AN ANALYSIS OF FEDERAL RULE OF EVIDENCE 502 AND ITS EARLY APPLICATION

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I. INTRODUCTION

On September 19, 2008, President George W. Bush signed S.2450, a bill sent to him by the 110th Congress.[1] The new law was enacted to "amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine" by adding a new Rule 502 to the Federal Rules of Evidence.[2] This Paper reviews the background and need for a new law, evaluates the rule itself, and analyzes its impact in the fifteen months since it became effective. First, this Paper briefly explains the attorney-client privilege and work-product doctrine and discusses the development of privilege law in federal courts prior to the enactment of Rule 502. It continues by highlighting some of the significant problems that led Congress to conclude that the new rule was necessary. The next part of this Paper provides a detailed analysis of the rule itself and considers the choice-of-law and constitutional implications the rule raises. The final part takes a close look at the rule's early application, through the lens of several judicial decisions, and offers a framework to help practitioners and courts properly apply the rule.

II. BACKGROUND

Before the protections supplied by Rule 502 can be properly analyzed, a brief explanation is needed of the attorney-client privilege and work-product doctrine, as well as their applicability in federal courts. The first two sections of this part address these tasks. The third section explains why Congress and the courts came to believe that the existing law governing the waiver of these protections required reform.

A. Overview of the Attorney-Client Privilege and Work-Product Doctrine

In federal courts, evidence is generally admissible if it is both relevant and reliable.[3] The test for relevance is minimal: the proof offered must merely have any tendency to make the existence of a consequential fact more or less likely.[4] Yet not all relevant and reliable

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1. *See* Act of Sept. 18, 2008, Pub. L. No. 110-322, 122 Stat. 3537; *see also Understanding New FRE 502 (Attorney-Client Privilege and Work Product Doctrine)*, 5 FED. EVID. REV. 1435 (2008).

2. 122 Stat. 3537.

3. Evidence is generally admissible if it is relevant. FED. R. EVID. 402. Certain types of evidence, however, are excepted from this general rule because they are thought to be unreliable. *See, e.g.*, FED. R. EVID. 802 (hearsay).

4. FED. R. EVID. 401.

evidence is admissible. Some is expressly rejected on the basis that its admission would be unduly prejudicial.[5] Other evidence may be excluded, despite being reliable and probative, in the service of important public policies.[6]

One such policy is to protect the attorney-client relationship. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[7] This privilege serves the public by promoting full and frank communication between attorneys and their clients, thus facilitating informed and sound legal advocacy.[8] Though the precise contours of the attorney-client privilege may vary slightly by jurisdiction, it generally protects private communications between clients or prospective clients and an attorney or his subordinates made for the purpose of giving or securing legal services or assistance.[9] Where the privilege has attached, and has not been waived, neither the attorney nor the client may be compelled to testify as to the protected communications.[10]

A distinct but related protection applies to documents and other tangible things prepared in anticipation of litigation by a party or her representative, including an attorney.[11] The seminal case *Hickman v. Taylor*,[12] while declining to establish a privilege per se, nevertheless rejected an attempt to use discovery to obtain an attorney's private interview notes and, in doing so, established what has come to be known as the work-product doctrine.[13] The Court found that an attempt, without necessity or justification, to discover an attorney's files and mental

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5. For example, character evidence is generally inadmissible to prove a propensity to engage in particular conduct. FED. R. EVID. 404. More generally, a court may exclude any relevant evidence where the court finds that the evidence's probative value is substantially outweighed by the danger of unfair prejudice. FED. R. EVID. 403.

6. United States v. Bryan, 339 U.S. 323, 331 (1950) ("Certain exemptions from . . . giving testimony are recognized by all courts. But every such exemption is grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth."); Trammel v. United States, 445 U.S. 40, 50 (1980) (stating that privilege should be accepted only where it "'has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth'") (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

7. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

8. *Id.*

9. *E.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

10. *See Upjohn*, 449 U.S. at 395-96.

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

12. Hickman v. Taylor, 329 U.S. 495 (1947).

13. *Id.* at 509-10.

impressions "contravene[d] the public policy underlying the orderly prosecution and defense of legal claims."[14] The work-product doctrine was later codified within the Federal Rules of Civil Procedure, which specify that, upon a showing of substantial need and undue hardship, protected documents and tangible things may be discoverable, subject to absolute protection for the mental impressions, conclusions, opinions, and legal theories that may be contained therein.[15]

B. Substantive Privilege Law in Federal Courts

In 1934, Congress passed the Rules Enabling Act authorizing the Supreme Court to prescribe rules governing "practice and procedure" in federal courts.[16] Yet for nearly forty years, questions of evidence and privilege were left to the common law—federal common law in federal-question cases, and state law in diversity actions.[17] In 1973, the Supreme Court finally submitted to Congress a draft of the Federal Rules of Evidence. At the time, the Rules Enabling Act, as amended, provided that rules would take effect no earlier than ninety days after they were reported to Congress.[18] The proposed rules were met with stiff resistance, however, and Congress acted swiftly to block their effectiveness.[19] One of the key reasons for this resistance was the proposed rules' treatment of privilege.[20]

As originally proposed, Article V contained thirteen rules dealing with privilege. Nine of these rules would have enacted specific substantive evidentiary privileges such as lawyer-client, psychotherapist-patient, or trade-secret.[21] Other proposed rules established general principles to be followed in handling questions of privilege.[22] These proposed rules were subject to extensive criticism on both substantive and federalism grounds. To some commentators, the rules included both too much and too little protection simultaneously.[23] For other

14. *Id.* at 510.

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

16. Rules Enabling Act, Pub. L. 73-415, 48 Stat. 1064 (1934).

17. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

18. 28 U.S.C. § 2072 (1970).

19. Act of Mar. 30, 1973, Pub. L. 93-12, 87 Stat. 9.

20. Aside from the concerns addressed below, it is dubious that the privilege articles, as they were initially proposed, were even authorized by the Rules Enabling Act, which has always provided that rules enacted under it "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 28 U.S.C. § 2072 (2006).

21. FED R. EVID. 502-10 (Proposed Official Draft 1970).

22. FED R. EVID. 501, 511, 512, 513 (Proposed Official Draft 1970).

23. *E.g.*, Charles L. Black, Jr., *Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48-52 (criticizing the inclusion of trade-

commentators, a principal problem was the preemption of all privileges except those specifically provided by the rules or by federal statute, particularly in diversity cases, where state privilege law had traditionally governed.[24] Of the specific privileges contemplated, only Proposed Rule 503 is of significance here, primarily as a foil to contrast the newly-enacted Rule 502. Unlike Rule 502, which primarily addresses the potential waiver of the attorney-client privilege under various circumstances but does not itself provide guidance as to whether a particular communication is privileged,[25] Proposed Rule 503 would have established the substantive contours of the privilege itself.[26] Under the rule, a client, subject to several enumerated exceptions, would have been entitled to refuse to disclose, and to prevent another person from disclosing, confidential communications made to a lawyer for the purpose of obtaining legal services.[27]

Eventually, of course, Congress authorized the Federal Rules of Evidence.[28] But it did so in significantly altered form. Proposed Rules 501 through 513 had been eliminated. In their place, Congress enacted a single Rule 501 that left the issue of privilege to the "reason and experience" of the courts in federal-question cases and in the hands of state law in diversity cases:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of

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secret and lawyer-client privileges while excluding marital-confidences and physician-patient privileges).

24. FED R. EVID. 501 (Proposed Official Draft 1970). *See, e.g.*, Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 66 (1973) ("In short, by failing to recognize state-created personal testimonial privileges, the *Rules* seriously impair the important capacity of the states to enlarge the enjoyment and protection of personal liberty.").

25. *See infra* Part III.

26. Proposed FED R. EVID. 503 (not enacted).

27. *Id.*

28. Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926.

> a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[29]

Moreover, while making express the power of the Supreme Court to amend the Federal Rules of Evidence,[30] Congress simultaneously imposed comparatively tighter controls on that power.[31] Although other rules, such as the Federal Rules of Civil Procedure, automatically took effect unless Congress intervened within ninety days of reporting, under the newly added 28 U.S.C. § 2076, amendments to the Federal Rules of Evidence would automatically take effect only after 180 days of reporting and could be blocked by either house of Congress acting alone.[32] Subsequent amendments to the Rules Enabling Act have gone even farther, specifying that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[33] Thus while rules of procedure or evidence will generally become effective if Congress merely declines to intervene, rules affecting evidentiary privileges require the full legislative process including Presidential signature. Until 2008, no such rule had been enacted. Instead, in cases where "State law supplies the rule of decision,"[34] federal courts have looked to state privilege law. In federal-question cases, Congress has left the development of substantive privileges to the "principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[35]

C. Problems Leading to the Need for Reform

Much of the dissatisfaction with the previous state of affairs focused on the question of waiver—when the protection would be waived and the scope of such a finding.[36] The application of varying state principles of

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29. FED. R. EVID. 501.

30. Prior to 1975, the Rules Enabling Act referred to rules of "practice and procedure" but failed to specifically authorize the establishment of evidentiary rules. 28 U.S.C. § 2072 (1970).

31. 88 Stat. 1926.

32. 28 U.S.C. § 2076 (1982) (*repealed* 1988).

33. 28 U.S.C. § 2074(b) (2006). Amendments affecting other rules of evidence or procedure now become effective on the first day of December in the year reported to Congress, thus providing a minimum of seven months for Congress to intervene if it wishes. 28 U.S.C. § 2074(a) (2006).

34. FED. R. EVID. 501.

35. *Id.*; *see also Trammel*, 445 U.S. at 47 (Congress meant to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.").

36. *See* FED. R. EVID. 502 advisory committee's note.

waiver and, in particular, the development of divergent federal common-law principles, led to great uncertainty among litigants.[37] This problem was exacerbated by the dramatically increased potential for waiver that has accompanied the explosive growth in electronic discovery,[38] as well as by governmental pressure to waive the privilege and by concerns about the effect of disclosure on subsequent litigation in the same or a different forum.[39] This section first addresses the varying approaches to waiver and then explains how the elevated risk of disclosing protected information has created such a serious problem.

At the outset, a distinction must be drawn between "voluntary" and "inadvertent" disclosures. Because the attorney-client privilege only applies to confidential communications, courts have routinely held that voluntary disclosure waives the protection.[40] The standard for waiving work-product protection has been somewhat more lenient, such that a voluntary disclosure to a third person may not automatically waive the protection, so long as secrecy is maintained against opponents.[41] Where voluntary disclosure results in waiver, the protection is frequently waived for all communications relating to the same subject matter and not merely for the specific communication disclosed.[42] This has been commonly referred to as "subject-matter waiver." Obviously, the consequences of subject-matter waiver could be disastrous to a party.

Inadvertent disclosures, on the other hand, have been subject to three different standards for determining whether or not a waiver has occurred and, if so, its scope. One approach has taken the traditional view espoused by Dean Wigmore[43] and applied strict liability:

> [T]he confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions

37. *Id.*

38. *Id.*

39. *Id.*

40. *E.g.*, United States v. Rockwell Int'l, 897 F.2d 1255, 1257 (3d Cir. 1990); United States v. El Paso Co., 682 F.2d 530, 538 (5th Cir. 1980); United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1950).

41. Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) ("By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system . . . .").

42. *E.g.*, United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982); *In re* Sealed Case, 676 F.2d 793, 817 (D.C. Cir. 1982).

43. *See* 8 J. WIGMORE, EVIDENCE § 2325 (McNaughten rev. ed. 1961).

> warrant. We therefore agree with those courts which have held that the privilege is lost "even if the disclosure is inadvertent."[44]

Under this strict approach, "once confidentiality is lost it can never be restored" and thus waiver is almost always found when an inadvertent disclosure has occurred.[45] Because inadvertence is of little or no significance under this approach, even comparatively minimal disclosures are likely to result in subject-matter waiver.[46]

On the opposite end of the spectrum is a lenient approach. Under this approach, waiver of the attorney-client privilege requires a knowing and intentional relinquishment of the privilege.[47] "Here the determination of inadvertence is the end of the analysis."[48] At its most extreme application, only the *client* can waive the privilege, and even negligence in his attorney's conduct should not result in waiver.[49] Courts applying this standard rarely, if ever, find waiver in an inadvertent disclosure.[50]

Between these extremes lies the position that has ultimately been adopted by most courts that have considered the question.[51] This intermediate approach requires a court to consider a variety of factors on a case-by-case basis to determine "whether the conduct is excusable so that it does not entail a necessary waiver."[52] The approach seeks to balance the policy of protecting full and frank communications between attorneys and clients with an incentive for parties to take appropriate precautions to protect the privilege when disclosing information during discovery.[53] Courts using this approach have commonly considered several factors to determine the effect of a disclosure: the reasonableness of precautions taken to prevent inadvertent disclosure, the time and

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44. *In re* Sealed Case, 877 F.2d. 976, 980 (D.C. Cir. 1989) (quoting *In re* Grand-Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984)); *see also* FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) ("One cannot 'unring' a bell.").

45. Hopson v. City of Baltimore, 232 F.R.D. 228, 235 (D. Md. 2005).

46. *See, e.g.*, Abbot Labs. v. Baxter Travenol Labs., 676 F. Supp. 831 (N.D. Ill. 1987) (holding that intentional production of three attorney opinions waived privilege as to all related opinions).

47. *Hopson*, 232 F.R.D. at 236.

48. Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996).

49. Conn. Mut. Life. Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955).

50. *E.g.*, *id.* at 451; Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982).

51. *E.g.*, *Gray*, 86 F.3d at 1483-84; Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993); Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 116 F.R.D. 46, 50 (M.D.N.C. 1987).

52. *Hopson*, 232 F.R.D. at 236.

53. *Alldread*, 988 F.2d at 1434.

measures taken to rectify the error, the scope of discovery, the number or extent of the disclosures, and overall considerations of fairness and the interest of justice.[54]

Though the intermediate test allowed some room for error, the uncertainty of a multi-factor balancing test created problems of its own. Different courts could reach opposite results on virtually indistinguishable facts.[55] Factors evaluating whether a party's conduct was "reasonable" or "prompt" were inherently malleable based on a court's own perception of the circumstances, and even quantitative factors such as the ratio of inadvertent disclosures to the overall scope of discovery were fuzzy since no bright-line test was available and courts were left to decide one case at a time what was "too much." Furthermore, a finding that waiver had occurred might result in waiver only as to the disclosed communications or, more rarely, subject-matter waiver.[56]

This uncertainty took on new significance in light of the electronic-discovery amendments to the Federal Rules of Civil Procedure and the increasing volume of electronically-stored information that has been deemed discoverable. *Hopson v. City of Baltimore*[57] is frequently cited for its exposition on the problems that parties face in balancing the cost of production against the specter of inadvertent waiver of the attorney-client privilege or work-product protection. The court noted that electronic discovery frequently involves thousands or millions of discoverable records.[58] "In this environment, to insist in every case upon 'old-world' record-by-record pre-production review, on pain of subject-matter waiver, would impose on parties costs of production that bear no proportionality to what is at stake in the litigation . . . ."[59] Not only does this impose enormous costs on parties, but also the time required to permit proper review would require extremely long pre-trial discovery periods, delaying the timely resolution of claims.[60]

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54. *See Hydraflow*, 145 F.R.D. at 637; Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985). The exact formulation of the factors varies slightly by court and circuit.

55. See *infra* text accompanying notes 106-13 for a case comparison.

56. *Compare In re* Brand Name Prescription Drugs Antitrust Litigation, No. 94-C-897 MDL 997, 1995 U.S. Dist. LEXIS 17110, at *7 (N.D. Ill. Nov. 16, 1995) (applying intermediate test and finding waiver only as to disclosed documents) *with* Edwards v. Whitaker, 868 F. Supp. 226, 230 (M.D. Tenn. 1994) (applying intermediate test and finding subject-matter waiver).

57. Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005).

58. *Id.* at 244.

59. *Id.*

60. *Id.*

The court noted that Federal Rule of Civil Procedure 26(b)(5) had imposed an obligation on the recipient of inadvertent disclosures to not use the disclosures and to return or destroy them.[61] The court further noted that non-waiver agreements between disclosing parties (so called "clawback" or "quick-peek agreements") had become common.[62] It recognized, however, that the protection afforded under the Rule and by these devices could be illusory.[63] Courts might refuse to uphold such agreements at all and, even if effective between the litigants, they would likely be unenforceable against third parties in future actions who may wish to argue for waiver based on the prior disclosure.[64]

In addition to the potentially enormous costs of comprehensive privilege review—that may still not succeed in preventing waiver—corporations have faced substantial pressure from the Department of Justice (DOJ) in recent years to waive attorney-client privilege and work-product protection in order to demonstrate cooperation with federal investigations and receive more lenient treatment such as lighter penalties or the avoidance of criminal charges.[65] While a thorough discussion of the various DOJ memoranda, in particular the McNulty Memo, is beyond the scope of this Paper, a brief comment is necessary. In general, while privilege waiver was not deemed a "prerequisite" to finding that a corporation had cooperated in an investigation, and while prosecutors were instructed to only request a waiver of privilege when there was a "legitimate need" to do so, whether a corporation complied with a request to waive the privilege was expressly to be considered as a factor in judging cooperation and a possible reduction in offense level under the United States Sentencing Guidelines.[66] Voluntary waivers were to be accepted routinely, subject only to record-keeping requirements.[67] Though the DOJ has recently backed away from the policies expressed in the McNulty Memo and now specifically bars prosecutors from seeking waiver of the privileges,[68] many people—including legislators—feel that

61. *Id.*

62. *Id.*

63. *Hopson*, 232 F.R.D. at 234-35.

64. *Id.* at 235.

65. *E.g.*, Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dept. of Justice (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches-/2006/mcnulty_memo.pdf. The McNulty Memo was the most notorious of a serious of internal memoranda that referenced incentives and penalties for corporate waiver of the attorney-client privilege and work-product protections.

66. *Id.*

67. *See id.*

68. *See* Memorandum from Mark Filip, Deputy Attorney General, U.S. Dept. of Justice (Aug. 28, 2008), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

corporations are still under substantial pressure to waive the attorney-client privilege and work-product protection in corporate investigations.[69]

The pressure to waive the privileges has been particularly harsh given the widely negative reaction in the courts to the question of selective waiver. Essentially, after complying with DOJ waiver requests or making disclosures to cooperate voluntarily, corporations have asked courts to treat the privilege as not waived as to non-governmental third parties seeking to capitalize on the disclosure. With the exception of the Eighth Circuit,[70] every circuit to consider the issue of selective waiver has ruled against it.[71]

In sum, by the time of the 2008 adoption of Rule 502, parties to litigation found themselves faced with a number of unattractive prospects going into discovery, including vastly increased costs of production and privilege review with a significant risk of inadvertent disclosure due to the exponential growth of electronically-stored information, as well as the possibility of government pressure to "voluntarily" disclose, and an unpredictable judicial environment for resolving waiver issues.

III. OVERVIEW OF THE RULE

According to the Advisory Committee Notes, Rule 502 was enacted with two major purposes. First, the rule attempts to resolve the inconsistent adjudication in the federal courts of questions of subject-matter waiver and the effect of inadvertent disclosures.[72] Second, the rule seeks to address the prohibitive costs of guarding against inadvertent disclosure, especially in light of the expansive use of electronic discovery.[73] To accomplish these purposes, "[t]he rule seeks to provide a predictable, uniform set of standards" by which parties can assess the likely consequences of disclosure and protect themselves through enforceable court orders and in subsequent proceedings.[74]

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69. *See, e.g., Attorney-Client Privilege Protection Act of 2009 Is Introduced In the Senate (S. 445)*, FED. EVID. REV. (Feb. 23, 2009), *available at* http://federalevidence.com/blog/2009/february/attorney-client-privilege-protection-act-2009-introduced-senate-s-445.

70. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

71. *See, e.g., In re* Qwest Comm'ns Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006); *In re* Columbia/HCA Healthcare Corp. Billing Practices Lit., 293 F.3d 289 (6th Cir. 2002).

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

73. *Id.*

74. *Id.*

A. Individual Provisions

In this section, I will individually analyze each of the provisions of the rule and both explain their primary effects as well as identify a number of less obvious implications that practitioners and courts should be aware of when applying the rule. Part III.B will discuss the choice-of-law and constitutional implications of Rule 502. Because of my focus on the rule as actually adopted, this Paper does not address the controversial selective-waiver provision that was drafted but neither recommended nor enacted.[75] Similarly, while this Paper analyzes the rule and early decisions applying it, and proposes a framework to more accurately and consistently apply it, I do not attempt to make predictions about the likelihood that the rule will actually help parties control the cost of discovery.[76]

1. Definition and Scope

Rule 502 consists of six operative subsections, a definitional subsection, and a statement of applicability. I begin my discussion with the latter provisions because they affect each of the operative subsections:

> Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver
>
> The following provisions apply, in the circumstances set out, to disclosure of a communication of information covered by the attorney-client privilege or work product protection."[77]
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> * * *
>
> (g) Definitions.—In this rule:

75. *See* Letter from Hon. Lee H. Rosenthal, Chair, U.S. Judicial Conf. Comm. on Rules of Practice and Procedure, to Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary, and Sen. Arlen Specter, Ranking Member, S. Comm. on the Judiciary (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

76. Such topics have been the primary emphasis of several other articles addressing the new rule. *See, e.g.*, Michael Kozubek, *Protecting Privilege: New Rule 502 Mitigates the Risk of Inadvertent e-Discovery Disclosures*, INSIDE COUNSEL, Feb. 2009, at 46; John K. Villa, *Inadvertent Disclosures and New FRE 502: Will It Relieve the Burdens and Costs of Discovery?*, ACC DOCKET, Jan.-Feb. 2009; John Corbett & Stephanie Feingold, *New Evidence Rule 502: Little Relief From Rising Discovery Costs Staunch the Flood of Litigants' Dollars*, N.J.L.J., Dec. 15, 2008.

77. FED. R. EVID. 502.

> (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
>
> (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.[78]

Several observations are pertinent here. First, the rule expressly refers to "applicable law" in defining the material to which it applies. Rule 502 is not intended to and does not change the substantive protection to which communications or materials are entitled. Rule 501 thus continues to direct the inquiry as to whether or not a privilege is applicable and, as noted above, the source of law supplying the answer to the inquiry will depend on whether or not state law supplies the rule of decision with respect to the element.[79]

Second, the rule applies only to the disclosure of communications or information protected by the attorney-client privilege or work-product doctrine; for simplicity I will use the phrase "privileged information" to refer to either category. Disclosures that implicate other privileges are afforded no protection under the rule. While it is possible that the rule may provide persuasive authority for resolving claims of waiver, and it is, in any event, unclear whether other privileges are subject to the sort of inadvertent disclosure that motivated the rule, one point seems clear: federal courts deciding issues of waiver will be required to correctly apply not two, but three different standards. If the disclosure involves the attorney-client privilege or work-product protection, Rule 502 applies regardless of the source of subject-matter jurisdiction. Where a different privilege is implicated and the element of the claim or defense arises under federal law, federal common law, potentially influenced by Rule 502, will determine whether or not the privilege has been waived. And where a different privilege is implicated but the element of the claim or defense arises under state law, Rule 501 requires the court to apply the waiver doctrine of the state, which may or may not accord any persuasive weight to Rule 502. This last implication will be discussed below in connection with subsection (f), which makes Rule 502 binding even where state law supplies the rule of decision, but only "in the circumstances set out in the rule."[80]

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78. FED. R. EVID. 502(g).
79. FED. R. EVID. 501.
80. FED. R. EVID. 502(f).

The third implication of the rule's scope is that it provides the same analysis to disclosures whether made in the context of attorney-client privilege or under the protection of the work-product doctrine. This supersedes previous judicial reasoning that "[b]ecause the attorney-client privilege and work product doctrine have different standards for waiver, they must be considered separately."[81] Finally, the rule applies only to the question of waiver in light of a *disclosure* of privileged information; other statutory or common-law doctrines govern the question of possible waiver when privileged information has not been disclosed in discovery.[82]

2. Subject-Matter Waiver

With the scope of the rule established, I turn now to the operative provisions. The first subsection addresses the issue of subject-matter waiver:

> (a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.—
>
> When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.[83]

Subsection (a) creates a strong presumption against subject-matter waiver. Under this provision, in most cases if a disclosure results in waiver at all, the privilege is waived only as to the actual communications or information disclosed. According to the Advisory

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81. *E.g.*, SNK Corp. of Am. v. Atlus Dream Entm't Co., 188 F.R.D. 566, 571 (N.D. Cal. 1999).

82. FED. R. EVID. 502 advisory committee's note (citing as examples the reliance-on-attorney-advice defense and legal-malpractice actions).

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

Committee, subject-matter waiver "is reserved for those unusual situations in which fairness requires a further disclosure . . . in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[84] While "intentional" is not defined, the Advisory Committee Notes hint at two possible meanings. First, they explicitly reject the possibility that an inadvertent disclosure should ever result in subject-matter waiver.[85] Thus "intentional" may mean "not inadvertent." A second, broader meaning is also suggested: "subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading, and unfair manner."[86] This meaning suggests that, beyond merely requiring reckless or knowing disclosure of privileged information, "intentional" refers to a purpose to deceive or take unfair advantage. Such a broad interpretation is supported by the Advisory Committee's approving citation of *In re United Mine Workers of America Employee Benefits Plan Litigation*[87] for the proposition that limited waiver was appropriate since the disclosure was not made "in an attempt to gain a tactical advantage."[88]

The question of fairness arises also in the third factor, which is whether the disclosed and undisclosed information "ought in fairness to be considered together."[89] While this factor partly tracks the nature of the disclosure, it also appears to establish that subject-matter waiver should be applied for remedial rather than punitive purposes. A party making a selective, unfair presentation "opens itself to a more complete and accurate presentation."[90]

Finally, subsection (a) serves the rule's goals of protection and predictability by constraining the scope of any subsequent waiver determination in state-court proceedings.[91] Where disclosure of privileged information is first made to a federal court, office, or agency, Rule 502(a) governs the waiver of undisclosed information in any subsequent proceeding.[92]

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84. FED. R. EVID. 502(a) advisory committee's note.

85. *Id.*

86. *Id.*

87. *In re* United Mine Workers of Am. Employee Benefits Plan Litig., 159 F.R.D. 307, 312 (D.D.C. 1994).

88. FED. R. EVID. 502(a) advisory committee's note.

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

90. FED. R. EVID. 502(a) advisory committee's note.

91. *Id.*

92. *Id.*

3. Inadvertent Disclosure

The second subsection addresses the effect of an inadvertent disclosure of privileged information:

> (b) Inadvertent disclosure.—
>
> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).[93]

As I will show in Part IV, almost all of the applications of Rule 502 in cases since the rule took effect have centered on this provision.[94] At first glance, subsection (b) appears to follow the majority approach described above in Part II.C. In many ways this is correct. Indeed, the Advisory Committee Notes expressly state that the rule "is in accord with the majority view on whether inadvertent disclosure is a waiver."[95] They explicitly reference the factors courts have often used to decide the question, while noting that the list is non-exclusive and that the rule is "flexible enough" to accommodate other factors.[96] It is significant to note that the majority approach was an intermediate position, however, between a strict subject-matter waiver rule that was seen as too harsh and a lenient no-waiver rule that was seen as too formalistic.[97] Thus, while in many cases courts have evaluated disclosures under an "intermediate test" to determine whether waiver applied at all and, if so, only to the communications actually disclosed,[98] in at least some cases courts have instead applied the same factors (and even cited the same cases) to treat

93. FED. R. EVID. 502(b).
94. *See infra* Part IV.
95. FED. R. EVID. 502(b) advisory committee's note.
96. *Id.*
97. *See supra* Part II.C.
98. *E.g.*, *Alldread*, 988 F.2d at 1433-34; Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204, 208-09 (N.D. Ind. 1990).

the decision as being between subject-matter waiver or merely waiver as to the documents actually disclosed.[99] The clear thrust of subsection (b) is to adopt the former position, and when combined with subsection (a), to reject the latter position. When the two provisions are synthesized, we see that the rule creates a presumption that disclosure should result in subject-matter waiver only in rare circumstances, and that even waiver as to the disclosed information is by no means automatic.

To determine whether a disclosure waives the attorney-client privilege or work-product protection at all, the rule sets out three criteria. If all are met, the disclosure will not result in waiver; if not, the disclosure will result in waiver, but only for the documents actually disclosed. The disclosure must have been inadvertent, the disclosing party must have taken reasonable steps to prevent disclosure, and the disclosing party must have promptly taken reasonable steps to rectify the disclosure. For simplicity, I will refer to the latter requirements as "reasonable precautions" and "reasonable response" respectively. Surprisingly, the rule provides no guidance—either in its text or in the Advisory Committee Notes—to explain what "inadvertent" means as an independent factor. This is an unfortunate drafting choice: 502(b) essentially says an *inadvertent disclosure* does not result in waiver if it was *inadvertent*, along with other factors. Compounding the problem is that "inadvertent" was the conclusion of the prior common-law approach, yet it is now an element under the rule. While it seems safe to say that a disclosure meeting the "intentional" standard of 502(a) would not be inadvertent and would thus be unprotected by 502(b), courts are likely to take varying approaches to interpreting this requirement. In my proposed framework below, I suggest a remedy to this problem.[100]

Fortunately, the rule provides some guidance as to the reasonable-precautions and reasonable-response requirements. While declining to adopt a precise standard, the Advisory Committee Notes nevertheless cite cases setting forth several factors that may be considered.[101] These include the reasonableness of precautions taken, the time taken to rectify the error, the scope of the discovery, the extent of disclosure, and the overriding issue of fairness.[102] The notes emphasize that none of these factors are individually necessary or dispositive, and that the rule is

99. *Edwards*, 868 F. Supp. at 229.

100. *See infra* Part IV.B.

101. FED. R. EVID. 502(b) advisory committee's note (citing Lois Sportswear U.S.A, Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co.*, 109 F.R.D. at 332).

102. *Id.*

intended to be flexible enough to accommodate other factors.[103] The Advisory Committee Notes also suggest that, if not necessarily providing a safe harbor, the use of advanced analytical software and linguistic tools to screen for privileged information is a relevant consideration.[104] The rule does not require post-production review, but parties are required to follow up on obvious indications of inadvertent production.[105] As with subsection (a), the determination under subsection (b) applies to subsequent proceedings at both the federal and state level.[106]

Despite this guidance, the actual application of 502(b) is likely to be idiosyncratic in any given case. These are many of the same factors that courts had already been using to arrive at very different outcomes on closely analogous factual circumstances. For example, in *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*,[107] a legal assistant had erroneously permitted opposing counsel to copy twenty documents out of nearly 12,000 produced.[108] The production process involved initial review by legal assistants, followed by two checks of documents identified as "sensitive" by an attorney and another legal assistant.[109] The court acknowledged the party's "fairly quick discovery" of the error but, nevertheless, faulted both the precautions as well as the response and held the privilege waived.[110] In contrast, in *Sanner v. Board of Trade of Chicago*,[111] a staff member similarly allowed opposing counsel to view twelve confidential documents out of 22,500 produced.[112] The documents had previously been identified on a privilege log and the error was asserted prior to delivering copies of the document.[113] The court, satisfied that both the precautions and response were reasonable, held that the privilege had not been waived.[114]

Other examples of startlingly divergent results are readily available in pre-502 decisions. Such uncertain application can be expected to continue in the decisions that are entered under the new rule. Further, the rule's trumpeted "flexibility" virtually guarantees that a trial court will

103. *Id.* The note mentions the number of documents to be reviewed and the time allowed for discovery as possible examples of such additional factors. *Id.*

104. *Id.*

105. *Id.*

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

107. *Parkway Gallery Furniture, Inc.*, 116 F.R.D. 46.

108. *Id.* at 51.

109. *Id.* at 49.

110. *Id.* at 51-52.

111. Sanner v. Bd. of Trade of Chi., 181 F.R.D. 374 (N.D. Ill. 1998).

112. *See id.* at 376-77, 379. The court did not specify the number of documents, but it did provide Bates numbers from which the number was derived.

113. *Id.* at 376.

114. *Id.* at 379.

have even broader discretion to determine whether a party did or did not take reasonable precautions or make a reasonable response under the circumstances.

4. Prior Disclosure

The third subsection addresses the effect in a federal proceeding of a disclosure made previously in a state proceeding:

> (c) Disclosure made in a State proceeding.—
>
> When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
>
> (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
>
> (2) is not a waiver under the law of the State where the disclosure occurred.[115]

Like aspects of the two previous provisions, subsection (c) attempts to resolve the uncertainty that parties have regarding the effect in a later proceeding of a disclosure in the current (or a previous) proceeding. Where those provisions dealt in part with the later effect of disclosures in a *federal* proceeding, this provision resolves the opposite problem: how a court should treat disclosures in *state* proceedings that are subsequently introduced in a federal proceeding. The rule requires that in such a situation, the most-protective law shall apply.[116] This is the result of a specific policy choice that a more lenient federal policy should not impair a more protective state policy upon which a disclosing party may have relied, but neither should a state's more lenient policy supersede the protective policy expressed elsewhere in the rule.[117] Where, however, a state-court confidentiality order is in place, the rule is inapplicable as a matter of full faith and credit, federalism, and comity.[118]

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

116. *Id.*; *see also* FED. R. EVID. 502(c) advisory committee's note.

117. FED. R. EVID. 502(c) advisory committee's note.

118. *Id.* (citing 28 U.S.C. § 1738 (1948) and Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 499 (D. Md. 2000)).

I highlight two additional implications. First, the rule imposes no threshold showing of inadvertence prior to the availability of the most-protective law. Even entirely unscreened disclosures resulting in subject-matter waiver in state court thus may benefit from 502(c), since they may not be intentional as required by subsection (a). Second, the provision only addresses the effect of prior disclosure on a subsequent federal proceeding. Combining the first three subsections, we can see that Rule 502 provides substantial protection in federal-to-federal, federal-to-state, and state-to-federal disclosure sequences. Yet, it is silent when the disclosure sequence is state-to-state. This reflects a conscious drafting choice.[119] The first draft of the rule provided for uniform waiver rules in both state and federal proceedings, regardless of where the initial disclosure was made.[120] This approach, while supported by lawyers and legal groups because it provided more certainty, drew considerable criticism from state judges on federalism and comity grounds.[121] Ultimately, the drafters elected to limit the rule, finding that even so limited it would still achieve its primary purpose of reducing the costs of discovery in federal proceedings.[122]

5. Controlling-Effect Provisions

The final three subsections address the controlling effect of the rule. Each will be discussed in turn:

> (d) Controlling effect of a court order.—
>
> A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.[123]
>
> (e) Controlling effect of a party agreement.—
>
> An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.[124]

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119. *See* Rosenthal letter, *supra* note 75.
120. *Id.*
121. *Id.*
122. *Id.*
123. FED. R. EVID. 502(d).
124. FED. R. EVID. 502(e).

(f) Controlling effect of this rule.—

Notwithstanding Rules 101 and 1101,[125] this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.[126]

Subsection (d) reflects the goal of providing greater certainty in order to reduce the costs of disclosure. It permits a federal court to issue a protective order preventing disclosure from resulting in waiver.[127] This order is binding on subsequent federal or state-court proceedings.[128] Rule 502(d) does not authorize a court to make an order determining the waiver effects of disclosing the same information separately in another proceeding.[129] Nor is subsection (d) applicable if the court is determining the waiver effects of a disclosure made in another proceeding.[130]

Subsections (d) and (e) work together to address the effect of agreements between the parties to limit the effect of waiver by disclosure. Under (d), the court may make a protective order whether or not it memorializes an agreement.[131] Subsection (e) makes it clear, however, that the court can incorporate such an agreement into a protective order and make it binding against other parties in subsequent proceedings.[132] If the court refuses to incorporate such an agreement, or if the parties fail to request such an order, the agreement may still be binding between the parties in the current proceeding but will not bind other parties in future proceedings.[133]

The final subsection serves two purposes. First, it implements the portions of the previous provisions that act upon state courts, by

125. Rule 101 makes the Federal Rules of Evidence applicable to federal-court proceedings. FED. R. EVID. 101. Rule 1101 provides additional specification as to the applicability of and exceptions to the Rules. FED. R. EVID. 1101.

126. FED. R. EVID. 502(f). *See supra* note 24 and accompanying text discussing Rule 501.

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

128. *Id.*

129. FED. R. EVID. 502(d) advisory committee's note.

130. *Id.* In this case, however, Rule 502(c) would apply if the prior disclosure was made in a state proceeding, and subsections (a) and (b) would apply if the prior disclosure was made in a federal proceeding.

131. *Id.*

132. FED. R. EVID. 502(e) and advisory committee's note.

133. *Id.*; *see In re* Certain Elect. Devices, Including Handheld Wireless Commc'n Devices, No. 337-TA-667, 2009 WL 478359 (U.S. Int'l Trade Comm. Feb. 23, 2009) (refusing to amend protective order to incorporate parties' clawback agreement).

excepting Rule 502 from the normal scope of the Federal Rules of Evidence.[134] Normally, the Federal Rules are only applicable in courts of the United States and before United States bankruptcy judges and magistrates,[135] and are subject to a number of further limitations and exceptions.[136] The drafters of the rule determined that it could not serve its purposes of reducing uncertainty and expense, however, unless state courts were bound by the rule as well.[137] Commentators have speculated as to possible constitutional challenges to this element of the rule.[138] This issue will be addressed below in Part III.B. Less controversially, the rule is also made applicable in federal court-ordered and court-annexed arbitrations without regard to other limitations under Rule 1101.[139]

Second, 502(f) expressly makes the rule applicable regardless of whether state law provides the rule of decision.[140] This departs from Rule 501, which requires federal courts to apply state law to questions of privilege wherever state law supplies the rule of decision.[141] Without such a provision, the federal courts could not have achieved the desired uniformity and the rule would have failed to achieve much of its purpose.[142] Though this aspect of 502(f) does not raise any constitutional issues, it may be controversial nonetheless for its choice-of-law implications, also addressed in the next section.

B. Choice-of-Law and Constitutional Implications

Rule 502 raises important questions about choice of law and its own constitutionality. The choice-of-law problem stems from the aspect of subsection (f) making the rule applicable regardless of whether or not state law supplies the rule of decision. Though this aspect is undoubtedly constitutionally valid as a matter of Congressional authority, it nevertheless implicates the policy considerations underlying the *Erie* doctrine.[143] The constitutional question centers on the several aspects of

134. FED. R. EVID. 502(f); *see also* FED. R. EVID. 502(f) advisory committee's note.
135. FED. R. EVID. 101; FED. R. EVID. 1101(a).
136. FED. R. EVID. 1101.
137. FED. R. EVID. 502(f) advisory committee's note.
138. Thomas F. Munno & Benjamin R. Barnett, *New Federal Rule of Evidence Arrives*, N.Y.L.J., Dec. 1, 2008, *available at* http://www.dechert.com/library-/NewFederalRuleofEvidenceArrives.pdf.
139. FED. R. EVID. 502(f); *see also* FED. R. EVID. 502(f) advisory committee's note.
140. FED. R. EVID. 502(f).
141. FED. R. EVID. 501.
142. FED. R. EVID. 502(f) advisory committee's note.
143. *See Erie R.R. Co.*, 304 U.S. at 64.

the rule that are expressly applicable to state courts. Each issue will be discussed in turn.

1. Choice-of-Law Implications

Erie established the fundamental rule that in a diversity action, a federal court must apply the substantive law of the state whose law supplied the rule of decision; however for procedural issues, federal law applies.[144] Though the court advanced three arguments for its holding,[145] the policy of preventing intra-state forum shopping has become the dominant rationale.[146] Essentially, absent the rule of *Erie*, a party faced with unfavorable state law could potentially bring suit in federal court instead to obtain a more favorable result.[147] After the distinction between "substance" and "procedure" proved inconclusive, the Supreme Court refined the question in what became known as the "outcome-determinative test,"[148] which seeks to ensure that the outcome of the litigation is substantially the same whether brought in federal or state court by deeming an issue substantive—in which case state law applies—if it would affect the outcome.[149] In time, the outcome-determinative test too became problematic because virtually any rule, no matter how insignificant, could at some level affect the outcome of a case. The Court once again refined the test in light of the forum-shopping concern, explaining that a rule that is substantive under the *Erie-York* formulation is one that "would have so important an effect on the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court."[150]

Under the refinement articulated in *Hanna*, Rule 502 would almost certainly qualify as forum-choice determinative. Any party expecting to produce a significant volume of documents, particularly in electronic format, has enormous incentives to avail itself of the protections of the

144. *Id.*

145. *Id.* at 72-78 (correcting past statutory misinterpretation, preventing intra-state forum shopping, and the non-existence of constitutional authority for the development of a general federal common law, respectively).

146. *See* Guar. Trust. Co. of N.Y. v. York, 326 U.S. 99, 109-110 (1945); *see also* Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496 (1941) (requiring federal courts sitting in diversity to apply state choice-of-law principles to prevent intra-state forum shopping).

147. *See Erie*, 304 U.S. at 73-77 (discussing abuses of diversity jurisdiction, in particular the egregious case of Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928)).

148. *York*, 326 U.S. at 109-10.

149. *Id.*

150. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1968).

rule. In contrast, a party expecting to produce few, if any, records may well prefer a stricter state waiver regime, hoping for a mistake upon which it can capitalize. As noted in *Hopson*, "[i]n many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not played on a level field. The plaintiff typically has relatively few electronically stored records, while the defendant often has an immense volume of it."[151] Where the anticipated discovery is highly asymmetric, Rule 502 thus provides an incentive for the plaintiff to forum-shop based on the more favorable waiver law.[152]

The forum-choice-influencing aspects of the rule are not limited to situations involving asymmetrical production burdens. In litigation between business entities, for example commercial disputes, both sides may anticipate heavy production of electronic records. In such a case, both sides have incentives to avail themselves of the protection of Rule 502. Indeed, at least in theory, this could lead to an increase in federal diversity actions that minimally satisfy the amount-in-controversy requirement of $75,000,[153] since the prohibitive cost of discovery may be ameliorated.

Rule 502, of course, would have no forum-choice-influencing effect at all if it were applicable in full force to all actions, wherever brought—in other words, if it supplied a preemptive rule of evidence applicable initially in both federal and state courts.[154] Such a rule would be subject to serious constitutional challenge, however, as detailed below. Even the lesser measure of making a uniform rule governing the waiver effect of a disclosure in all subsequent proceedings was abandoned after sharp criticism.[155]

Despite its obvious conflict with the policy of avoiding intra-state forum shopping, however, the rule would almost certainly be upheld if challenged on *Erie* grounds. This is because, in addition to refining the

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151. *Hopson*, 232 F.R.D. at 245. These sorts of actions, of course, are likely to raise federal questions such that Rule 502(f) exception from state waiver law is inapplicable anyway. However, diversity actions based on state law could have similar asymmetrical discovery.

152. Parties may well have other reasons to select a forum based on predictions of how favorably federal or state courts will resolve their claims; such predictions tend to be based on perceptions of demographics, sophistication, and historical jury verdicts, however, rather than on explicit legal rules.

153. 28 U.S.C. § 1332 (1996).

154. As enacted, Rule 502 is applicable initially in all federal actions, in subsequent actions in state or federal court based on a disclosure previously made in federal court, and in subsequent actions in federal court based on a disclosure previously made in state court. The rule is not applicable initially in state actions, nor in subsequent state actions based on a disclosure previously made in state court. FED. R. EVID. 502.

155. See *supra* text accompanying notes 118-21.

outcome-determinative test, *Hanna* announced that rules enacted under the Rules Enabling Act are presumptively valid:[156]

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[157]

This strong statement in *Hanna* was made in reference to a challenge to one of the Federal Rules of Civil Procedure, which take effect *unless* Congress affirmatively intercedes.[158] In contrast, Rule 502 is not merely a rule, but a federal statute.[159] As such, the rule is valid unless Congress was without power to enact it. Though the constitutionality of certain aspects of the rule may at least be questionable, the general authority of Congress to establish rules of procedure and evidence for federal courts cannot seriously be challenged[160] and, therefore, what remains of the choice-of-law problem amounts to a policy decision that, in this context, one important federal policy (deterring intra-state forum shopping) must bow before another important federal policy (minimizing the risks and costs associated with inadvertent disclosure where federal courts are involved). The Supreme Court has previously acknowledged the need to balance the *Erie* policy against other important federal policies in this way.[161]

2. *Constitutionality of Application to State Proceedings*

While there is little question that Congress can establish rules governing procedure and evidence in courts of the United States, Rule 502 goes beyond the boundaries of the federal system. Two subsections of the rule determine the waiver effect in a subsequent federal or state proceeding of a disclosure in a current federal proceeding.[162] Two other subsections make clear the power of a federal court to enter a prospective

156. *Hanna*, 380 U.S. at 469-71.

157. *Id.* at 471.

158. *See* 28 U.S.C. § 2074(b).

159. Act of Sept. 18, 2008, Pub. L. No. 110-322, 122 Stat. 3537.

160. U.S. CONST. art. I, § 8, cl. 9 (authorizing Congress to "constitute tribunals inferior to the Supreme Court").

161. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535-40 (1958).

162. FED. R. EVID. 502(a)-(b).

order barring other courts (including state courts) and third parties from treating disclosures made under the order as resulting in waiver.[163] As acknowledged by the rule's drafters, it can only achieve its purpose if federal confidentiality orders are enforceable in state courts.[164] Yet it is not clear that Congress in fact has the power under the United States Constitution to enact a statute governing the admissibility of evidence in state courts.

The arguments favoring the constitutionality of the rule proceed primarily from the Commerce[165] and Supremacy[166] Clauses of the Constitution. In essence, this position contends that pursuant to its authority to legislate under the Commerce Clause, Congress has the power to regulate activities that substantially affect interstate commerce.[167] Not only are legal services themselves commercial activity, but virtually all interstate commerce is dependent on the advice and services provided by attorneys.[168] Since interstate commerce by definition involves exposure to different jurisdictions' privilege and waiver regimes, these are appropriate targets for federal regulation.[169] Though the rule reaches non-commercial activity as well as purely intrastate activity, under longstanding Supreme Court precedent this over-inclusiveness does not invalidate the exercise of Congressional authority.[170] Finally, because the rule neither requires states to enact laws nor commandeers state executives in the enforcement of federal law, it does not violate the Tenth Amendment and is merely a valid application of the Supremacy Clause.[171] This argument received considerable support from the Supreme Court in a 2003 case unanimously upholding a federal statute that barred certain highway-safety reports from being introduced as evidence in any actions for damages, including in state courts.[172] Moreover, especially with regard to the provisions of 502(a) and 502(b), a plausible argument may be made that the Full Faith and Credit Clause and considerations of comity require subsequent courts to

163. FED. R. EVID. 502(d)-(e).
164. FED. R. EVID. 502 advisory committee's note.
165. U.S. CONST. art. I, § 8, cl. 3.
166. U.S. CONST. art. VI.
167. Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 157-58 (2002).
168. *Id.* at 158-60.
169. *Id.* at 159-61.
170. *Id.* at 160-61.
171. *Id.* at 162-63.
172. Pierce County v. Guillen, 537 U.S. 129, 147-48 (2003).

adhere to a determination of whether an actual disclosure has waived the privilege.[173]

The principal arguments against the constitutionality of the rule are that it exceeds the authority granted under the Commerce Clause and offends the principles of federalism inherent under the Tenth Amendment.[174] Even if the provision of legal services is economic activity subject to the Commerce Clause, the rule regulates the evidentiary effect in state proceedings of disclosures, rather than the business of law or communications between attorneys and clients.[175] This argument points out that while *Guillen* upheld a federal evidentiary statute, that law was regulating the "instrumentalities and channels" of interstate commerce rather than activity merely affecting interstate commerce, and thus the Commerce Clause argument in that case rested on stronger footing.[176] Further, both the regulation of the attorney-client relationship as well as the procedural and evidentiary rules of state courts are areas of the law traditionally governed by the states.[177] Even if the Supreme Court ultimately upholds the rule, the very state courts whose authority the rule constrains may well make the initial determinations of its constitutionality.[178]

As of this writing, federal courts have just begun to apply the rule's primary aspects—those governing the waiver effect of inadvertent disclosures made in the same proceeding. An actual constitutional challenge has not yet been made to the controlling-effect provisions, and it is impossible to be certain of the outcome should one be raised. The possibility that the rule could be partially invalidated, however, at least somewhat undermines the likelihood that it will fully achieve its goal of reducing the cost of discovery since parties will still need to consider this risk when determining how to proceed with privilege review and their production obligations.

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173. Presumably the disclosing party will argue against waiver, and the receiving party will argue in favor of waiver, making the determination appropriate for collateral estoppel. This argument carries less weight with the forward-looking protective orders contemplated by 502(d).

174. Munno & Barnett, *supra* note 138.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

IV. EARLY RESPONSE TO THE RULE AND PROPOSED FUTURE APPLICATION

A. Judicial Interpretation and Application[179]

In the first seven months after Rule 502 took effect, it was cited in approximately twenty decisions.[180] As I explore below, almost all of the application has centered on subsection (b) and the question of whether inadvertent production waived attorney-client privilege or work-product protection as to those documents. No cases have yet arisen under the provisions dealing with the effect of a prior disclosure in a subsequent proceeding. In a largely silent application of subsection (a), no federal cases applying the rule have found subject-matter waiver following a disclosure.[181] A few cases, however, have addressed subsections (d) and (e) authorizing a court to issue a protective order.

As noted above in Part III.A, subsection (d) expressly authorizes a court to issue a protective order that disclosure of privileged information will not act as a waiver in the pending proceeding, or in any subsequent proceedings, and subsection (e) authorizes the court to incorporate a protective agreement between the parties into its order, thus binding third parties.[182] Three cases have applied these provisions, at least on the front end—no subsequent challenges have yet arisen to an order issued under these subsections. In *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil*

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179. In addition to its application in federal court proceedings, Rule 502 has had some early influence on state law. For example, Massachusetts, which does not use a formal code of evidentiary rules, has cited Rule 502 as being "similar" to its own common-law principles of inadvertent waiver. MASS. GUIDE TO EVID. § 523 (2008). Similarly, in 2008 Arkansas amended its own rules of evidence to add an inadvertent-disclosure provision. ARK. R. EVID. 502(e).

180. Based on Westlaw and Lexis searches. In several cases, Rule 502 was cited only incidentally, since the motion was disposed of on separate grounds. *See* Stillmunkes v. Givaudan Flavors Corp., No. C04-0085, 2009 WL 936605, at *6 (N.D. Iowa Apr. 7, 2009) (waiver not asserted); *In re* City of Vallejo, 403 B.R. 72 (Bankr. E.D. Cal. 2009) (disclosed document not privileged); Frye v. Ayers, No. CIV-S-99-0628, 2008 WL 4642783, at *1 (E.D. Cal. Oct. 16, 2008) (waiver previously found; issue was its scope); *but see* AHF Cmty. Dev. Co. v. City of Dallas, 258 F.R.D. 143, 146-49 (N.D. Tex. 2009) (finding waiver under intermediate standard, without applying Rule 502).

181. Only one case has even purported to analyze 502(a), finding in it support for the proposition that selective disclosure of certain privileged documents to the government, while waiving the privilege as to those documents—which the holder of the privilege had conceded—did not result in subject-matter waiver to a third party in a separate proceeding. United States v. Treacy, No. S2-08-CR-366, 2009 WL 812033, at *1-3 (S.D.N.Y. Mar. 24, 2009).

182. FED. R. EVID. 502(d), (e).

& Gas Corp.,[183] a law firm sued its former client for non-payment related to defending another still-pending action in state court.[184] The client resisted court-ordered discovery, arguing that the billing documents sought were privileged; it apparently feared that production could waive the privilege in the initial action.[185] The client further argued that the state court might not adhere to a protective order in the billing dispute, because the state action was commenced prior to the effective date of Rule 502.[186] The court found that even if the state court did not respect Rule 502, it nevertheless could not find a court-ordered disclosure to be voluntary.[187] Therefore, under Rule 502(d) it ordered the disclosure subject to an order protecting the privileged information.[188] In another recent case, citing *Whitaker*, the court granted a motion for protective order limiting the scope and accessibility of a proposed production that might include work-product-protected information.[189]

However, at least one recent decision has expressly refused to incorporate a clawback provision into a protective order. In a proceeding pending before the United States International Trade Commission, an administrative-law judge, while noting the recent amendment adding Rule 502, decided that "because the clawback provision offered by the parties concerns privileged information, it is not appropriate for the Protective Order."[190] It is possible that this decision was motivated by a conception of the existing protective order as intended solely to protect confidential business information,[191] but the decision's wording is far broader than this. Though the text of subsection (d)—unlike other sections that expressly apply to federal proceedings, offices, and agencies—refers solely to federal courts,[192] the rule plainly refutes the administrative-law judge's rationale. Moreover, the request was made in an unopposed joint motion, making even a discretionary denial questionable.[193] Despite the order's invitation for the parties to enter a private clawback agreement,[194] as Rule 502(e) makes abundantly clear,

183. Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., No. 08-CV-684, 2009 U.S. Dist. LEXIS 15901 (N.D. Tex. Feb. 23, 2009).

184. *Id.* at *2.

185. *Id.* at *3.

186. *Id.* at *10.

187. *Id.* at *10-11.

188. *Id.* at *14-22.

189. D'Onofrio v. SFX Sports Group, Inc., 256 F.R.D. 277, 279-81 (D.D.C. 2009).

190. *In re Certain Elec. Devices*, No. 337-TA-667, 2009 WL 478359.

191. *See id.*

192. *Compare* FED. R. EVID. 502(a)-(b) *with* FED. R. EVID. 502(d).

193. *Id.*

194. *In re Certain Elec. Devices*, No. 337-TA-667, 2009 WL 478359.

such an agreement would have no effect against other parties in separate litigation.[195] A more defensible ground for denial would have been the dubious authority of the Commission to enter an order binding federal or state courts, but this issue was not even mentioned. What seems most likely is that the judge misconceived of Rule 502 as solely intended to address inadvertent disclosures rather than as a provision to address the problem of waiver in a variety of contexts.[196] This suggests that one important lesson for advocates is that judges may need to be guided to a complete understanding of the scope of the rule, rather than focusing solely on subsection (b).

Nevertheless, the fact remains that so far, and most likely in future cases as well, the primary disputes involving the rule will be those addressing the waiver effect of inadvertent disclosures of privileged information. In the sub-sections that follow, I discuss the rationales and holdings of several decisions applying Rule 502 to cases of inadvertent disclosure.[197] Along the way, I offer criticism and analysis to highlight the problems that my subsequent recommendations are intended to address.

1. Relion, Inc. v. Hydra Fuel Cell Corp.*[198]*

Relion, in part, involved a privilege dispute over two emails produced by plaintiff Relion during discovery.[199] Relion's production plan involved assembling all physical files at its counsel's offices, as the assembled documents "occupied over 40 feet of shelf space."[200] Attorneys and support staff reviewed the files for privileged materials.[201] Counsel for defendant Hydra was then permitted to inspect the files and

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

196. *In re Certain Elec. Devices*, No. 337-TA-667, 2009 WL 478359.

197. Other recent decisions were excluded from detailed review primarily due to their cursory or conclusory treatment of the waiver issues. *See, e.g.*, Reckley v. City of Springfield, No. 05-CV-249, 2008 U.S. Dist. LEXIS 103663 (S.D. Ohio Dec. 12, 2008); B-Y Water Dist. v. City of Yankton, No. 07-4142, 2008 WL 5188837 (D.S.D. Dec. 10, 2008). Another case, though it engaged in comprehensive analysis, was omitted primarily because the disclosures took place under a protective order requiring the return of inadvertently-produced documents. The issue was whether the production was inadvertent in the meaning of the order rather than in the meaning of Rule 502(b). Alcon Mfg., Ltd. v. Apotex, Inc., No. 06-CV-1642-RLY-TAB, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008).

198. Relion, Inc. v. Hydra Fuel Cell Corp., No. CV06-607-HU, 2008 U.S. Dist. LEXIS 98400 (D. Or. Dec. 4, 2008).

199. *Id.* at *4.

200. *Id.* at *7.

201. *Id.*

select documents for off-site copying.[202] During this inspection, Hydra came across a three-inch thick file of apparently-privileged documents left in the conference room and voluntarily asked for the file to be removed.[203] After copying, Hydra provided Relion with both physical and electronic copies of all the materials it had selected.[204] Four months later, Hydra inquired about two emails that it had taken as part of discovery, and Relion asserted its privileges three days after receiving Hydra's letter, claiming that the emails had been accidentally misfiled.[205]

The court's approach to Rule 502 was somewhat begrudging and conclusory. After first noting the strict approach to waiver that had traditionally been followed in the circuit,[206] the court acknowledged that the rule called for a more lenient approach.[207] Yet the court then specified that it would deem the privilege waived if the privilege holder "fail[ed] to pursue *all* reasonable means of preserving the confidentiality of the matter."[208] The court did not engage in an individualized consideration of the Rule 502(b) factors. Instead, it said that, because the documents had been screened for privilege prior to production, Hydra had engaged in no surprise or deception, and since Relion could have reviewed both the physical and electronic copies of the documents Hydra selected, Relion had not pursued all reasonable means of preserving confidentiality.[209] Thus, the court held that Relion's privilege was waived.[210]

2. Rhoads Industries v. Building Materials Corp. of America[211]

In *Rhoads*, plaintiff Rhoads Industries inadvertently disclosed over 800 electronic documents to defendant Building Materials Corp. of America (BMCA), which claimed that any privilege was thereby waived.[212] In preparation for electronic discovery, Rhoads had employed a software-consulting expert who evaluated various discovery software

202. *Id.*
203. *Id.*
204. *Relion*, 2008 U.S. Dist. LEXIS 98400, at *7.
205. *Id.* at *8.
206. *Id.* at *4-5.
207. *See id.* at *5.
208. *Id.* at *6 (emphasis added). Yet for this proposition, the court cited a case where the privilege holder failed to do "anything" to protect the privilege over the course of six months. *Id.* (citing United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992)).
209. *Relion*, 2008 U.S. Dist. LEXIS 98400, at *8-9.
210. *Id.* at *9.
211. Rhoads Indus. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216 (E.D. Pa. 2008).
212. *Id.* at 218.

programs and, after testing, purchased one.[213] The consultant and an attorney worked together to identify mailboxes and email addresses that would have responsive documents, confident that the software would adequately screen privileged information.[214] The consultant and multiple attorneys discussed the scope of discovery and appropriate search terms during several meetings.[215] In its initial keyword search, Rhoads identified 210,635 email messages as responsive; it screened for privilege by searching the email-address fields for the names of its outside law firms and a retained expert's firm, removing 2000 emails but failing to place them on a privilege log.[216] Rhoads ran the same search a second time to confirm that all these emails had been successfully eliminated.[217] Rhoads further refined the keyword search to reduce the number of "responsive and non-privileged" documents to about 78,000.[218] An attorney then spot-checked selected mailboxes and removed and logged additional emails as privileged.[219] On June 5, BMCA emailed Rhoads advising it that apparently privileged documents had been produced.[220] Rhoads immediately emailed a response claiming inadvertence and asserting privilege, but spent two and a half weeks conducting depositions and responding to a motion before taking further action.[221] On June 23, Rhoads identified 812 of the 78,000 documents as privileged and sent BMCA a letter asking for them to be sequestered under Federal Rule of Civil Procedure 26(b)(5)(B).[222]

The *Rhoads* court's analysis was as lenient as the *Relion* court's analysis was strict. The court initially noted that Rule 502(b) was applicable, but strangely, failed to structure its analysis using the rule's elements. Instead, after quoting the subsection and the portion of the Advisory Committee's Note summarizing a non-exhaustive list of factors courts might consider,[223] the court went on to analyze the facts using

213. *Id.*
214. *Id.* at 221-22.
215. *Id.* at 222.
216. *Id.*
217. *Rhoads*, 254 F.R.D. at 222.
218. *Id.* The court's description here is not explicit, but it appears that this refinement simply eliminated non-responsive emails and did not involve additional privilege screening. The court was careful to recount each step of privilege review undertaken, and later in the opinion criticizes Rhoads for merely re-running its same screening search: "Plaintiff's only testing of its search was to run the same search again." *Id.* at 224.
219. *Id.* at 222.
220. *Id.*
221. *Id.*
222. *Rhoads*, 254 F.R.D. at 222.
223. *Id.* at 219.

Fidelity & Deposit Co. of Maryland v. McCullough,[224] which it called "[a] widely cited case setting an appropriate standard."[225] The *Fidelity* standard considers five factors to be relevant: the reasonableness of precautions in light of the extent of production, the number of inadvertent disclosures, the extent of disclosure, any delay and the measures taken to rectify the disclosure, and the overriding interest of justice.[226]

The court undertook a comprehensive analysis of the facts favoring Rhoads and BMCA respectively for each of the *Fidelity* factors.[227] It found that Rhoads had taken certain precautions such as hiring a consultant and using advanced screening software.[228] However, it should have used additional search terms including actual attorney's names, should have searched email bodies and not just email addresses so that forwarded emails would have been caught, failed to perform testing of the reliability and effectiveness of its screening procedure, and inadequately supervised the attorney performing the screening though she had no prior experience in privilege review.[229] Though the percentage of privileged documents produced was fairly small at one to two percent, the absolute number at over 800 was still large.[230] On the issue of delay, favoring Rhoads were its immediate email response when it learned of the disclosure and its invocation of the remedial measures specified by Rule 26(b)(5)(B), and the time taken to identify the privileged documents after learning of disclosure was mitigated by the tight discovery schedule at the time.[231] Yet the court noted that BMCA, rather than Rhoads, identified the error, and that as plaintiff, Rhoads could have started its privilege review earlier and assigned more staff to it to alleviate any time crunch; further, it still took three weeks to identify privileged documents after learning of the disclosure and took months to propose a plan to rectify the problem.[232] The court concluded that each of these factors favored BMCA, yet ultimately held that the privilege was not waived based on the overriding interests of justice.[233] Rhoads had

224. Fidelity & Deposit Co. of Md. v. McCullough, 168 F.R.D. 516 (E.D. Pa. 1996).

225. *Rhoads*, 254 F.R.D. at 219, 224-25.

226. *Id.* at 219.

227. *Id.* at 224-25.

228. *Id.* at 224. The court specifically noted that this "substantially complied" with the explanatory note in Rule 502 stating that using advanced analytical software and linguistic tools may constitute reasonable precaution. *Id.* at 222.

229. *Id.* at 224.

230. *Rhoads*, 254 F.R.D. at 224-25.

231. *Id.* at 225.

232. *Id.*

233. *Id.* at 226-27.

demonstrated "general compliance" with the conditions of Rule 502,[234] though its efforts were "to some extent, not reasonable,"[235] and it would be highly prejudiced by a finding of waiver, while BMCA had not demonstrated that it would suffer substantial unfairness if it did not obtain the documents.[236]

3. Laethem Equipment Co. v. Deere & Co.[237]

Compared with the previous two cases, *Laethem* is both simpler and cleaner. At issue was whether plaintiff Laethem's production of a pair of computer disks containing privileged information waived the privilege.[238] The court quoted Rule 502(b) and briefly applied each of the three elements.[239] As a threshold matter, the court dismissed defendant Deere's allegations that Laethem had acted in bad faith or engaged in gamesmanship, treating these claims as irrelevant to the 502(b) analysis.[240] The court noted that Deere did not argue that the disclosure was anything but inadvertent, nor did the record suggest that it was not.[241] Thus the first element was met. The court then determined that Laethem had taken reasonable precautions, noting that the disclosure took place when Deere copied the disks outside of the agreed-upon "inspect and copy" procedure that would have afforded Laethem an opportunity to screen them, and that the two disks were the only inadvertent productions despite "voluminous discovery."[242] Finally, Laethem undertook a reasonable response immediately upon learning of the disclosure when Deere referenced privileged documents at a deposition, by objecting on the spot, sending Deere a letter the same day demanding return of the disks, lodging repeated objections and demands at subsequent depositions, and obtaining a court order for the return of the disks within three weeks of discovering the disclosure.[243]

234. *Id.* at 225.

235. *Id.* at 226.

236. *Rhoads*, 254 F.R.D. at 225.

237. Laethem Equip. Co. v. Deere & Co., No. 05-CV-10113, 2008 WL 4997932 (E.D. Mich. Nov. 21, 2008).

238. *Id.* at *7-8.

239. *Id.* at *8-9.

240. *Id.* at *8. It is possible, and as I argue below would have been appropriate, that the court might have considered these claims relevant if Deere had argued that the disclosure was not inadvertent.

241. *Id.* at *9.

242. *Id.*

243. *Laethem*, 2008 WL 4997932, at *9.

Accordingly, the court held that Laethem's privilege had not been waived by the production.[244]

Though *Laethem* is complicated by a number of other issues not relevant here, and is somewhat sparse in expressing the various facts that contributed to each of its findings, it represents a good early approach to interpreting the rule. Unfortunately, the case provides no guidance as to the inadvertence element because the court found no need to analyze it. Otherwise, the case serves as a good model for applying both the letter of the rule as well as the rule's generally lenient policy favoring non-waiver to reduce the cost and risk inherent in modern discovery practice.

4. Heriot v. Byrne[245]

In *Heriot*, plaintiff Heriot and defendant Byrne filed cross-motions to compel production and to find waiver of inadvertently-produced privileged documents, respectively.[246] Only the latter is relevant here. In response to Byrne's initial production request, Heriot hired a document vendor to provide scanning, optical-character recognition, and other discovery-related services.[247] Heriot provided a comprehensive array of documents to the vendor, which it imported into a master database.[248] Heriot used paralegals and other non-attorneys to initially code the imported documents by type, and then searched the master database for responsive documents.[249] Responsive documents were to be screened for privilege and flagged for copying into a production database that would be provided to Byrne.[250] Unfortunately, the vendor mishandled a late addition of one particular privileged document, and the error cascaded to a number of other privileged documents that were then copied to the production database.[251] Ultimately, Heriot produced a total of 1499 documents comprised of 6952 pages.[252] On October 22, Heriot discovered the inadvertent production during preparation for a deposition.[253] The following day, Heriot sent Byrne a letter identifying

244. *Id.*

245. Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. 2009).

246. *Id.* at 650.

247. *Id.* at 650-51.

248. *Id.* at 651.

249. *Id.* Though the court emphasized that the preliminary review was by non-lawyers, all subsequent review was described only as done by "Plaintiffs," so it is impossible to tell whether attorneys were involved in determining which documents were responsive or privileged. *See id.*

250. *Heriot*, 257 F.R.D. at 645.

251. *Id.*

252. *Id.*

253. *Id.*

the inadvertently-disclosed documents and requesting their sequestration.[254]

The court began by determining that Rule 502(b) applied and that all three of its elements must be satisfied to avoid waiver.[255] It continued by recognizing that as a threshold matter, the existence of privilege must be established, and that in applying the rule, it was free to consider factors from case precedent where appropriate.[256] The court found that nearly all the disputed documents were privileged.[257] Next, the court engaged in a detailed analysis of each element of subsection (b): inadvertence, reasonableness of precautions, and reasonableness of response.

Unfortunately, in its analysis the court applied many of the same factors to each of the three elements without pausing to question either the appropriateness of a given factor to the particular element, or the redundancy that this produced. Instead of requiring three distinct conjunctive elements, the court largely reviewed the same factors twice. Thus, to determine inadvertence, the court considered the total number of documents reviewed, the procedures used to screen them, the actions of the producing party after disclosure, the extent of discovery, and the scope of discovery.[258] Undeniably, these were among the typical factors used to determine "inadvertence" prior to the adoption of the rule; but as the court itself recognized, inadvertence under Rule 502 is not necessarily the same as under prior case law.[259] As I argue below, inadvertence as a factor, rather than a conclusion, is best measured by the privilege holder's mental state—was the disclosure truly accidental, or was it the result of sheer recklessness or bad faith? Though it may not be possible to completely sever each element from the next—for example, having no screening procedure at all likely would fail both the inadvertence element as well as the reasonable-precautions element—courts should attempt to isolate factors that give each statutory element independent meaning.

Returning to *Heriot*, the court initially criticized the large number of disclosures—196 documents and 357 pages out of 1499 documents and 6952 pages—but found this error to be outweighed by Heriot's prompt response upon discovering it.[260] Though non-lawyers had conducted the privilege review, the court discounted this factor because the errors

254. *Id.*
255. *Id. at* 654.
256. *Heriot*, 257 F.R.D. at 654-56.
257. *Id.*
258. *Id.* at 659-60.
259. *Id.* at 655 n.6.
260. *Id.* at 659.

resulted not from a misidentification of documents as unprivileged, but rather due to the vendor's error; since the privileged documents had in fact been identified, the screening procedures were reasonable.[261] Thus the court found that the inadvertence element was satisfied.[262] Turning to reasonable precautions, the court noted that because the rule does not require a post-production review, but only that a party follows up on obvious indications of an inadvertent production (absent here), the element is met if reasonable procedures were in place to screen documents prior to turning them over to a vendor for production.[263] Having already determined this to be so in its analysis of inadvertence, the court similarly found that reasonable precautions had been taken.[264] The court then considered the reasonableness of the response.

Here, after analyzing three cases, including *Laethem*, *supra*, the court made an insightful observation that "*how* the disclosing party *discovers and rectifies* the disclosure is more important than *when* after the inadvertent disclosure the discovery occurs."[265] The court went on to suggest that what was important in such a situation was whether it was the privilege holder or the recipient who discovered the error, how prompt the holder's response was after learning of the disclosure, and how thoroughly and proactively the holder sought to remedy the disclosure; less meaningful was the time between the actual production and the realization of an error.[266] Here, Heriot discovered the disclosure before it was raised in a deposition, and sent a letter within twenty-four hours identifying the documents and firmly asserting the privilege.[267] Of course, since the court had already noted these same factors as favoring Heriot during its analysis of the inadvertence element, it also found that they satisfied the reasonable-response element.[268] Because all three elements were met, the privilege was not waived.[269]

In the end, the *Heriot* decision represents a mixed bag in its application of the rule. In its favor, it attempted a structured analysis that is appropriate under the rule, and though overall the court took a relatively lenient view toward the disclosures,[270] the decision appears to

261. *Id.* at 659-60.
262. *Heriot*, 257 F.R.D. at 660.
263. *Id.* at 660-61.
264. *Id.* at 661.
265. *Id.* at 662.
266. *See id.*
267. *Id.*
268. *Heriot*, 257 F.R.D. at 662.
269. *Id.*
270. While its analysis of the response appears to be solidly defensible, courts could certainly differ on the reasonableness of precautions given the facts of the case. The court

be well within the court's discretion. Nevertheless, the opinion clearly reveals the difficulty courts are faced with in giving the inadvertence element of subsection (b) independent meaning, and though it putatively engaged in a three-element analysis, fundamentally what the court did was merely assess two elements twice.

5. Preferred Care Partners Holding Corp. v. Humana, Inc.[271]

In *Preferred Care Partners*, defendant Humana disclosed more than 10,000 pages of documents during supplemental discovery; among them were five emails that it later claimed were privileged.[272] The supplemental production became necessary when, at or shortly after the discovery deadline, Humana became aware of the existence of emails that it had previously thought were deleted.[273] A renewed search for responsive documents took place between December 10 and December 22.[274] The documents were screened by four attorneys over the next three days, sent to a vendor for copying, and provided to plaintiff Preferred Care Partners (PCP) on January 15.[275] On January 23, Humana discovered one inadvertently-disclosed email and sent PCP a letter asserting the privilege and requesting the email's return; Humana sent another letter after discovering a second email on the January 26, and again on February 6 for a third.[276] Humana only learned of the fourth email after seeing it cited in PCP's February 17 motion for sanctions, and asserted its privilege two days later.[277] Finally, on March 4, Humana realized the fifth email was also referenced in the motion for sanctions and objected to it also.[278]

The court decided that Rule 502(b) was applicable to the dispute.[279] In an unusual step, it evaluated each of the five emails individually, and for each, analyzed whether the document was privileged and whether all

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was clearly concerned that the errors of vendors, increasingly necessary in modern discovery, could be held against a party: "In making this finding, the Court also considered the unfairness of penalizing Plaintiffs for an error that it neither caused nor anticipated." *Id.* Yet the rationale itself creates no incentive for parties to monitor their vendors to prevent such errors.

271. Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D 684 (S.D. Fla. Apr. 9, 2009).

272. *Id.* at 687-89.

273. *Id.* at 691.

274. *Id.*

275. *Id.*

276. *Id.* at 691-92.

277. *Preferred Care Partners*, 258 F.R.D at 692.

278. *Id.*

279. *Id.* at 690.

three elements of subsection (b) had been met.[280] Ultimately it held that four of the emails were privileged and that the inadvertent disclosure had not resulted in waiver,[281] but that the fifth email was not privileged and would have been subject to waiver even if it had been.[282] Several observations can be made from the court's analysis. First, for most of the emails the court was willing to assume that production was inadvertent either because the email was identified as privileged on a log, or because it was facially obvious that it was privileged due to its content or having been sent to or by an attorney.[283] The unstated rationale must have been that Humana would never have intentionally disclosed documents it knew to be privileged, which is probably a reasonable—but imperfect—assumption.[284] The court also noted, both for inadvertence as well as reasonableness of precautions taken, the extremely large amount of documents produced in a very short time frame, after screening by four attorneys.[285] Though I have criticized conflating factors, particularly in reference to *Heriot*, *supra*, in this case it is more defensible since the same facts support more than one distinct inference. The inference for inadvertence is that Humana made a good-faith screening effort when faced with a short time to do a great deal of work, or put more simply, this was an accident. The inference for reasonable precautions taken is that having four attorneys rapidly and manually review 10,000 documents, making only five errors, is good enough; expecting perfection would be unreasonable and contrary to the policy of the rule.

The court offered one other simple but particularly relevant rationale for finding the inadvertence element satisfied regarding one of the emails: Humana's attorney submitted a sworn affidavit stating that the document had been identified as privileged but that due to a clerical error it had been omitted from the privilege log and produced.[286] Though this

280. *Id.* at 692-700.

281. The privilege was waived as to one of the emails, nonetheless, because of later voluntary disclosure of its contents in a hearing as well as to other parties. *Id.* at *10.

282. *Id.* at 692-700.

283. *Preferred Care Partners*, 258 F.R.D. at 692-700.

284. This rationale is supported by the observation that inadvertence was a "close question" for the fifth email, which was logged but the court found to be fairly obviously unprivileged. *Id.* at 699. That observation exposes the underlying weakness in the court's assumption, since it is really no more likely that Humana meant to disclose a document it thought was, but should have known was not, privileged, than that it meant to disclose the obviously privileged ones. Moreover, it is strange to think that a party's disclosure of an obviously-privileged document deserves more benefit of the doubt than its disclosure of a questionable document; if anything, the obviously-privileged document ought to be treated more carefully, not less.

285. *Id.* at 692-700.

286. *Id.* at 697-98.

admission might undermine the reasonableness of precautions taken, I believe that it reaches the heart of what inadvertence means as an element of 502(b). Was the disclosure truly accidental? Or, rather, did the party either fail to make a good faith effort to protect itself, or even engage in bad faith tactics?

As noted above, the court's primary rationale for finding that reasonable precautions were taken to screen privileged documents was that attorneys individually reviewed the documents on an expedited schedule and made relatively few errors.[287] A second rationale that carries little persuasive force is that two of the emails in their text or headers contained labels specifically flagging them as privileged.[288] It makes no sense that a legend embedded in an email clearly identifying it as privileged can add anything to the adequacy of a screening process. If anything, the converse is true: failing to catch such obviously-privileged documents would suggest that whatever screening process was undertaken was either flawed in its approach or sloppily executed.

Finally, the court assessed the reasonableness of Humana's response to the inadvertent disclosures. For three of the emails, Humana discovered its own error before PCP raised it or sought to use it in a deposition or court filing, and immediately asserted the privilege and complied with the procedures specified by Federal Rule of Civil Procedure 26(b)(5)(B).[289] For the fourth, though Humana did not detect the error on its own, as soon as it reviewed PCP's motion for sanctions and discovered the disclosure, it again adequately asserted the privilege.[290] The dispositive factor in finding the privilege waived for the fifth email was the inadequacy of Humana's response. This email, too, was referenced by PCP's motion, but unlike with the fourth email, Humana failed to object until March 4.[291] By this time, Humana had ample notice of defects in its supplemental production and should have investigated the obvious indications of problems and thus detected the fifth email sooner.[292] Since it failed to carefully review the entire motion promptly, its response to the disclosure therein of this email waived the privilege.[293]

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287. *Id.* at 692-700.

288. *Id.* In comparison, the court said that it was an "even closer question whether Humana took reasonable steps to prevent the disclosure" of the final email since it was not marked as privileged. *Preferred Care Partners*, 258 F.R.D. at 699.

289. *Id.* at 692-95.

290. *Id.* at 697.

291. *Id.* at 699.

292. *Id.* at 700.

293. *Id.*

B. A Proposed Framework for Applying the Rule to Inadvertent Disclosures

As the previous section showed in the context of each case, there have been a number of shortcomings in the early application of Rule 502, as well as some things that have been done well. This section will synthesize these observations and recommend a specific framework for courts to use in adjudicating waiver disputes under the rule. Such a framework will help to promote a consistent and logically cohesive approach that supports the rule's goal of reducing the vast risk and expensive associated with modern discovery.

Prior to deciding whether or not an inadvertent disclosure results in a waiver, a court must decided whether the information was actually privileged. The necessity of this step is relatively clear from the rule itself, and has not produced any notable confusion in practice. What has been somewhat less clear is the assignment of evidentiary burdens in this context. Though courts have routinely agreed that the party claiming a privilege has the burden of proof on that issue, there has been disagreement over which party bears the burden of proof as to the waiver of the privilege. One approach holds that the burden rests on the party asserting waiver.[294] Another approach holds that establishing that the privilege has not been waived (or that production was inadvertent) rests with the party asserting the privilege.[295] Obscuring the question further is that Rule 502 does not expressly place the burden, nor does it clearly indicate whether state law has any influence on the question in a diversity case.

Nevertheless, the better approach is to treat the question of burden as exclusively controlled by the rule, without regard to state law principles, and to place the burden on the party asserting the privilege. Rule 502 preempts state substantive law as to whether or not waiver will occur either prospectively or retroactively regarding a given disclosure, and also determines the scope of waiver if it does occur. It makes little sense that, in light of such complete federal dominion over this (admittedly narrow) issue, state law retains any power to assign burdens. Moreover, allowing state law to affect the placement of the burden would

294. *Rhoads*, 254 F.R.D. at 223 (noting that the Third Circuit had not endorsed such a test, but that it was "well supported" among district court precedents); Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc., 227 F.R.D. 382, 390 (W.D. Pa. 2005).

295. Weil v. Investment/Indicators Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981) (collecting cases from the Second, Fifth, and Tenth Circuits); 8 J. WIGMORE, EVIDENCE § 2327 (McNaughton ed. 1961).

undermine the rule's goal of predictable and uniform treatment. Finally, the rule itself lends textual support that suggests that it affirmatively places the burden on the party asserting privilege; if such a construction prevails, then the controlling-effect provision in subsection (f) ends the inquiry. The textual support can be found in subsection (b): a disclosure does not operate as a waiver "if" three factors are met. This suggests that avoiding waiver is akin to an affirmative defense, requiring that the privilege holder demonstrate why waiver should not be imposed. The factors themselves direct the court to evaluate the reasonableness of the privilege-holder's precautions and response, which the holder is in the best position to establish. These textual and policy rationales are bolstered by the comparative weight of circuit-court authority placing the burden on the holder of the privilege.

Once the burden is placed, and the court has determined that the disclosed information was privileged, it must evaluate the claim of waiver according to the factors listed in subsection (b). In this area, there is substantial room for improvement. As shown in the previous section, courts rarely have engaged in a clean, structured analysis of the elements. They have alternately ignored the elements in favor of prior precedent, analyzed the elements using interdependent factors that render the inadvertence element irrelevant, or attributed weight to factors that reveal little about what the element seeks to establish. In addition, courts have at times set almost impossibly high, for example *Relion*, or unreasonably low, for example *Rhoads*, thresholds to for finding the requirements of 502(b) met.

Consistent with ordinary principles of statutory interpretation, the rule must be read to give meaning to each element. This is especially important when the elements are conjunctive, as they are here. Since Congress chose to establish three requirements for the favorable finding of non-waiver, applications that effectively rely on only two of the requirements are invalid. Therefore, a court should evaluate in three separate steps whether the privilege holder has shown that the disclosure was inadvertent, whether the steps to prevent disclosure were reasonable, and whether the steps taken to rectify the error were reasonable.

Of these three steps, determining inadvertence seems to be the most problematic. The wording of the rule is probably more to blame than courts for this. Not only did the drafters make "inadvertent" an element, when under the previous majority approach it had been the conclusion, but they also failed to explain the distinction in the explanatory notes that follow the rule. I propose that in this context, courts treat the inadvertence element as testing whether the disclosure was truly accidental or the result of sheer recklessness or bad faith. It is one thing to relieve a party from harsh consequences after a mistake, particularly

when the volume and complexity of discovery makes mistakes relatively likely; it is quite another to relieve a party who made no good-faith effort at protecting himself, or whose disclosure was made in an effort to gain a strategic advantage. A consideration of subsection (a) supports the logic of such an approach. Under that subsection, a disclosure only results in subject-matter waiver if it is "intentional" and other factors are met. My proposed approach to subsection (b) parallels this: a disclosure only receives protection from waiver if it is "inadvertent" (unintentional) and other factors are met.

In practice, this element will probably be met in the vast majority of cases. Frequently it is not even in dispute—the receiving party simply concedes that the disclosure was inadvertent.[296] Moreover, even if a disclosure does not result in waiver, it is impossible to claw back the knowledge of their contents, and most parties would not want to lose this confidentiality. But even if it is largely a formality, the element serves an important purpose nonetheless. While courts may differ on what precautions and responses are reasonable, the inadvertence element sets a baseline requirement that all must meet: accidents only. For privilege holders, requiring independent proof of inadvertence should be no great obstacle. Ordinarily an affidavit stating that the disclosure was inadvertent should meet the burden, since this is the logical inference in any event.[297] And where the receiving party strenuously disputes inadvertence and has plausible grounds for doing so, a more searching inquiry is entirely appropriate.

By correctly focusing the inadvertence inquiry as described above, courts should no longer be conducting duplicative analysis of other factors that are more relevant to the reasonableness of the privilege holder's precautions or response. Where factors have relevance to more than one element, a court can be more precise in their application. For example, many of the traditional tests courts have relied on consider the number of disclosures relative to the scope of discovery. This test can have relevance to both the inadvertence element as well as the reasonable precautions element. A relatively small number of disclosures may support an inference that the disclosure was accidental and thus inadvertent; it also provides circumstantial evidence that the precautions taken were reasonable. A larger number of disclosures, conversely, supports no inferences about inadvertence—after all, people can and do make big mistakes unintentionally—but it is strongly suggestive that the precautions against disclosure were inadequate and unreasonable. Courts

296. *E.g.*, *Laethem*, 2008 WL 4997932, at *9.

297. *E.g.*, *Preferred Care Partners*, 258 F.R.D. at 697-98.

undertaking the structured analysis that I propose are better positioned to make nuanced findings such as this.

After addressing inadvertence, courts should continue by evaluating the reasonableness of precautions taken to protect the privilege, and the reasonableness of steps taken after discovery of the disclosure to rectify the error. In this area courts have largely been effective, though the analysis should still focus on the 502(b) framework and not simply walk through the individual factors of tests used in cases applying the old "inadvertent waiver" standard.[298] Here too, however, I propose a more nuanced approach than most courts have undertaken.

One commonly considered factor serves to illustrate. Many of the pre-502 inadvertence decisions emphasized fairness (or the overriding interests of justice) as an important factor.[299] The Advisory Committee Notes to subsection (b) specifically name this consideration and state that "[t]he rule is flexible enough to consider any of these factors."[300] Yet the issue of fairness tells us little about whether precautions or responses were reasonable. In some situations, such as where the court has determined that vendor error rather than party error is responsible for a disclosure, considerations of fairness seem to drive a finding of no waiver.[301] But this is unnecessary—the finding of reasonableness alone is sufficient. In other cases, a court may use fairness to avoid waiver even where it acknowledges that the precautions and response were not reasonable.[302] This is much more problematic; the plain text of the rule requires that all three elements be met, and a finding that *either* the precautions or the response was unreasonable should result in waiver regardless of the consequences to the privilege holder.

This is not to suggest that courts are required to take an unrelenting approach to the application of the rule.[303] To the contrary, the point of the rule is to make modern discovery less costly and risky by eliminating the harsh consequences of waiver when a party makes serious, good-faith efforts to protect the privilege both before and after disclosure. But what this requires of courts is not to ignore the text of the rule but rather to take an appropriately measured view of what it means to be reasonable

298. *E.g. Rhoads*, 254 F.R.D. at 218-19; *see also Heriot*, 257 F.R.D. at 655 n.7.

299. *E.g.*, *Lois Sportswear U.S.A., Inc.*, 104 F.R.D. at 105; *Hartford Fire Ins. Co.*, 109 F.R.D. at 332.

300. FED. R. EVID. 502(b) advisory committee's note.

301. *See Heriot*, 257 F.R.D. at 655.

302. *Rhoads*, 254 F.R.D. at 226-27.

303. Nor should it be taken as generating more, or unnecessary work. To the contrary, this framework should eliminate much of the difficulty of balancing fuzzy factors that do not compare easily. And where any of the three elements is clearly unmet, courts need not engage in a complete analysis since all must be present to avoid waiver.

under the rule. Contrary to the approach of the *Relion* court, the rule does not automatically impose waiver unless the response is perfect.[304] Rather, the essential question is whether, under the circumstances of the case, the party acted appropriately. As *Hopson* noted, it makes little sense if the cost of protecting the privilege is disproportionate to the underlying liability itself.[305]

In summary, my proposed framework is that courts first determine whether the disclosed information was privileged. Then with the burden of proof on the privilege holder, they should assess each element of the rule individually, treating inadvertence as a question of the holder's intent. This evaluation is free to consider any relevant factors, including those from previous precedent, but should be nuanced enough to ensure that the factor is actually pertinent to the element under consideration. Courts should avoid nullifying the rule either by making it impossible to satisfy or by ignoring its consequences when it is truly not met, and should adjust their assessment of reasonableness in light of the problems the rule was meant to solve.

V. CONCLUSION

The 2008 enactment of Rule 502 represents the first federal statutory foray into the arena of privilege law in thirty-five years. Though in some respects the rule is not controversial, such as in its substantial codification of the majority approach to inadvertent waiver, other provisions such as those controlling the effect of a disclosure in a subsequent state proceeding and the departure from *Erie* choice-of-law principles in the determination of waiver are major changes. Courts applying the new rule have principally been asked to focus only on the inadvertent-waiver provision thus far, and though they have for the most part determined that disclosures of privileged information have not resulted in waiver, their treatment of the rule has varied in important respects. This Paper has sought to comprehensively analyze the rule. For the common issue of inadvertent disclosure, I have proposed a framework that may assist courts in making more consistent, principled decisions in accord with the text and purpose of the rule. For other provisions of the rule that have not yet been tested, I have sought to explain both the core of the rule as well as provide useful background to assist in their application. Whether or not the rule will ultimately succeed in reducing the skyrocketing cost of modern electronic discovery remains to be seen. What does seem relatively clear so far, however, is that with

304. *Relion*, 2008 U.S. Dist. LEXIS 98400, at *6.
305. *Hopson*, 232 F.R.D. at 244.

the rule in place, parties have substantially improved means to protect themselves from waiver given the high likelihood that mistakes will be made, and thus avoid the doubly harsh result of absorbing great expense to prevent waiver, yet suffering it nonetheless.