation that would otherwise be exclusively within the lawyer's purview).

have broad power to control discovery.<sup>103</sup> Second, the parties themselves have the power by agreement to modify almost any discovery rule, with the exception of an extension of “time for discovery which requires court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.”<sup>104</sup> Third, any discovery must be evaluated based on the principle of proportionality.<sup>105</sup> As set forth in FRCP 26(b)(2)(C), proportionality means that the frequency or extent of discovery may be limited if the court determines:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.<sup>106</sup>

Fourth, federal judges expect attorneys to cooperate in discovery.<sup>107</sup>

For parties who produce material in discovery, a major risk is that privileged material will be inadvertently produced.<sup>108</sup> As discussed above, FRE 502 provides a measure of protection to producing parties, but many uncertainties exist with regard to that rule.<sup>109</sup> In counseling and representing clients, the duty of competency requires lawyers to be aware of these uncertainties.<sup>110</sup>

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103. See FED. R. CIV. P. 16(a), 26(c).

104. FED. R. CIV. P. 29(b).

105. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010) (“[A]ll permissible discovery must be measured against the yardstick of proportionality.”).

106. FED. R. CIV. P. 26(b)(2)(C).

107. The federal rules do not contain a specific duty to cooperate, although FRCP Rule 37 is labeled “Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.” FED. R. CIV. P. 37. However, the Sedona Conference, a nonprofit organization devoted to the study and advancement of the law in complex litigation and related subjects, has issued a Cooperation Proclamation by which it seeks to facilitate “cooperative, collaborative, and transparent discovery.” See THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION: RESOURCES FOR THE JUDICIARY 2 (Ronald J. Hedges & Kenneth J. Withers eds., 2012), available at [https://thesedonaconference.org/judicial\\_resources](https://thesedonaconference.org/judicial_resources). Numerous federal court decisions have endorsed the principle of cooperation. See Barkett, *supra* note 80, at 45–47 (collecting cases in which courts have endorsed the Sedona Conference Cooperation Proclamation).

108. See Anthony Francis Bruno, Note, *Preserving Attorney-Client Privilege in the Age of Electronic Discovery*, 54 N.Y.L. SCH. L. REV. 541, 543 (2010).

109. See *supra* Part III.A–B.

110. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18 (2012) (“Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the

Under Rule 502(a), if a party discloses documents subject to ACP or WPP, the production amounts to a waiver of privilege with respect to “undisclosed communication or information” if the disclosure is intentional, the disclosed and undisclosed communications relate to the same subject matter, and “they ought in fairness to be considered together.”<sup>111</sup> The term “intentional” is undefined in the rule<sup>112</sup> and, as discussed below in connection with the term “inadvertent” in Rule 502(b),<sup>113</sup> is ambiguous. In addition, suppose a party concludes that it is to its advantage to intentionally disclose information in connection with a federal proceeding. For example, suppose in connection with an investigation by the SEC, a company wants to disclose privileged material to the SEC. If it does so, can it prevent the disclosure from being a subject matter waiver in related civil cases? If so, how? If it cannot, then the party faces a Hobson’s choice in responding to the SEC investigation.<sup>114</sup>

Rule 502(b) deals with “inadvertent” rather than “intentional” disclosure.<sup>115</sup> The duty of competency requires lawyers to understand that courts are divided on the meaning of inadvertent.<sup>116</sup> Some courts have held that when a lawyer is involved in the process of disclosing information, even a disclosure resulting from a mistake of judgment qualifies as inadvertent.<sup>117</sup> This may be referred to as the “lawyer involvement approach.” Other courts have decided that whether a disclosure is inadvertent depends on a number of factors, including the number of documents involved, the level of care with which the privilege review was conducted, and the conduct of the producing party after the production.<sup>118</sup> This may be referred to as the “factor approach.”

A court might consider Comment 2 to ABA Model Rule 4.4(b) as a definition of “inadvertent.”<sup>119</sup> That comment seems to equate “inadvertent” with “accidental”:

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lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”)

111. FED. R. EVID. 502(a).

112. Grimm et al., *supra* note 22, at 20.

113. *See infra* notes 115–31 and accompanying text.

114. *See, e.g., In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (acknowledging that defendant must choose between waiving WPP by cooperating with authorities or risk a civil fraud suit for refusing to cooperate, but finding such a “Hobson’s choice” insufficient for creating an exception to the waiver doctrine).

115. *See* FED. R. EVID. 502(b).

116. *See, e.g., MODEL RULES OF PROF’L CONDUCT* R. 1.1 cmt. 5 (2012) (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . .”).

117. *See, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (“[W]e do not think it matters whether the waiver is labeled ‘voluntary’ or ‘inadvertent’ . . .”). *But see* Amobi v. D.C. Dep’t of Corr., 262 F.R.D. 45, 54 (D.D.C. 2009) (rejecting the argument that a document disclosure made by a lawyer can never be inadvertent).

118. Grimm et al., *supra* note 22, at 29–30 (quoting *Heriot v. Byrne*, 257 F.R.D. 645, 658–59 (N.D. Ill. 2009)).

119. *See MODEL RULES OF PROF’L CONDUCT* R. 4.4 cmt. 2 (2012).

A document or electronically stored information is inadvertently sent when it is *accidentally* transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is *accidentally* included with information that was intentionally transmitted.<sup>120</sup>

This may be referred to as the “accidental approach.”

In *Amobi v. D.C. Department of Corrections*,<sup>121</sup> the court rejected the claim that involvement of a lawyer in the privilege review prevented the disclosure from being inadvertent:

[T]o 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.<sup>122</sup>

Instead, the court concluded that “inadvertent” should be interpreted to mean “mistaken” or “unintended.”<sup>123</sup> This may be referred to as the “mistake approach.”

The decision in *Amobi*, however, is unclear as to what qualifies as a mistake.<sup>124</sup> In *Barnett v. Aultman Hospital*,<sup>125</sup> the court adopted a broad concept of mistake.<sup>126</sup> In *Barnett*, the defendant produced “handwritten notes . . . taken by defendant’s Vice President of Human Resources in connection with a conversation . . . with defendant’s counsel.”<sup>127</sup> Defendant’s counsel did not know that the notes had been produced until plaintiff’s counsel introduced them into evidence at the deposition of the vice president.<sup>128</sup> Prior to production, the documents at issue were reviewed by defendant’s counsel.<sup>129</sup> A paralegal at the

120. *Id.* (emphasis added).

121. 262 F.R.D. 45 (D.D.C. 2009).

122. *Id.* at 54.

123. *Id.* at 53; *accord* *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009).

124. *See Amobi*, 262 F.R.D. at 53–54 (providing that the simplest analysis for determining if a disclosure was inadvertent would be to analyze whether the disclosure was unintended or a mistake, but not providing any concrete examples of what constitutes a mistake).

125. No. 5:11 CV 399, 2012 U.S. Dist. LEXIS 53733 (N.D. Ohio Apr. 17, 2012).

126. *See id.* at \*8–9 (discussing the facts of the disclosure and concluding that whether the documents provided were not recognized as privileged when they were disclosed, or if the disclosure was simply a mistake, did not change the fact that the disclosure was inadvertent).

127. *Id.* at \*2.

128. *Id.* at \*3.

129. *Id.* at \*2.

firm partially redacted one of the pages, but privileged material remained.<sup>130</sup> With regard to Rule 502(b)(1), the court adopted a broad conception of inadvertent:

It is unclear to the [c]ourt 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 privileged and disclosed by mistake. However, either way under Rule 502(b), the disclosure was inadvertent.<sup>131</sup>

In my opinion, the “lawyer involvement approach” is unsound because it means that almost any production of a privileged document amounts to a waiver. If a lawyer was involved in review of the information, the privilege would be waived because the production was not inadvertent.<sup>132</sup> If a lawyer was not involved in the privilege review, the privilege would probably be lost because the absence of any lawyer review would probably mean that the second requirement for avoidance of waiver—taking reasonable steps to avoid production of privileged material<sup>133</sup>—would not be met. The “factor approach” is also unsound because it combines the first element of Rule 502(b)—“inadvertence”<sup>134</sup>—with the other two elements of reasonable precautions and reasonable steps to rectify a disclosure.<sup>135</sup> The “accidental approach” should be rejected because it employs too narrow a concept of “inadvertent.” Under this approach, lawyer mistakes, production of documents that had not been reviewed, and production of documents using technologically assisted review (TAR) of ESI would not be treated as inadvertently produced because the production may have been mistaken or unintended, but not accidental. In other words, limiting the meaning of “inadvertent” to accidental means that the most important types of cases in which privileged information is produced would not be covered by Rule 502(b). This approach seems inconsistent with the purposes of the rule to

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130. *Id.* at \*8.

131. *Id.* at \*8–9 (citing *Valentin v. Bank of N.Y. Mellon Corp.*, No. 09 Civ. 9448(GBD)(JCF), 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.”)). Even though the disclosure was inadvertent, the court found that the defendant waived the privilege because it failed to adopt reasonable precautions to protect privileged material from disclosure: the number of documents reviewed was relatively small, time pressure for disclosure did not exist, counsel had failed to prepare a privilege log, the documents were not marked as confidential, and no procedure or protocol was followed to prevent disclosure of privileged material. *Id.* at \*9.

132. *See Amobi v. D.C. Dep’t of Corr.*, 262 F.R.D. 45, 54 (D.D.C. 2009).

133. FED. R. EVID. 502(b)(2).

134. FED. R. EVID. 502(b)(1).

135. FED. R. EVID. 502(b)(2)–(3).

eliminate disputes about inadvertent disclosures and to reduce costs associated with privilege reviews.<sup>136</sup>

The decisions in *Amobi* and *Barnett*, which define “inadvertent” to mean “mistaken,”<sup>137</sup> seem sound. However, the courts’ analysis needs to be taken a step further to carry out the purposes of the rule, one of which is increased predictability of when a waiver of privilege occurs.<sup>138</sup> Mistakes in production of privileged material can occur in three ways: failure to identify a document as possibly privileged because the document is overlooked either by electronic or human review (mistaken identification),<sup>139</sup> mistake as to what qualifies as a privileged document even when the document has been identified as possibly privileged (mistaken review),<sup>140</sup> and mistake in production when, for example, a box of privileged material is sent to the opposing party when it should not have been (mistaken production).<sup>141</sup> For the reasons given above, more limited definitions of inadvertent are unsound as a matter of policy. In my opinion, a court should define the concept of “inadvertent” broadly to include mistakes in identification, review, and production. Of course, even if the court adopts a broad concept of inadvertent, waiver can still result if the producing party failed to take reasonable steps to prevent the inadvertent production.<sup>142</sup>

With regard to the meaning of “intentional” in Rule 502(a), consider *First American Corelogic, Inc. v. Fiserv, Inc.*<sup>143</sup> First American filed privileged emails in support of its motion for a protective order regarding communications with two former employees.<sup>144</sup> First American filed the emails under seal but not in camera and served them on all defendants.<sup>145</sup> Defendants contended that First American had intentionally disclosed the emails resulting in a subject

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136. FED. R. EVID. 502 advisory committee’s note.

137. *See supra* notes 121–31 and accompanying text.

138. FED. R. EVID. 502 advisory committee’s note (“The rule 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.”).

139. *See, e.g.*, *D’Onofrio v. Seaside Park*, No. 09–6220, 2012 WL 1949854, at \*2 (D.N.J. May 30, 2012) (explaining situation where a clerical employee tasked with separating privileged documents from nonprivileged documents overlooked four boxes of documents during her review, resulting in the disclosure of privileged information in those boxes).

140. *See, e.g.*, *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, No. 2:07–CV–116, 2012 WL 3731483, at \*3–4 (S.D. Ohio Aug. 28, 2012) (finding that the producing party failed to take reasonable precautions to prevent inadvertent disclosure where one out of every twenty-two produced documents were privileged, even though all documents were reviewed by several attorneys tasked with identifying privileged material).

141. *See Barnett v. Aultman Hosp.*, No. 5:11 CV 399, 2012 U.S. Dist. LEXIS 53733, at \*9 (N.D. Ohio Apr. 17, 2012) (holding that producing party failed to show that reasonable steps were taken to prevent disclosure after that party identified privileged information, but failed to take proper steps to ensure that the documents were not provided to the opposing party).

142. FED. R. EVID. 502(b)(2).

143. No. 2:10 CV 132 TJW, 2010 WL 4975566 (E.D. Tex. Dec. 2, 2010).

144. *Id.* at \*1.

145. *Id.*

matter waiver.<sup>146</sup> The court held that the emails were not inadvertently disclosed, so the privilege was waived as to the emails, but that there was no subject matter waiver because the disclosure was not intentional.<sup>147</sup> In my opinion, the court's result is sound but not its analysis. To create three categories—inadvertent, intentional, and something in between—is confusing and unnecessary. The court in *First American* was driven to this approach because it seems to have defined “inadvertent” to mean “accidental,”<sup>148</sup> and the filing in *First American* was, in my opinion, clearly not accidental. The better approach is to define “inadvertent” broadly to mean “mistaken” as discussed above.<sup>149</sup> Under this approach, the filing in *First American* was mistaken and therefore inadvertent. Since it was inadvertent, it was not intentional under 502(a), and therefore subject matter waiver did not result.<sup>150</sup> However, waiver would still result as to the specific emails in question under FRE 502(b) because the plaintiff failed to use reasonable precautions to prevent the disclosure;<sup>151</sup> all the plaintiff had to do, as the court pointed out, was to file in camera, not simply under seal.<sup>152</sup> Even if a disclosure is found to be intentional under FRE 502(a), the disclosure will not result in a subject matter waiver except in unusual situations: “[A] subject matter waiver (of either privilege or work product) is 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.”<sup>153</sup>

Assuming the holder of a privilege has inadvertently disclosed information or communications that are subject to ACP or WPP, the second requirement that the holder of the privilege must establish to avoid waiver by disclosure is that the holder “took reasonable steps to prevent disclosure.”<sup>154</sup>

What are reasonable efforts? The Rule itself does not provide any guidance.<sup>155</sup> However, the Advisory Committee's Note identifies the following factors:

- the reasonableness of precautions taken;

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146. *Id.*

147. *Id.* at \*3.

148. *Id.* at \*5.

149. *See supra* note 123 and accompanying text.

150. *See* FED. R. EVID. 502(a)(1).

151. *See* FED. R. EVID. 502(b)(2).

152. *First American*, 2010 WL 4975566, at \*3.

153. FED. R. EVID. 502(a) advisory committee's note, *cited with approval in* Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471-PAB-KMT, 2009 WL 4949959, at \*12 (D. Colo. Dec. 14, 2009).

154. FED. R. EVID. 502(b)(2).

155. *See Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 54 (D.D.C. 2009) (citing FED. R. EVID. 502(b) advisory committee's note) (asserting that even though the Advisory Committee provided “non-dispositive factors” that may be considered by the court in determining whether reasonable steps to prevent disclosure were taken, “the Committee indicates that it consciously chose not to codify any factors in the rule because the analysis should be flexible and should be applied on a case by case basis”).

- the time taken to rectify the error;
- the scope of discovery;
- the extent of disclosure;
- the overriding issue of fairness;
- the number of documents to be reviewed;
- the time constraints for production;
- depending on the circumstances, the use of advanced analytical software and analytical tools in screening for privileged material; and
- the implementation of an efficient system of records management prior to litigation may also be relevant.<sup>156</sup>

Under Rule 502(b)(3), the holder of a privilege, to avoid waiver, must show that he or she “promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”<sup>157</sup> The case law is clear: the holder of the privilege has the burden of proving the elements necessary to avoid disclosure.<sup>158</sup>

Under Rules 502(b)(2) and (3), the inquiry into reasonableness pre- and post-production is fact specific; a party or its counsel can fail to meet the requirements of reasonableness in many ways, resulting in waiver of privileges.<sup>159</sup> For example, a party’s reliance solely on key word searches or failure to implement proper quality control procedures with regards to its search methodology are factors supporting a conclusion that reasonable precautions were not taken.<sup>160</sup> Compliance with Rule 502(b)(2) requires the holder of the

156. FED. R. EVID. 502(b) advisory committee’s note. The first five factors listed were set out in cases decided before Rule 502 was enacted. *See, e.g., Hartford Fire Ins. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (quoting *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985)). The Advisory Committee provided the last four factors. FED. R. EVID. 502(b) advisory committee’s note.

157. FED. R. EVID. 502(b)(3).

158. *See, e.g., Callan v. Christian Audigier, Inc.*, 263 F.R.D. 564, 566 (C.D. Cal. 2009) (finding that the holder of privilege did not meet its burden of showing that the disclosure to the opposing party was inadvertent); *Comrie v. IPSCO, Inc.*, No. 08 C 3060, 2009 WL 4403364, at \*2 (N.D. Ill. Nov. 30, 2009) (“The burden is on [the producing party] to prove all three of the elements in FRE 502.”); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008) (The holders of the privilege “bear the burden of proving that their conduct was reasonable for purposes of assessing whether they waived attorney-client privilege.”). *But see Rhoads Indus. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 223 (E.D. Pa. 2008) (indicating that party seeking to overcome claim of privilege—i.e., establish a waiver—bore the burden of proof).

159. *See supra* note 156 and accompanying text.

160. *See Rhoads Indus.*, 254 F.R.D. at 224; *see also Victor Stanley, Inc.*, 250 F.R.D. at 257 (“The only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive.”); *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (“Common sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.”). *See generally* Symposium, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189,

privilege to provide details of its procedures to protect against inadvertent disclosures; general affidavits that materials were reviewed by experienced paralegals and counsel are insufficient.<sup>161</sup> Significant unexplained delay in failing to assert a claim of privilege once the holder of the privilege becomes aware of the disclosure is likely to result in a finding of waiver.<sup>162</sup> Lawyers' duty of competency requires them to be aware of both the general principle of pre- and post-disclosure reasonableness as well as the case law providing details as to what amounts to reasonable conduct, particularly with regard to search methodologies to identify privileged material.<sup>163</sup> Because search methodologies are technologically based, competency in discovery requires lawyers to become knowledgeable about the technology involved in search methodology.<sup>164</sup> Competence does not mean that lawyers must be experts in the technicalities of search methodology; by way of analogy, a lawyer does not need to be a doctor to handle a medical malpractice case, but the lawyer must be knowledgeable about the medical aspects that are relevant to the case.<sup>165</sup> One particularly useful way for lawyers to become knowledgeable in this area is through the annual Georgetown Advanced eDiscovery Institute.<sup>166</sup>

When privileged material is identified, assertion of a claim of privilege requires the holder to prepare a privilege log.<sup>167</sup> In *In re Denture Cream Products Liability Litigation*,<sup>168</sup> the court outlined the following elements for a proper privilege log:

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194–95, 201–02 (2007) (providing practical advice on e-discovery retrieval methods and discussing common issues with keyword searches).

161. See *U.S. Home Corp. v. Settlers Crossing, LLC*, No. DKC 08–1863, 2012 WL 3025111, at \*8 (D. Md. July 23, 2012); see also *Thorncreek Apartments III, LLC v. Vill. of Park Forest*, Nos. 08 C 1225, 08–C–0869, 08–C–4303, 2011 WL 3489828, at \*7 (N.D. Ill. Aug. 9, 2011) (finding that defendant failed to show reasonableness of precautions taken by claiming that it spent “countless hours reviewing a relatively large amount of documents” and marking privileged documents accordingly).

162. See, e.g., *United States v. Sensient Colors, Inc.*, No. 07 1275 (JHR/JS), 2009 WL 2905474, at \*5–6 (D.N.J. Sept. 9, 2009) (finding a waiver of privilege where plaintiff claimed privilege over three months after being put on notice of the disclosure of privileged material).

163. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 19 (2012).

164. See, e.g., Adam Cohen, *Lawyers Have Professional Responsibilities as They Relate to Electronically Stored Information*, INSIDECOUNSEL (Dec. 21, 2012), <http://www.insidecounsel.com/2012/12/21/lawyers-have-professional-responsibilities-as-they> (discussing a recent amendment to the Model Rules for Professional Conduct, Rule 1.1, Comment 8, that indicates a competent lawyer needs to have some knowledge with respect to benefits and risks associated with technology).

165. See *id.*

166. See *The Advanced eDiscovery Institute*, GEORGETOWN LAW, <https://www.law.georgetown.edu/continuing-legal-education/programs/cle/ediscovery-institute/> (last visited Feb. 25, 2013).

167. See FED. R. CIV. P. 26(b)(5)(A).

168. No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014 (S.D. Fla. Oct. 18, 2012).

- (1) the name and job title or capacity of the author of the document;
- (2) the name and job title or capacity of each recipient of the document;
- (3) the date the document was prepared and if different, the date(s) on which it was sent to or shared with persons other than the author(s);
- (4) the title and description of the document;
- (5) the subject matter addressed in the document;
- (6) the purpose(s) for which it was prepared or communicated; and
- (7) the specific basis for the claim that it is privileged.<sup>169</sup>

Failure to prepare a proper privilege log can result in waiver of the privilege as to the materials not included in the log.<sup>170</sup>

Compliance with ethical obligations regarding IPPI also applies to receiving and producing parties.<sup>171</sup> Under FRCP 26(b)(5)(B), a party who has produced materials claimed to be subject to ACP or WPP may notify the other party.<sup>172</sup> On receipt of the notice, the receiving “party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified.”<sup>173</sup> The receiving party has the option of filing a motion under seal seeking a determination of whether ACP or WPP would apply to the material, or the receiving party can await action by the producing party.<sup>174</sup> If the information has been returned to the producing party, that party must preserve the material pending a judicial determination of the claim of privilege.<sup>175</sup> This rule applies only when the receiving party has received notice that produced materials are subject to a claim of ACP or WPP.<sup>176</sup> However, ABA Model Rule 4.4(b) imposes a duty on a party who receives material that the party knows or reasonably should know was inadvertently sent to notify the other party who can then take corrective action to protect any claim of privilege.<sup>177</sup> Some jurisdictions, however, have not adopted

169. *Id.* at \*47–48 (quoting *Roger Kennedy Constr., Inc. v. Amerisure Ins. Co.*, No. 6:06-cv-1075-Orl-19KRS, 2007 WL 1362746, at \*1 (M.D. Fla. May 7, 2007)).

170. *See Rhoads Indus. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 226 (E.D. Pa. 2008) (finding waiver of privilege as to documents not listed on privilege log). *But see U.S. Fire Ins. Co. v. City of Warren*, No. 2:10 CV 13128, 2012 WL 1454008, at \*6 (E.D. Mich. Apr. 26, 2012) (holding that failure to file a proper privilege log need not be a waiver and in any event would apply only to specific documents that were not listed).

171. *See* FED. R. CIV. P. 26(b)(5)(B) (imposing requirements on the receiving party after being notified that information it has received is subject to a claim of privilege).

172. *Id.*

173. *Id.*

174. *See id.*

175. *Id.*

176. *See id.*

177. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2012).

Model Rule 4.4.<sup>178</sup> In addition, the fact that material is labeled as ACP or WPP does not necessarily mean that the receiving party has a duty to inform the producing party because the material may not have been inadvertently produced and because it is well known that many documents so labeled are not in fact privileged.<sup>179</sup>

The combination of FRCP 26(b)(5)(B) and ABA Model Rule 4.4(b) raises ethical issues for both producing and receiving lawyers.<sup>180</sup> From these rules, a producing lawyer cannot be confident that a receiving party will notify the producing party of the receipt of privileged material. FRCP 26(b)(5)(B) does not impose a notification requirement.<sup>181</sup> ABA Model Rule 4.4(b) may not apply in the given jurisdiction.<sup>182</sup> Even if it does, the receiving party may conclude that it does not know that the material was inadvertently sent even if it is labeled as ACP or WPP.

Receiving parties may also face ethical problems. If Rule 4.4(b) applies and the receiving party obtains material that is labeled as ACP or WPP, should they inform the sending party or should they conclude that they need not do so because they do not know that the material has been inadvertently sent? If Rule 4.4 does not apply, may a receiving party as a matter of professional discretion inform the sending party of the possible receipt of privileged material, or does the lawyer's duty to his or her client require the lawyer to use the material until a court determines otherwise?

As the preceding discussion shows, attorneys in federal court litigation face a host of legal and ethical problems in dealing with IPPI.<sup>183</sup> However, lawyers have an extremely useful tool for dealing with many of these problems—the clawback order—which may either incorporate an agreement of the parties or be issued as a protective order on motion of one of the parties.<sup>184</sup> A comprehensive clawback order can deal with a number of the issues lawyers face. The order could specify the amount of pre-production privilege review that lawyers are

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178. See Schaefer, *supra* note 3, at 195 (citations omitted) (identifying states that have adopted Model Rule 4.4(b) or its substantial equivalent, and noting that “[i]n . . . ten states, no professional conduct rule addresses the recipient’s ethical obligations.”).

179. *Kmart Corp. v. Footstar, Inc.*, No. 09 C 3607, 2010 WL 4977228, at \*2 (N.D. Ill. Dec. 2, 2010).

180. See *supra* notes 171–79 and accompanying text.

181. See FED. R. CIV. P. 26(b)(5)(B) (“[T]he party making the claim [of privilege] may notify any party that received the information of the claim and the basis for it.” (emphasis added)).

182. See *supra* note 178 and accompanying text.

183. See *supra* Part IV.B.

184. See FED. R. CIV. P. 16(b)(3)(iv) (providing that a scheduling order may “include any agreements the parties reach for asserting claims of privilege . . . after information is produced”); see also FED. R. CIV. P. 26(e)(1) (allowing the court to issue protective orders in the event of inadvertent disclosure); FED. R. CIV. P. 26(f) committee’s note to 2000 amendment (“[P]arties enter agreements—sometimes called ‘clawback agreements’—that production without intent to waive privilege or protection should not be a waiver . . .”).

required to undertake, or even eliminate that requirement entirely;<sup>185</sup> could define more precisely the ambiguous term “inadvertent”;<sup>186</sup> could specify post-production notification requirements;<sup>187</sup> could impose obligations on parties that receive privileged material to notify the sender that such material has been received;<sup>188</sup> could reduce the risk of subject matter waiver;<sup>189</sup> and could deal with other matters, such as the requirements for a privilege log and imposition of costs associated with IPPI.<sup>190</sup> Unfortunately, some unresolved legal issues hamper the use of clawback orders.<sup>191</sup> As a result, many lawyers fail to seek such orders,<sup>192</sup> and orders that are obtained are often incomplete.<sup>193</sup>

## V. ISSUES INVOLVING CLAWBACK ORDERS

### A. *Narrow Interpretations of Federal Rule of Evidence 502(d)*

A number of courts have narrowly interpreted the power to issue clawback orders.<sup>194</sup> Some of these cases, although decided before the adoption of FRE

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185. *See, e.g.*, *U.S. Home Corp. v. Settlers Crossing, LLC*, No. DKC 08-1863, 2012 WL 3025111, at \*5 (D. Md. July 23, 2012) (discussing how party agreements can supplant the requirement of reasonable privilege review).

186. *See, e.g., id.* at \*5 (noting that Rule 502(b) is merely a default rule that may be altered by court order).

187. *See, e.g.*, FED. R. CIV. P. 26(f) committee’s note to 2006 amendment (“A case-management or other order including such agreements may further facilitate the discovery process.”).

188. ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, 109TH CONG., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 28 (2005), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf> (“[Parties] may agree that if privileged . . . information is inadvertently produced, the producing party may by timely notice assert the privilege . . . and obtain return of the materials without waiver.”).

189. *See VLT, Inc. v. Lucent Techs., Inc.*, 54 Fed. R. Serv. 3d (West) 1319, 1320 (D. Mass. 2003) (discussing a protective order that contained the language “[i]nadvertent production of documents subject to . . . privilege shall not constitute a waiver of the immunity or privilege”).

190. *See generally* FED. R. CIV. P. 16(b)(3)(iv) (providing that a scheduling order may “include any agreements the parties reach for asserting claims of privilege . . . after information is produced”).

191. *See supra* note 9 and accompanying text.

192. *See, e.g.*, *Cnty. Bank v. Progressive Cas. Ins. Co.*, 81 Fed. R. Serv. 3d (West) 1162, 1167 (S.D. Ind. 2010) (noting that counsel failed to agree on how to handle inadvertent production).

193. *See, e.g.*, *United States v. Cinergy Corp.*, No. 1:99-cv-01693-LJM-JMS, 2009 WL 6327414, at \*2 (S.D. Ind. Nov. 10, 2009) (finding that a protective order failed to mention ACP and contained a “sort of claw-back provision” that protected confidential information only if it was labeled “confidential”); *Sullivan v. Stryker Corp.*, No. 3:10-CV-0177 (MAD/DEP), 2011 U.S. Dist. LEXIS 60887 (N.D.N.Y. June 6, 2011) (failing to mention pre-production privilege review).

194. *See, e.g.*, *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (explaining that “blanket” clawback provisions are ill-advised and such provisions should not be broadly construed); *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 412 (D.N.J. 1995) (finding waiver of attorney–client privilege despite the existence of a “blanket” clawback provision).

502(d) in 2008,<sup>195</sup> continue to have effect under FRE 502(d).<sup>196</sup> Perhaps the leading anticlawback-order case is *Ciba-Geigy Corp. v. Sandoz Ltd.*<sup>197</sup> In *Ciba-Geigy*, the court rejected the defendant's interpretation of the protective order as allowing it to disclose documents that were privileged and reclaim those documents as long as the disclosure was unintentional.<sup>198</sup> The court found that a "blanket" inadvertent disclosure provision was "inconsistent with controlling case law."<sup>199</sup> Instead, in order to maintain privilege, a producing party was required to conduct a reasonable privilege review before producing information.<sup>200</sup> Additionally, the court in *Koch Materials Co. v. Shore Slurry Seal, Inc.*<sup>201</sup> provided the rationale for rejecting "blanket" protective orders:

[T]he court observes that such blanket provisions, essentially immunizing attorneys from negligent handling of documents, could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases. Moreover, where the interpretation of the provision remains hotly disputed, as it is in this case, broad construction is ill advised.<sup>202</sup>

While *Ciba-Geigy* and *Koch Materials* are both pre-FRE 502 cases,<sup>203</sup> some decisions after the adoption of Rule 502 also show a remarkable hostility to clawback agreements.<sup>204</sup> In *United States v. Sensient Colors*,<sup>205</sup> the parties entered into a joint discovery plan that included nonwaiver and inadvertent disclosure provisions to protect privileged material.<sup>206</sup> The court held, however,

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195. Act of Sept. 19, 2008, Pub. L. No. 110-332, 122 Stat. 3537 (codified as amended at FED R. EVID. 502).

196. See, e.g., *United States v. Sensient Colors, Inc.*, No. 07 1275 (JHR/JS), 2009 WL 2905474, at \*3 (D.N.J. Sept. 9, 2009) (citing *Ciba-Geigy Corp.*, 916 F. Supp. at 411) (noting that the pre-FRE 502 approach of *Ciba-Geigy* is in essence the same as the approach of FRE 502).

197. 916 F. Supp. at 412-14 (D.N.J. 1995) (holding that defendants did not take reasonable precautions to preserve confidentiality of document by inadvertently producing it and thereby waived attorney-client privilege regarding the document).

198. *Id.* at 411-12.

199. *Id.* at 412.

200. *Id.*

201. 208 F.R.D. 109 (D.N.J. 2002).

202. *Id.* at 118.

203. Federal Rule of Evidence 502 was adopted in 2008, see *supra* note 195, and *Ciba-Geigy* and *Koch Materials* were decided in 1995 and 2002, respectively. See *supra* note 194.

204. See, e.g., *U.S. Home Corp. v. Settlers Crossing, LLC*, No. DKC 08-1863, 2012 WL 3025111, at \*6 (D. Md. July 23, 2012) (finding that waiver disputes are governed by FRE 502 instead of the parties' clawback provision); *United States v. Sensient Colors, Inc.*, No. 07 1275 (JHR/JS), 2009 WL 2905474, at \*2-3 (D.N.J. Sept. 9, 2009) (requiring parties to comply with FRE 502's standards in addition to the parties' alleged clawback provision).

205. *Sensient Colors*, 2009 WL 2905474.

206. *Id.* at \*2.

that these provisions did not excuse the parties from compliance with FRE 502 while citing *Ciba-Geigy*<sup>207</sup> and quoting with approval from *Koch Materials*.<sup>208</sup>

Indeed, the prevailing approach seems to be that the standards set forth in Rule 502 will apply unless the clawback order provides specific standards for displacing each of the elements of Rule 502.<sup>209</sup> As the court stated in *U.S. Home Corp. v. Settlers Crossing, LLC*:<sup>210</sup>

To find that a court order or agreement under Rule 502(d) or (e) supplants the default Rule 502(b) test, courts have required that concrete directives be included in the court order or agreement regarding *each* prong of Rule 502(b). In other words, if a court order or agreement does not provide adequate detail regarding what constitutes inadvertence, what precautionary measures are required, and what the producing party's post-production responsibilities are to escape waiver, the court will default to Rule 502(b) to fill in the gaps in controlling law.<sup>211</sup>

Other courts have taken a broader view of FRE 502(d).<sup>212</sup> In *Rajala v. McGuire Woods, LLP*,<sup>213</sup> the court found that it had authority to enter a clawback order even though the parties had failed to reach agreement on the terms of the order.<sup>214</sup> In addition, the court concluded that FRCP 26(c) authorized entry of a clawback order that allowed McGuire Woods to reclaim privileged documents, even though it had not concluded a pre-production privilege review.<sup>215</sup> Given

207. *Id.* (citing FED. R. EVID. 502(b); *Ciba-Geigy Corp.*, 916 F. Supp. 404).

208. *Id.* (quoting *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002)).

209. *U.S. Home*, 2012 WL 3025111, at \*5.

210. 2012 WL 3025111.

211. *Id.* at \*5. For a further discussion, see, e.g., *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 130, 133 (S.D. W. Va. 2010) (following the parties' agreement regarding post-production responsibilities, but reverting to Rule 502(b)(2) regarding required precautionary measures because the agreement was silent on that prong), *aff'd sub nom.* *Felman Prod., Inc. v. Indus. Risk Insurers*, No. 3:09 0481, 2010 WL 2944777 (S.D. W. Va. July 23, 2010); *Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP*, No. 06cv2804 BTM (WMC), 2010 WL 275083, at \*4 (S.D. Cal. Jan. 13, 2010) (applying Rule 502(b) despite the existence of a court order that provided for a general nonwaiver of privilege for inadvertent disclosure because that court order failed to offer detailed instructions regarding post-production responsibilities); *United States v. Sensient Colors, Inc.*, No. 07 1275 (JHR/JS), 2009 WL 2905474, at \*2 (D.N.J. Sept. 9, 2009) (applying Rule 502(b) despite a general nonwaiver agreement, in part, because "[n]owhere in the [agreement] does it mention that the parties are excused from [sic] the requirements of Federal Rule of Evidence 502(b)" (citing FED. R. EVID. 502(b))).

212. See, e.g., *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, at \*4 (W.D. Va. June 29, 2012) ("[I]n the world of ESI, new perspectives and approaches are needed to complete discovery in an efficient and reasonable manner."); *Rajala v. McGuire Woods, LLP*, No. 08 2638 CM DJW, 2010 WL 2949582, at \*5 (D. Kan. July 22, 2010) (interpreting courts to enter a clawback provision even in the absence of agreement by the parties).

213. *Rajala*, 2010 WL 2949582.

214. *Id.* at \*5 (citing FED. R. CIV. P. 26(c)(1)).

215. *Id.* at \*7.

the number of documents McGuire Woods was required to review, the court found that a broad protective order would reduce the expense and burden of discovery for both parties.<sup>216</sup> The court rejected the plaintiff's argument that a broad clawback order would deprive the plaintiff of the opportunity to show that McGuire Woods failed to use reasonable efforts to prevent disclosure because acceptance of this argument would "defeat the purpose behind Rule 502(d) and (e)."<sup>217</sup>

Similarly, in *Adair v. EQT Production Co.*,<sup>218</sup> the magistrate court issued a discovery order providing for electronic searching of documents to narrow the universe of potentially privileged documents, followed by production of other documents *without individualized privilege review*.<sup>219</sup> The court's order included a clawback provision that protected against the use of privileged documents that were revealed and a protective provision that prevented disclosure of nonrelevant documents outside the litigation.<sup>220</sup> The defendant objected that it was being ordered to produce privileged material.<sup>221</sup> The court disagreed.<sup>222</sup> It held that the risk of disclosure of privileged information was present in any document-intensive case, whether a privilege review was conducted manually or electronically.<sup>223</sup> The court concluded that the defendant had "not shown that the use of electronic searching would substantially increase the number of inadvertently produced privileged documents such that electronic searching is an unacceptable form of document review."<sup>224</sup>

#### B. Issues Regarding Clawback Orders

The cases discussed in the preceding section raise a number of issues about clawback orders that require resolution before such orders can achieve wider use.

##### 1. Does a Court Have the Authority to Issue a Clawback Order Without Party Agreement?

The answer to this question is almost certainly "yes," even though the rule itself is unclear on the point.<sup>225</sup> Rule 502(e) states that a court order may incorporate an agreement by the parties;<sup>226</sup> Rule 502(d) states that a court may issue an order that ACP or WPP is not waived by disclosure connected with the

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216. *Id.*

217. *Id.*

218. Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982 (W.D. Va. June 29, 2012).

219. *Id.* at \*2-3.

220. *Id.* at \*4 & n.6.

221. *Id.* at \*3.

222. *Id.* at \*4.

223. *Id.*

224. *Id.*

225. See FED. R. EVID. 502.

226. FED. R. EVID. 502(e).

litigation before the court, in which case the order operates in any other federal or state proceeding.<sup>227</sup> Although Rule 502(d) does not specifically authorize a court to issue an order on its own,<sup>228</sup> the Advisory Committee's Note states: "Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. *Party agreement should not be a condition of enforceability of a federal court's order.*"<sup>229</sup>

In addition, the Statement of Congressional Intent states that Rule 502(d)

is designed to enable a court to enter an order, whether on motion of one or more parties *or on its own motion*, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege. . . .<sup>230</sup>

Moreover, it should be noted that if party agreement was a prerequisite to clawback orders, the utility of such orders would be dramatically reduced. Parties easily can fail to agree about a clawback agreement either in principle or in detail. Further, depending on the case, a party could use its failure to agree to a clawback agreement as a tactical weapon.

In *Rajala v. McGuire Woods, LLP*,<sup>231</sup> the court concluded that it had the authority to issue a clawback order without agreement of the parties.<sup>232</sup> While it cited the Advisory Committee's Notes and the Statement of Congressional Intent,<sup>233</sup> the court ultimately based its authority on FRCP 26(c)(1),<sup>234</sup> which provides that a court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."<sup>235</sup>

227. FED. R. EVID. 502(d).

228. *Id.*

229. FED. R. EVID. 502(d) advisory committee's note (emphasis added).

230. 154 CONG. REC. 18017 (2008) (emphasis added) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

231. No. 08 2638 CM DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).

232. *Id.* at \*5.

233. *Id.* at \*4 (citing FED. R. EVID. 502 advisory committee's note; 154 Cong. Rec. 18017 (2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence)).

234. *Id.* at \*5.

235. FED. R. CIV. P. 26(c)(1). Other rules could be the basis of a court order providing for clawback provisions. *See, e.g.*, FED. R. CIV. P. 16(b)(3)(B)(ii) (providing that a scheduling order may "modify the extent of discovery"); FED. R. CIV. P. 26(b)(2)(C)(iii) (providing for court ordered limitations on discovery if the benefit is outweighed by the burden or expense). *But see* FED. R. CIV. P. 16(b)(3)(B)(iv) (providing that the scheduling order may "include any *agreements* the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced" (emphasis added)).

2. *Is a Court Required to Find “Good Cause” for Issuing a Clawback Order?*

“Good cause” requires a specific factual showing of harm if the protective order is not granted rather than a general, speculative, or conclusory claim of injury.<sup>236</sup> Further, in deciding whether good cause exists, a court must consider the relative harm to the nonmoving party.<sup>237</sup> If the court order is incorporating an agreement of the parties, it seems unnecessary for there to be a showing of “good cause.” In this situation, the order could be based on FRE 502(d) and (e) and on FRCP 16(b)(3)(B)(iv), all of which authorize orders incorporating agreements of the parties without mention of “good cause.”<sup>238</sup> However, if the parties have not reached an agreement on clawback provisions, then the court will probably proceed under FRCP 26(c)(1) as the court did in *Rajala* to issue a protective order, which requires a showing of “good cause.”<sup>239</sup>

3. *Does a Court Have the Authority in Issuing a Clawback Order to Relieve a Party from the Standards Set Forth in Federal Rule of Evidence 502(b)?*

In particular, may a court provide that disclosure of privileged material does not constitute a waiver even if the disclosing party has taken *no pre-production steps* to prevent disclosure of privileged material? One argument against judicial power to relieve a party of the standards in Rule 502(b) is that legislative history shows that the intent of Rule 502(b) was not to change the law dealing with the substance or waiver of ACP or WPP.<sup>240</sup> The Advisory Committee’s Note states:

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover,

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236. *Peter Kiewit Sons’, Inc. v. Wall St. Equity Grp., Inc.*, No. 8:10CV365, 2012 WL 1852048, at \*11 (D. Neb. May 18, 2012) (“A showing of ‘good cause’ requires ‘a particular and specific demonstration of fact, as distinguished from . . . conclusory statements.’”) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981); *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, 197 F.3d 922, 926 (8th Cir. 1999)).

237. *Id.* (quoting *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)).

238. See FED. R. EVID. 502(d)–(e); FED. R. CIV. P. 16(b)(3)(B)(iv).

239. FED. R. CIV. P. 26(c)(1) (“The court may, for good cause, issue an order to protect a party or person . . .”). In the *Rajala* and *Adair* cases discussed above, the courts considered whether the moving party had shown “good cause” for the protective order. See *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, at \* 4 (W.D. Va. June 29, 2012); *Rajala v. McGuire Woods, LLP*, No. 08 2638 CM DJW, 2010 WL 2949582, at \*6 (D. Kan. July 22, 2010); see also *Potomac Elec. Power Co. v. United States*, Nos. 12-19T, 12-23T, slip op. at 6 (Fed. Cl. filed Sept. 19, 2012) (“[T]he Court finds that Plaintiff has failed to demonstrate good cause for the adoption of its proposed claw back standard.”).

240. See FED. R. EVID. 502 advisory committee’s note.

while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.<sup>241</sup>

Similarly, the Statement of Congressional Intent states that the rule has a “limited though important purpose.”<sup>242</sup> The rule addresses “only the effect of disclosure, under specified circumstances, of a communication” otherwise protected by ACP or WPP.<sup>243</sup> The Statement goes on to say: “The rule does not alter the substantive law regarding attorney–client privilege or work-product protection in any other respect . . . .”<sup>244</sup> Based on this history, it can be argued that a court order that relieves a party of the obligation to use reasonable efforts to determine whether information is subject to privilege violates the intention of Rule 502 because such an order operates as a major change in the law of privilege.<sup>245</sup> Case law prior to the adoption of Rule 502 clearly required a party to use at least reasonable efforts to protect against disclosure of privileged material.<sup>246</sup>

However, there are persuasive arguments against this narrow view of judicial authority under Rule 502(d). Electronic discovery, with its potentially enormous cost associated with privilege review, is a recent development.<sup>247</sup> Cases prior to the adoption of Rule 502 considered this development to only a limited extent.<sup>248</sup> In addition, one of the fundamental purposes of Rule 502 is to reduce the cost necessary to protect against waiver of ACP and WPP.<sup>249</sup> Court authority to issue clawback orders that eliminate the need for pre-production review for ACP and WPP will greatly reduce the cost and foster expeditious use of discovery.<sup>250</sup> Indeed, the Statement of Congressional Intent provides that the rule will “enable a court to enter an order . . . that will allow the parties to

241. *Id.*

242. 154 CONG. REC. 18016 (2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

243. *Id.*

244. *Id.*

245. 154 CONG. REC. 18017 (2008) (statement of Rep. Jackson-Lee) (“[Rule 502] protects information inadvertently disclosed in discovery, as long as the party . . . upon learning of the disclosure, promptly takes reasonable steps to rectify it.”).

246. *See, e.g.,* Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 413 (D.N.J. 1995) (“[T]he Court finds that counsel has failed to establish that it undertook reasonable precautions to prevent the inadvertent disclosure . . . .”); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (“The elements which go into [the waiver] determination include the reasonableness of the precautions to prevent inadvertent disclosure . . . .”).

247. 154 CONG. REC. 18017 (2008) (statement of Rep. King) (“[T]he cost of discovery has spiked in recent years based on the proliferation of e-mail and other forms of electronic recordkeeping.”).

248. *See* Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 238 (D. Md. 2005).

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

250. *See* 154 CONG. REC. 18016 (2008) (statement of Rep. Jackson-Lee) (“Concern about the potential adverse consequences has [forced] . . . lawyers to undertake exhaustive, time-consuming, and expensive examination of documents . . . before they can be comfortable turning them over in discovery.”).

conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege."<sup>251</sup> On balance, therefore, it would seem that a court should have the authority to issue an order relieving parties of the obligation of pre-production review for privilege while still preserving their right to claim of privilege, whether the parties have agreed to such a provision or based on a motion of one of the parties for good cause. It follows *a fortiori* that a court would also have the authority to specify levels of pre-production review rather than eliminate that requirement entirely.<sup>252</sup>

A second argument against judicial authority to dispense with pre-production privilege review is that such blanket orders are "essentially immunizing attorneys from negligent handling of documents, [which] could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases."<sup>253</sup> If the clawback order is based on agreement of the parties, or results from a motion of a party for a protective order, this argument is weak.

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251. 154 CONG. REC. 18017 (2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

252. The argument in the text in favor of court authority to eliminate or define pre-production review while preserving privilege through a clawback agreement should also apply to Rule 502(b)(1), which requires the disclosure to be "inadvertent" to avoid waiver of the privilege. FED. R. EVID. 502(b)(1). Inadvertence goes hand-in-hand with reasonable pre-production review. Indeed, a number of courts have indicated that "inadvertence" is determined by a number of factors that are similar, if not the same as, the factors for reasonable pre-production review. *See* Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 411 (D.N.J. 1995) (quoting *Advanced Med., Inc. v. Arden Med. Sys., Inc.*, No. 87-3059, 1988 WL 76128, at \*2 (E.D. Pa. July 18, 1988)). A court order relieving a party of the obligation to do pre-production review, but requiring the disclosure to be inadvertent, would leave parties in doubt as to when the clawback provision would apply. As discussed above, courts are divided on the meaning of "inadvertent." *See* Schaefer, *supra* note 3, at 198. Some courts construe the term to mean "accidental." *See* *supra* note 148 and accompanying text; *see also* Potomac Elec. Power Co. v. United States, Nos. 12-19T, 12-23T, slip op. at 7 (Fed. Cl. filed Sept. 19, 2012) ("The Court agrees . . . that the standards set forth in FRE 502(b) . . . provide . . . adequate protection against the consequences of any *accidental* disclosures of privileged information that may occur in the course of discovery." (emphasis added)). Thus, a court order requiring disclosure to be inadvertent, but also eliminating pre-production review would seem inconsistent in itself—compliance with the order would not be an accidental disclosure, but rather, intentional conduct to conform to the order. Therefore, a court order that eliminated pre-production review should provide that the clawback provision applies regardless of the reason for disclosure and need not be inadvertent. If the order defines a level of pre-production review rather than eliminating pre-production review entirely, the order should also define an "inadvertent" disclosure. For example, the order could state that a disclosure that occurred despite compliance with pre-production methodology set forth in the order would be treated as "inadvertent."

In contrast, the argument in the text for broad court authority should not be applied to Rule 502(b)(3)'s requirement that parties must take "reasonable [post-production] steps to rectify the error." FED. R. EVID. 502(b)(3). A court should not have authority to eliminate this requirement because it would not serve the purpose of minimizing cost in reviewing materials for privilege. However, a court should have authority to define in its order specifically what this requirement entails, for example, by specifying time periods and form of notice. *See* FED. R. CIV. P. 16(b)(3)(B).

253. *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002).

Among the duties lawyers owe their clients are of competency<sup>254</sup> and communication.<sup>255</sup> Before entering into an agreement that would be incorporated into an order or seeking a protective order, an attorney has an obligation to discuss with the client the advantages, disadvantages, and risks associated with such an agreement or order.<sup>256</sup> For a producing party, this discussion may include an analysis of the relative risks of producing privileged material compared to the cost savings from not having to do extensive privilege review.<sup>257</sup> If a client, after proper consultation with its lawyer, agrees to such a provision or authorizes counsel to seek such a protective order, it is wrong to characterize the resulting agreement or order as immunizing lawyers from negligent handling of documents.

Third, it has been claimed that judicial power to issue clawback orders that relieve parties of pre-production review for privilege improperly shifts the burden of determining privilege to the recipient.<sup>258</sup> When the clawback order approves an agreement of the parties, this argument is also weak. A party receiving discovery may have some additional burden imposed on it by virtue of a clawback order, but that party also receives the benefit of faster responses to discovery requests. In addition, the receiving party may also avoid the risk of cost-shifting if its discovery requests are burdensome.<sup>259</sup> These advantages and disadvantages are for the receiving client to decide after consultation with its lawyer.<sup>260</sup>

If the clawback order is not the result of agreement between the parties, then the argument that the moving party is shifting the burden of determining privilege to the recipient has weight, but is not conclusive. In deciding whether

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254. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012).

255. *Id.* R. 1.4.

256. *See id.* This also implicates ABA Model Rule 1.1 because “[t]o represent a client competently in a Rule 26(f) conference, a lawyer must have the ability to discuss and negotiate in necessary detail a number of ESI-related topics, including . . . the burdens associated with collection and production . . . and agreements to protect inadvertently produced privileged information.” Katherine G. Maynard, *Ethical Obligations Arising in Electronic Discovery*, ROBINSON BRADSHAW & HINSON (Nov. 2007), [http://www.rbh.com/files/Publication/3631f755-2316-4cad-a783-e2cc527db58b/Presentation/PublicationAttachment/6b5610f8-7a66-4cfe-b501-ec57168303bb/article\\_kmaynard\\_ethical.pdf](http://www.rbh.com/files/Publication/3631f755-2316-4cad-a783-e2cc527db58b/Presentation/PublicationAttachment/6b5610f8-7a66-4cfe-b501-ec57168303bb/article_kmaynard_ethical.pdf).

257. *See Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (“[R]ecord-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation . . .”).

258. *See Jessica Wang, Comment, Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1848 (2009). The receiving lawyer also may have an ethical burden imposed when privileged documents are received. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2012) (“If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.”).

259. FED. R. CIV. P. 26(b)(2) committee’s note to 2006 amendment (outlining the factors for determining whether cost-shifting will occur).

260. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2012).

the movant has established “good cause,” the court should consider the harm to the nonmoving party.<sup>261</sup> In addition, the court, in its order, can ameliorate any burden on the receiving party by requiring the producing party to notify the recipient within a specified period of time after it becomes aware that it has disclosed information subject to ACP or WPP.<sup>262</sup>

*Potomac Electric Power Co. v. United States*<sup>263</sup> is an example of a case in which a court found that the moving party failed to establish “good cause” for a clawback order that relieved it of obligations to perform pre-production privilege review.<sup>264</sup> The case was a tax refund suit in which Potomac Electric (Pepco) sought a protective order with two disputed provisions.<sup>265</sup> One provision would provide that any intentional disclosure that it made in the case would not operate as a waiver in any other state or federal proceeding.<sup>266</sup> The second provision allowed Potomac to clawback any privileged documents that were disclosed to the United States within ten days after becoming aware of the disclosure, regardless of the degree of care used when making the disclosure.<sup>267</sup>

The United States objected to the clawback provision on the ground that it would put the burden on the government to determine whether documents were intentionally or inadvertently produced.<sup>268</sup> The burden would be particularly acute because it appeared that Pepco would be producing a number of privileged documents intentionally to establish an advice of counsel defense.<sup>269</sup> The government also objected to the intentional waiver limitation on the ground that applicable law required intentional waivers to apply to all cases.<sup>270</sup>

The court rejected both provisions proposed by Pepco, but it did grant a general protective order that would protect Pepco from inadvertent disclosures.<sup>271</sup> As to the clawback provision, the court found that Pepco had failed to establish “good cause” for the provision.<sup>272</sup> According to the court, “the standards set forth in FRE 502(b) are both fair and sufficiently definite to provide the parties with adequate protection against the consequences of any accidental disclosures of privileged information that may occur in the course of discovery.”<sup>273</sup>

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261. See *Peter Kiewit Sons', Inc. v. Wall St. Equity Grp., Inc.*, No. 8:10CV365, 2012 WL 1852048, at \*11 (D. Neb. May 18, 2012) (citing *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)).

262. See *supra* note 188 and accompanying text.

263. Nos. 12-19T, 12-23T (Fed. Cl. filed Sept. 19, 2012)

264. *Id.* at 6 (citing *Williams v. District of Columbia*, 806 F. Supp. 2d 44, 49 (D.D.C. 2011)).

265. *Id.* at 1.

266. *Id.* at 7.

267. *Id.* at 6–7.

268. *Id.* at 2.

269. See *id.*

270. *Id.* at 7–8.

271. *Id.* at 10.

272. *Id.* at 9.

273. *Id.* at 7.

*Adair v. EQT Production Co.*<sup>274</sup> exemplifies another possible argument against court authority to issue clawback orders that eliminate pre-production review.<sup>275</sup> In that case, the court issued a clawback order over the objection of, rather than on the motion of, EQT.<sup>276</sup> The court order specified a level of privilege review that EQT was required to use and required EQT to produce all the resulting documents subject to a clawback order protecting privileged information and a protective order preventing use of irrelevant material outside the litigation.<sup>277</sup> EQT claimed that the clawback order in essence required it to reveal privileged information.<sup>278</sup> The court rejected EQT's argument on the ground that any form of privilege review, whether manual or electronic, had the possibility of error, and EQT had not shown that the methods ordered by the court would substantially increase the number of inadvertently produced documents subject to ACP or WPP.<sup>279</sup> *Adair* is an unusual situation because normally, a producing party is moving to reduce the burden of pre-production review for privileged material.<sup>280</sup> It can be argued that a court order *preventing* a party from engaging in the privilege review it deems appropriate violates that party's rights not to produce privileged material and to have a court determination of whether the privilege applies to particular communications.<sup>281</sup> After all, the producing party will generally bear the expense of conducting the review.<sup>282</sup> On the other hand, a court has the power, upon a showing of good cause, to issue discovery orders aimed at reducing delay.<sup>283</sup> Although the fact pattern in *Adair* was unusual, in essence, EQT's argument amounted to a claim that it had the right to decide how privileged documents are identified.<sup>284</sup> This argument should be rejected. In the complex and expensive world of electronic discovery, a court should have the power, upon a showing of good cause, to decide how privilege determinations will be made.

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274. Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982 (W.D. Va. June 29, 2012).

275. *Id.* at \*3–4 (rejecting EQT's argument that “[s]uch an order . . . is not justified under either Rule 26 or Federal Rule of Evidence 502”) (citing FED. R. CIV. P. 26; FED. R. EVID. 502)).

276. *Id.* at \*4.

277. *Id.* at \*3.

278. *Id.*

279. *Id.* at \*4.

280. *See, e.g.,* Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 231 (D. Md. 2005) (noting that “[o]ne of the Defendants’ concerns was the cost and burden of performing pre-production privilege review of the records sought by the Plaintiffs”).

281. *See* FED. R. CIV. P. 26(b)(5)(A) (providing parties with a process for withholding documents they believe are subject to ACP or WPP).

282. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 283 (S.D.N.Y. 2003) (“[T]he presumption is that the responding party must bear the expense of complying with discovery requests . . . .” (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (internal quotation marks omitted))).

283. *See* FED. R. CIV. P. 16(c)(2)(P) (stating that at pre-trial conference, a court may take action appropriate for “facilitating in other ways the just, speedy, and inexpensive disposition of the action”); FED. R. CIV. P. 26(b)(2)(C) (providing for court ordered limitations on frequency and extent of discovery).

284. *See Adair*, 2012 WL 2526982, at \*3–4.

4. *May a Clawback Order Provide that Any Intentional Disclosure Will Not Amount to a Subject Matter Waiver?*

Another issue regarding a clawback order that relieves a party of the burden of any pre-production review is that sometimes a disclosure of materials subject to ACP or WPP may be “intentional.”<sup>285</sup> If so, under FRE 502(a), the intentional disclosure could result in a subject matter waiver, not only in that proceeding, but in other proceedings as well.<sup>286</sup> The risk of subject matter waiver may seriously erode the benefit of the clawback order.

The legislative history of Rule 502 provides support for the contention that a court does not have the power to limit the subject matter waiver effect of an intentional waiver.<sup>287</sup> The Statement of Congressional Intent states: “[T]his subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information.”<sup>288</sup> The Statement goes on to provide that “acquiescence in use” will be treated as an intentional waiver.<sup>289</sup>

In *Potomac Electric*, Pepco sought court approval of a provision in a protective order that any intentional disclosure in the case would not operate as a waiver in any other state or federal proceeding.<sup>290</sup> The court rejected this argument, concluding that FRE 502(d) was intended to “close the loop” that would exist without the rule.<sup>291</sup> What the court meant was that in the absence of 502(d), an inadvertent waiver in one federal case could nonetheless be treated as a waiver in other federal or state cases.<sup>292</sup> However, according to the court, Rule 502(d) was not intended to affect intentional waivers.<sup>293</sup> The court relied on Congressional and Advisory Committee statements that Rule 502 does not alter any substantive aspects regarding privilege and waiver.<sup>294</sup>

A court could attempt to deal with the problem of possible subject matter waiver effects of an intentional disclosure in at least two ways. First, its order could provide that any disclosure made pursuant to the order would not be treated as intentional because it was being made pursuant to court order rather than voluntarily. This approach may not succeed, however, if the order results

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285. See FED. R. EVID. 502(a) (providing consequences for intentional waivers).

286. See *id.* (extending an intentional waiver to federal and state proceedings).

287. See 154 CONG. REC. 18017 (2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

288. *Id.*

289. *Id.*

290. *Potomac Elec. Power Co. v. United States*, Nos. 12-19T, 12-23T, slip op. at 1 (Fed. Cl. filed Sept. 19, 2012).

291. *Id.* at 8.

292. See *id.*

293. *Id.*

294. *Id.* at 8–9.

from an agreement of the parties or is the result of a motion for protective order by the producing party. It would be difficult for a party to argue that it did not disclose material voluntarily when it entered into an agreement or sought an order allowing it to do so without privilege review. Second, the order could provide that even if the disclosure is treated as intentional, “fairness” does not require that the waiver extend to undisclosed communications or information—i.e., a subject matter waiver—because the disclosure is being made pursuant to a court order and is not being made for tactical reasons.<sup>295</sup> The Advisory Committee’s Note states that subject matter waiver under FRE 502(a) is “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.”<sup>296</sup> Quite clearly, a disclosure pursuant to a court order providing that the producing party need not engage in pre-production review for materials subject to ACP or WPP is not being done in a selective or misleading way to the disadvantage of the other party.<sup>297</sup>

### 5. *Summary of Analysis*

To summarize my conclusions regarding court authority with regard to clawback orders:

(a) A court has the authority to issue such orders either incorporating an agreement of the parties or on a motion by one party for a protective order.<sup>298</sup>

(b) If the order incorporates an agreement of the parties, the order does not require a showing of “good cause” under FRE 502(d).<sup>299</sup> If the order is on a motion of one of the parties, “good cause” should be shown under FRCP 26(c)(1).<sup>300</sup>

(c) While a number of arguments can be made against judicial authority to relieve a party of the obligation of pre-production review, the more persuasive view is that a court can issue such an order for “good cause.”<sup>301</sup>

(d) Judicial authority to issue an order relieving a party of the subject matter waiver effect of an intentional disclosure is questionable, but a court, in connection with an order relieving a party of privilege review, could attempt to

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295. See FED. R. EVID. 502(a)(3).

296. FED. R. EVID. 502(a) advisory committee’s note.

297. Some court decisions relying on FRE 502(a)(3) have allowed what have been called “cabined waivers,” or intentional waivers limited to the particular case in which the waiver occurs. See, e.g., *In re MF Global Holdings Ltd.*, Nos. 11 15059 (MG), 11 2790(MG) SIPA, 2012 WL 769577 at \*1–2 (S.D.N.Y. Mar. 7, 2012) (approving a protective order that granted a limiting waiver of certain privileges concerning information relating to a specific time frame with a provision stating that the waiver did not constitute a broader waiver under FRE 502(a)(3)).

298. See *supra* Part V.B.1.

299. See *supra* notes 236–38 and accompanying text.

300. See *supra* note 239 and accompanying text.

301. See *supra* Part V.B.3.

limit the potential subject matter waiver effect of such a disclosure by ruling that the disclosure does not produce “unfairness” under FRE 502(a)(3).<sup>302</sup>

### C. *Clawback Failures*

While some legal questions exist regarding clawback orders, their potential utility is great, but only if they are carefully crafted. As this section shows, clawback agreements and orders can fail to achieve their intended purpose in a number of ways.

First, lawyers may simply fail to obtain a clawback order. *Community Bank v. Progressive Casualty Insurance Co.*<sup>303</sup> is one example of the need for written clawback agreements.<sup>304</sup> In 2009, Progressive advised Community Bank that it had inadvertently produced unredacted copies of seven pages and demanded their return or destruction pursuant to FRCP 26(b)(5)(B).<sup>305</sup> Community Bank did so and, in addition, identified two other documents that may have been inadvertently produced and destroyed those documents as well.<sup>306</sup> Several days later, Progressive asked Community Bank to destroy three additional pages.<sup>307</sup> Community Bank did so,<sup>308</sup> at the same time its counsel wrote to Progressive as follows:

I trust that you will be similarly accommodating if we ask for the return of inadvertently produced privileged/protected documents in the future. And I hope we will not face a debate about “inadvertently,” diligent review, etc. I did not even raise those issues when you asked for the documents to be returned or destroyed, despite the small number of documents in issue and the length of time taken to review them, etc.<sup>309</sup>

Progressive’s counsel wrote back as follows: “I appreciate your courtesy in this regard and the consideration you afforded us in that regard. Should the occasion arise, you can expect the same courtesy in return.”<sup>310</sup>

Several years later, Progressive served a nonparty subpoena on Community Bank’s law firm.<sup>311</sup> When the law firm responded, it objected to production of ACP or WPP.<sup>312</sup> However, when the defendant reviewed files at the law firm’s

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302. *See supra* Part V.B.4.

303. No. 1:08-cv-01443-WTL-JMS, 2010 WL 1435368 (S.D. Ind. Apr. 8, 2010).

304. *Id.* at \*3.

305. *Id.* at \*2.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at \*1.

312. *Id.*

office, the defendant actually reviewed the firm's entire file.<sup>313</sup> The defendant's access to privileged documents came to light during the deposition of one of the law firm's partners.<sup>314</sup> Progressive claimed that Community Bank had waived the privilege.<sup>315</sup>

The court denied Community Bank's motion claiming that it had not waived the privileges.<sup>316</sup> The court found that the language in the letter from Progressive's counsel granting the plaintiff the same "courtesy" was too amorphous to amount to a party agreement under Rule 502(e).<sup>317</sup> The use of the word "courtesy" indicated to the court that the "nature of any expected reciprocal conduct was professional/moral in nature, not in the nature of a legal right."<sup>318</sup> In addition, the court indicated that the courtesy was limited to inadvertent production, which may not have been the case here.<sup>319</sup>

The court then turned its analysis to Rule 502(b).<sup>320</sup> The court found that Community Bank, who was the owner of the privilege, did not reasonably rely on its law firm to protect the privilege.<sup>321</sup> The court felt that the bank should have known that generalized objections without a privilege log were insufficient.<sup>322</sup> In addition, the court found that the bank should have examined the documents itself to determine if any were privileged.<sup>323</sup> The court held that the bank could not "blindly rely" on its lawyers to assert privilege claims.<sup>324</sup>

Having found against the Bank under Rule 502, the court nonetheless granted the bank almost all of the relief it sought, excluding the documents from substantive evidence.<sup>325</sup> The court based its decision on FRCP 26(b)(5)(B), finding that Progressive violated that rule by using the disputed documents in its summary judgment motion before the privilege issue was resolved.<sup>326</sup>

Second, the order may be unclear as to whether it is an ordinary protective order or a clawback order. In *United States v. Cinergy Corp.*,<sup>327</sup> the defendants had hired Energy Management & Services Co. (EMS) to help determine the feasibility of building a gas pipeline to one of its plants.<sup>328</sup> The agreement with EMS was part of the remedy phase of litigation between the United States and

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313. *Id.* The parties disagreed about whether this was done with or without the permission of one of the firm's partners. *See id.*

314. *Id.*

315. *Id.* at \*2.

316. *Id.* at \*4-5.

317. *Id.* at \*3.

318. *Id.*

319. *Id.*

320. *Id.* at \*4.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)).

325. *Id.* at \*5.

326. *Id.* (citing FED. R. CIV. P. 26(b)(5)(B)).

327. No. 1:99-cv-01693-LJM-JMS, 2009 WL 6327414 (S.D. Ind. Nov. 10, 2009).

328. *Id.* at \*1.

the defendants.<sup>329</sup> EMS and the defendants entered into a confidentiality agreement in which EMS agreed “to cooperate with Defendants if [they] chose to seek a protective order in response to any subpoena served [by the United States on] EMS.”<sup>330</sup> The United States chose to subpoena certain documents from EMS.<sup>331</sup> Before serving the subpoena, the United States asked defendants’ counsel if the subpoena implicated any privileged documents.<sup>332</sup> Without reviewing responsive documents, defense counsel answered in the negative, even though the response included an email with privileged information.<sup>333</sup> Defense counsel did not discover the email during preparation for the project manager’s deposition, but first learned of the document when plaintiffs attempted to use the email at the deposition, at which time defense counsel objected and sought to reclaim the email as work product under a protective order previously issued by the court.<sup>334</sup> The email was the seventh document in a set of 420 documents consisting of 2,226 pages.<sup>335</sup> The protective order had been entered before FRE 502 went into effect.<sup>336</sup>

The court rejected defendants’ argument that it should be able to reclaim the email.<sup>337</sup> The court first noted that FRE 502 applied, even though it had not been discussed by the parties, because the disclosure occurred in a federal proceeding.<sup>338</sup> The court then discussed whether a court order or party agreement under the Federal Rules of Evidence was in effect.<sup>339</sup> The court found that a protective order previously entered by the court did not amount to an agreement under Rule 502.<sup>340</sup> The order provided for exchange of confidential information, but it had a different purpose than a clawback agreement.<sup>341</sup> The protective order was designed to allow for exchange of confidential information without fear that it would be shared with the public or used for purposes other than the litigation.<sup>342</sup> The court noted that the protective order had “a sort of claw-back provision” which allowed a party to reclaim “unlabeled” confidential information that was produced in discovery.<sup>343</sup> However, there was no provision exempting inadvertently disclosed confidential information from discovery.<sup>344</sup>

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329. *Id.* at \*3.

330. *Id.* at \*1.

331. *See id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at \*2.

337. *Id.* at \*3.

338. *Id.* at \*1 (citing FED. R. EVID. 502(a), (b)).

339. *See id.* at \*2.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

Indeed, the order did not even mention attorney–client privilege or work product.<sup>345</sup>

Having found that there was no 502(d) order in effect, the court then analyzed whether the defendant could reclaim the email under 502(b).<sup>346</sup> The court rejected defendants' claim, finding that the defendants had failed to take reasonable steps to prevent disclosure.<sup>347</sup> The court noted that the defendants failed to explain what, if any, steps they took before informing the United States that there was no claim of privilege as to any of the documents being produced by EMS, and how defendants failed to identify the contents of the email in question when preparing for the deposition of the EMS project manager.<sup>348</sup> In this connection, the court pointed out that the burden rested with defendants to show that they had taken reasonable steps to prevent disclosure and that the universe of documents the defendants were required to review was relatively small.<sup>349</sup>

Third, the order may fail to provide sufficient guidance as to the application of each of the components of Rule 502(b). In *U.S. Home Corp. v. Settlers Crossing, LLC*,<sup>350</sup> the court discussed when court orders under FRE 502(d) or party agreements under 502(e) displace the standards of Rule 502.<sup>351</sup> One of the defendants notified plaintiff's counsel that it intended to serve a subpoena on plaintiff's former counsel.<sup>352</sup> Plaintiff's counsel contacted former counsel to offer to assist in responding to the subpoena.<sup>353</sup> Former counsel declined the offer, stating that they would handle the response on their own.<sup>354</sup> Current counsel did nothing further about the subpoena, relying on the assurances of former counsel because he was a partner in a nationally known firm and the subpoena was expressly limited to nonprivileged documents.<sup>355</sup> On January 25, 2011, the defendant notified plaintiff's counsel that it had received former counsel's response to the subpoena.<sup>356</sup> Six weeks later, plaintiff's counsel asked for a cost estimate to obtain copies of the response.<sup>357</sup> About one month after receiving copies of the response, plaintiff's counsel discovered that the response contained material that it claimed to be privileged.<sup>358</sup>

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345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* (citing *Heriot v. Byrne*, 257 F.R.D. 645, 658 (N.D. Ill. 2009)).

349. *Id.* at \*2–3.

350. No. DKC 08–1863, 2012 WL 3025111 (D. Md. July 23, 2012).

351. *See id.* at \*5.

352. *Id.* at \*1.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at \*2.

357. *Id.*

358. *Id.*

After negotiated attempts to receive the contested documents failed, plaintiff filed a motion to enforce a confidentiality order with clawback provisions.<sup>359</sup> The provisions essentially tracked the language of FRE 502(b)(1) and FRCP 26(b)(5)(B).<sup>360</sup> The district court, affirming the magistrate judge's decision, found that Rule 502(b), rather than the confidentiality order, controlled.<sup>361</sup> The court gave the following test for determining when a confidential order or agreement supplants the Rule:

To find that a court order or agreement under Rule 502(d) or (e) supplants the default Rule 502(b) test, courts have required that concrete directives be included in the court order or agreement regarding *each* prong of Rule 502(b). In other words, if a court order or agreement does not provide adequate detail regarding what constitutes inadvertence, what precautionary measures are required, and what the producing party's post-production responsibilities are to escape waiver, the court will default to Rule 502(b) to fill in the gaps in controlling law.<sup>362</sup>

The court found that Rule 502 applied because "the Confidentiality Order is silent as to either the parties' precautionary or post-production responsibilities to avoid waiver."<sup>363</sup>

*U.S. Home Corp.* is significant in other respects. The plaintiff relied on *Hanson v. United States Agency for International Development* to argue that its counsel could not have unilaterally waived the attorney–client privilege because the privilege belonged to the client.<sup>364</sup> The court agreed with this proposition but pointed out that the *Hanson* court said that an attorney's "unilateral disclosure . . . tells us nothing about whether [the client] has waived its right to withhold" the document.<sup>365</sup> Thus, while the plaintiff could not waive the privilege because of the conduct of its former counsel, it could do so by its own conduct, and Rule 502(b) established standards for waiver based on plaintiff's conduct.<sup>366</sup>

The court then found that the plaintiff failed to offer sufficient details about the preventive measures taken by current counsel to protect ACP and WPP.<sup>367</sup> In particular, the plaintiff only showed two brief telephone calls by its current counsel noting that "[s]uch minimal efforts to secure the privilege or protection

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359. *Id.*

360. *See id.*

361. *Id.* at \*6 (citing Grimm et al., *supra* note 22, at 96).

362. *Id.* at \*5.

363. *Id.* at \*6.

364. *Id.* (citing *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 294 (4th Cir. 2004)).

365. *Id.* (quoting *Hanson*, 372 F.3d at 294) (alteration in original) (internal quotation marks omitted).

366. *Id.* at \*6 & n.16 (citing *Hanson*, 372 F.3d at 294).

367. *Id.* at \*8.

are unreasonable.”<sup>368</sup> Notably, the court stated that the delegation of current counsel’s responsibility to protect the privilege to former counsel was unreasonable.<sup>369</sup> In addition, the court indicated that current counsel failed to take prompt post-production efforts to correct the disclosure.<sup>370</sup>

Another example of an inadequate clawback order can be found in *Sullivan v. Stryker Corp.*<sup>371</sup> Like in *Cinergy Corp.*, the order in *Sullivan* was a protective order, but unlike in *Cinergy Corp.*, the order did have a specific clawback provision dealing with ACP and WPP.<sup>372</sup> Paragraphs 12 and 13 of the order stated:

12. Inadvertent production or other disclosure of documents subject to work-product immunity, the attorney-client privilege or other legal privilege that protects information from discovery shall not constitute a waiver of the immunity, privilege, or other protection, provided that the producing party notifies the receiving party in writing as soon as it confirms such inadvertent production. Copies of such inadvertently produced privileged and/or protected document(s) shall be returned to the producing party or destroyed immediately upon notice of privilege and any information regarding the content of the document(s) shall be deleted from any litigation support or other database and is forbidden from disclosure and forbidden from use in this action or for any other reason at all. Any party or individual having inadvertently received privileged or protected information need not wait for notice from the producing party before complying with the above and is expected to comply with the requirements of this paragraph as soon as it is known or should be known, that the document and information contained therein, is privileged and/or protected. The parties shall have the benefit of all limitations on waiver afforded by Federal Rules of Evidence 502. Any inadvertent disclosure of privileged information shall not operate as a waiver in any other federal or state proceeding, and the parties’ agreement regarding the effect of inadvertent disclosure of privileged information shall be binding on nonparties.

13. Any party may, within ten (10) business days after notification of the inadvertent disclosure under paragraph 12, object to the claim of inadvertence by notifying the designating or producing party in writing of that objection and specifying the designated or produced material to which objection is made. Only in the event of such a dispute may the receiving party(ies) sequester and retain a single copy of the claimed protected materials for the sole purpose of seeking court determination

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368. *Id.*

369. *Id.*

370. *Id.* at \*9.

371. No. 3:10-CV-0177 (MAD/DEP), 2011 U.S. Dist. LEXIS 60887 (N.D.N.Y. June 6, 2011).

372. *Id.* at \*8–10.

of the issue. The parties shall confer within five (5) days of service of any written objection. If the objection is not resolved, the designating party shall, within three (3) days of the conference, file and serve a motion to resolve the dispute. If a motion is filed, information subject to dispute shall be treated consistently with the designating or producing party's most recent designation until further Order of this Court.<sup>373</sup>

Note that this provision does not say anything about the precautions a party must take with regard to privileged material before production.<sup>374</sup> Thus, a party trying to reclaim material would need to show that it used reasonable precautions to prevent disclosure.<sup>375</sup> Also note that the provision does not have a definition of inadvertent.<sup>376</sup> However, this provision does provide time periods for action, thus reducing the possibility of controversy over whether a party “took reasonable steps to rectify the error” under FRE 502(b)(3).<sup>377</sup>

Fourth, a clawback order may fail to deal with the problem of intentional disclosures. Such a provision is particularly important when the order allows a party to disclose information without any pre-production review for privilege, as was the case in *Potomac Electric* discussed above.<sup>378</sup>

## VI. DRAFTING CLAWBACK ORDERS

A number of lessons can be drawn from the analysis of clawback orders in Part V.

1. The order should be labeled as a “clawback order” to distinguish it from a general protective order.
2. The order may be based either on an agreement of the parties or a motion for a protective order. In the latter case, the order should be based on a showing of good cause.
3. The order should state that it is designed to protect ACP or WPP information disclosed in discovery from waiver due to production pursuant to the court order.
4. The order should state that its provisions supersede and replace the provisions of FRE 502.
5. If the order will relieve a producing party of any pre-production privilege review, it should provide that any disclosure pursuant to the order

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373. *Id.*

374. *See id.*

375. *See id.* at \*9 (“The parties shall have the benefit of all limitations on waiver afforded by Federal Rules of Evidence 502.”); *see also* FED. R. EVID. 502(b) (providing that an inadvertent disclosure of privileged information “does not operate as a waiver” if, among other things, the producing party used reasonable precautions to prevent disclosure).

376. *See Sullivan*, 2011 U.S. Dist. LEXIS 60887, at \*8–10.

377. *Id.*; FED. R. EVID. 502(b)(3).

378. *See supra* notes 264–73 and accompanying text.

without pre-production review will be “inadvertent” within the meaning of the FRE 502(b)(1).

6. If the order will impose some level of pre-production review on the producing party, it should specify the methodology to be used.<sup>379</sup> In this case, the order should define “inadvertent” to be consistent with the methodology set forth in the order.

7. If the order will only protect against inadvertent disclosure, it should define “inadvertent” broadly to include any mistake in identification, review, or production of ACP or WPP material.

8. The order should specify that a party who receives ACP or WPP material produced in discovery should notify the producing party and include a timeframe and the method of notification.

9. The order should specify that a producing party who learns that it has produced documents subject to ACP or WPP shall promptly notify the recipient to comply with the obligations of FRCP 26(b)(5)(B). The order should provide details for the timeframe and the method of notification.

10. The order should include provisions stating that production of ACP and WPP material as a result of this order is not intentional, and that “fairness” does not justify a subject matter waiver as to any such disclosed material because the disclosure is not being made to obtain an unfair litigation advantage.

11. The order could include additional provisions, such as privilege log details and cost-sharing provisions.

Appendix A contains the clawback order in *Adair*,<sup>380</sup> which follows many of the principles set forth above. Appendix B contains a more elaborate draft of a clawback agreement, along with a draft court order approving the agreement. Alternatively, if the parties fail to agree to the terms of the clawback agreement, the court could amend the drafts as needed and enter them as a clawback order.

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379. See, e.g., *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, at \*3–4 (W.D. Va. June 29, 2012) (providing an example of an order specifying methodology of pre-production review).

380. *Id.*

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION

ROBERT ADAIR, on behalf of himself	)	
and all other similarly situated,	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:10cv0037
	)	
EQT PRODUCTION COMPANY, <i>et al.</i> ,	)	
Defendants.	)	

PROTECTIVE ORDER ALLOWING CLAWBACK RIGHTS

Pursuant to Fed. R. Evid. 502(d) and Fed R. Civ. P. 26(c)(1), and in order to facilitate discovery and avoid delays, the court hereby ORDERS as follows:

1. The disclosure or production of any information or documents that are subject to an objection on the basis of the attorney-client privilege or the work-product doctrine or any other privilege or immunity against discovery (“Protected Documents”) will not be deemed to waive a party’s claim to their privileged or protected nature or to estop that party from later designating the Protected Documents as privileged or protected.

2. Any party receiving Protected Documents shall return them upon request from the producing party. Any such request must specify the type of privilege or immunity that the producing party is asserting with respect to each Protected Document covered by the request. Upon receiving such a request as to specific information or documents, the receiving party shall return the Protected Documents to the producing party within five (5) business days, whether or not the receiving party agrees with the claim of privilege or protection.

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3. Prior to the return or a request for return of Protected Documents, the receiving party shall treat such documents as Confidential under the Protective Order.

4. This Order shall apply to all Protected Documents that are produced in the case, whether or not production was inadvertent and whether or not care was taken by the producing party to avoid disclosure. The producing party is specifically authorized to produce Protected Documents without a prior privilege review, and the producing party shall not be deemed to have waived any privilege or protection in not undertaking such a review.

5. Nothing herein shall prevent the receiving party from contesting the protected status of Protected Documents on grounds unrelated to their production pursuant to this Order.

ENTER: this 29th day of November, 2011.

/s/ Pamela Meade Sargent

UNITED STATES MAGISTRATE JUDGE

## APPENDIX B

CLAWBACK AGREEMENT REGARDING PRIVILEGED INFORMATION  
INADVERTENTLY DISCLOSED IN DISCOVERY

Agreement made and entered into this \_\_\_ day of \_\_\_\_\_, 2013 by and between [insert here the names of the parties to the agreement]

## RECITALS:

The parties intend by this Agreement:

to cooperate to reduce the cost and delay involved in this Litigation; and

to specify the exclusive circumstances under which Inadvertent disclosure of Information subject to Attorney-Client Privilege (ACP) or Work-Product Protection (WPP) will constitute a waiver of ACP or WPP;

to replace the standards set for in Federal Rule of Evidence (FRE) 502(b) with specific standards to guide their conduct;

to provide that Inadvertent production of ACP or WPP material pursuant to the terms of this order will not be a voluntary or intentional disclosure under FRE 502(a) and also does not result in unfairness under FRE 502(a)(3);

to enter into a stipulation under Federal Rule of Civil Procedure (FRCP) 29(b);

to move the Court for an order adopting this agreement pursuant to FRE 502(d) and (e).

Therefore, in consideration of the mutual covenants set forth below, the parties hereby agree as follows:

1. Scope. This agreement applies to disclosure of information in the following federal matters: [Insert here the matters to which this agreement applies.]

This agreement also applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings in the circumstances set forth in FRE 502.

2. Definitions.

(a) “Attorney-Client Privilege” (ACP) means “the privilege applicable law provides for confidential attorney-client communications.” FRE 502(g)(1);

(b) “Claimant” means a Party to this agreement that is asserting a claim that it or a third person has made an Inadvertent disclosure of Information to an Opposing Party that is subject to ACP or WPP;

(c) “Disclosing Person” means a person responding to a discovery request in this Litigation and includes that person’s attorneys, agents, and employees;

(d) “Inadvertent disclosure” means disclosure of Information in response to a discovery request that is subject to a claim of ACP or WPP when the Disclosing Person made a mistake in disclosing the Information to an Opposing Party. The term “mistake” is intended to be broad, to include without limitation oversight, accident, technical error, or error of judgment including failure:

(i) to identify the Information as subject to ACP or WPP; or

(ii) in reviewing the Information to determine that the Information was subject to ACP or WPP; or

(iii) to withhold Information that the Disclosing Person had determined was subject to ACP or WPP. The parties have agreed pursuant to FRE 502(e) that this is the definition of “inadvertent” for the purpose of FRE 502(b)(1).

(e) “Information” means communications or data in any form, whether tangible or electronic;

(f) “Litigation” refers to the matters indicated in paragraph 1.

(g) “Opposing Party” means a signatory to this agreement that is adverse in this Litigation to another party;

(h) “Party” means a signatory to this Agreement;

(i) “Pre-production review methodology” (PRM) means a methodology to determine if the Information is subject to ACP or WPP as set forth below;

(j) “Privilege or Privileged” means subject to ACP or WPP or both;

(k) “Recipient” means a person that has received Information in discovery in connection with this Litigation;

(l) “Work-Product Protection” (WPP) means “the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.” FRE 502(g)(2).

3. Pre-production Review Methodology. The Parties hereby agree that the PRM set forth in Appendix A for each Party is the method for that Party to use in determining whether Information otherwise subject to discovery is subject to a claim of Privilege.

If a Disclosing Person complies with its PRM but nonetheless produces Information that is subject to a claim of Privilege, the disclosure shall be treated as Inadvertent under this agreement.

If a Disclosing Person discloses Information subject to Privilege as a result of a failure to comply with its PRM, the disclosure will be treated as a waiver of Privilege, but only as to the Information so disclosed.

A Disclosing Person who for economic or other reasons decides not to comply with its PRM shall notify any Party to whom production is being made of its decision not to follow its PRM. A Disclosing Person may decide to follow the PRM for a response to some discovery requests but not to others. If a Disclosing Person elects not to follow its PRM in responding to a discovery request, a Recipient may use or disclose Information disclosed in responding to such discovery request free of any claim by the Disclosing Person of Privilege.

The Parties have agreed pursuant to FRE 502(e) that compliance with that Party’s PRM constitutes “reasonable steps to prevent disclosure” of Privilege under FRE 502(b)(2).

4. Privilege Log. A Party that claims that it is not required to produce Information in discovery on the ground that the Information is subject to Privilege shall prepare a privilege log with regard to the Information containing the following entries for each item of Information: [Here list the requirements for the privilege log or refer to local rule or court order for the requirements.]

5. Obligations of Claimant to Notify Recipient of Inadvertent Disclosure of Information. If a Claimant learns of Inadvertent disclosure of Privileged Information to a Recipient, the Claimant shall provide the notice set forth in this paragraph to the Recipient in writing within five (5) business days from the date the Claimant learns of the Inadvertent disclosure. The Claimant’s

obligation to notify the Recipient applies regardless of the way in which the Claimant learns of the Inadvertent disclosure, including notice from the Recipient under the next paragraph.

The Claimant's notice shall identify to the extent reasonably possible the Information subject to Privilege, state the basis for the claim of Privilege, and direct the Recipient to follow the procedures set forth in this paragraph.

If the Recipient fails or refuses to follow the procedures set forth below, the Claimant shall promptly file a motion with the Court under seal seeking return of the Information to which it is asserting a claim of Privilege. If the Claimant fails to follow the procedure set forth in this paragraph, the Recipient may use or disclose the Information free of any claim of Privilege by the Claimant.

The Parties have agreed pursuant to FRE 502(e) that the procedure set forth in this Paragraph constitutes "reasonable steps to rectify the error" of inadvertent disclosure of Privileged Information 502(b)(3).

6. Obligations When Recipient Learns of Inadvertent Disclosure of Information. If a Recipient learns that it has received Information that is identified as Privileged relating to a Disclosing Person, the Recipient shall notify the Disclosing Person in writing of the receipt of such Information within five (5) business days.

If a Claimant provides the notice to the Recipient set forth in the preceding paragraph, the Recipient:

- (i) must promptly return, sequester, or destroy the specified Information and any copies it has;
- (ii) must not use or disclose the Information until the claim is resolved;
- (iii) must take reasonable steps to retrieve the Information if the Recipient has disclosed it before being notified;
- (iv) may promptly present the Information to the Court under seal for a determination of the claim.

The Claimant must preserve the information until the claim is resolved.

7. Consequence of an Uncontested Challenge by Recipient or Court Decision in Favor of Claimant. If the Recipient does not challenge or if the Court upholds the Claimant's claim of

Privilege as to Information in the Recipient’s possession, the Recipient or its counsel shall return or dispose of the specified communication or information, as well as any hard or electronic copies thereof within ten (10) business days. Within five (5) business days of taking such measures, the Recipient party shall certify in writing that it has complied with the requirements of this paragraph.

8. Production under this Agreement as Unintentional. The parties agree that production of Information that is subject to Privilege under this Agreement is inadvertent rather than voluntary or intentional and accordingly is not grounds for a claim of subject matter waiver under FRE 502(a). The parties further agree that disclosure of Information subject to Privilege was done inadvertently, without tactical intent, and accordingly does not result in unfairness under FRE 502(a)(3).

9. Costs. The Claimant shall reimburse the Recipient for any reasonable costs incurred by the Recipient in connection with identification, deletion, and return of Information that was Inadvertently disclosed under this agreement, including the cost of staff time incurred by the Recipient to identify the location of such Information and to delete it from devices and applications where it may be located.

Agreed to this \_\_\_\_\_ day of \_\_\_\_\_, 2013

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502(d) Order

This Order is issued pursuant to Rule 502(d) and (e) of the Federal Rules of Evidence (FRE) and pursuant to Rules 16(b)(3), 26(b)(1), 26(b)(2), and 26(b)(5)(B) of the Federal Rules of Civil Procedure (FRCP).

The Court approves the attached “Clawback Agreement Regarding Information Inadvertently Disclosed in Discovery Subject to Attorney-Client Privilege or Work Product Protection.” In particular, pursuant to FRE 502(d) and (e) the Court approves the definition of inadvertent, and the procedures for pre-production and post-production review as set forth in the Agreement to replace the standards set forth in FRE 502. As set forth in the Agreement, the Agreement constitutes a stipulation of the parties pursuant to Rule 29(b) of FRCP.

So ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
United States Magistrate Judge

