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§ 5:34 Waiver of privilege—Inadvertent or involuntary disclosure

Prior to the adoption of Rule 502, courts split on the question whether accidental or inadvertent disclosure waived the protection of the attorney-client privilege. Usually inadvertent or accidental disclosure happens when a lawyer releases a privileged document during discovery, and in this setting there were three views on the question whether protection continued.

First was Wigmore's wooden and mechanical notion that any unprivileged disclosure waives the privilege,¹ and some courts took an unyielding position that any unprivileged voluntary disclosure waives protection, even if made without intent to waive

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¹See 8 J. Wigmore, Evidence § 2325 (McNaughton rev. ed. 1961) (involuntary disclosures through loss or theft of documents results in loss of protection; law grants "secrecy so far as its own process goes" but lawyer and client must "take measures of caution sufficient to prevent being overheard," and client bears risk of "insufficient precautions").

or even to disclose.² This approach made almost every misstep by a lawyer or client subject to the penalty of privilege waiver.³

A second view, at very nearly the opposite end of the spectrum, held that disclosure waives the privilege only where the disclosing party intended to waive it.⁴

A third view fell between the first two. This intermediate view turned on notions of fairness⁵ and held sensibly that the question whether disclosure during discovery results in loss of protection depends on circumstances.⁶ Rule 502 adopts this middle view and

²District of Columbia: *In re United Mine Workers of America Employee Ben. Plans Litigation*, 156 F.R.D. 507 (D.D.C. 1994) (inadvertent production in discovery caused loss of privilege; absent extraordinary circumstances, disclosure waives, regardless whether voluntary or inadvertent).

In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (refusing to distinguish between degrees of voluntariness or to grant greater protection than precautions by claimant warrant; parties must treat confidentiality “like jewels—if not crown jewels”).

First Circuit: *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449 (D. Mass. 1988) (confidentiality is lost through inadvertent disclosure regardless of “the intention of the disclosing party”).

³Seventh Circuit: *Suburban Sew ‘N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D. Ill. 1981) (plaintiff got letters from defendant’s trash dumpster; privilege was lost) (invoking Wigmore). But see *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 n 8 (N.D. Ill. 1982) (Wigmore’s “strict responsibility doctrine” is “atavistic” and generates “harsh results”).

Eighth Circuit: *In re Grand Jury Proceedings Involving Berkley and Co., Inc.*, 466 F. Supp. 863, 869 (D. Minn. 1979), *aff’d as modified*, 629 F.2d 548 (8th Cir. 1980) (rejecting Wigmore’s view; client did not lose privilege where employee stole documents and gave them to government).

⁴Third Circuit: *Eisenberg v. Gagnon*, 766 F.2d 770, 788 (3d Cir. 1985) (defense counsel discussed correspondence at side bar, assumed discussion was off the record; no waiver of privilege because “waiver must be knowing” by any standard).

Seventh Circuit: *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D. Ill. 1982) (applying constitutional standard that waiver must be “an intentional relinquishment or abandonment of a known right”).

See generally Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 *Creighton L. Rev.* 513, 543 (1990) (favoring requirement of subjective intent to waive); Comment, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 *Pac. L.J.* 59 (1986).

⁵See generally Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 *Mich. L. Rev.* 1605, 1654–1655 (1986) (emerging trend is to base waivers on “fairness,” and main concern is to prevent litigant from affirmatively using privileged material “to garble the truth” while preventing opponent from access to material that would put proffered evidence in perspective).

⁶Fourth Circuit: *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D. N.C. 1987) (whether inadvertent

provides that disclosure does not operate as a waiver if three conditions are satisfied: 1) the disclosure is inadvertent; 2) the holder of the privilege 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).⁷

The ACN to Rule 502(b) cites the multifactor test used in pre-Rule 502 case law for determining whether inadvertent disclosure

disclosure waives privilege turns on “reasonableness of the precautions” in view of extent of production, number and extent of disclosures, whether claimant delayed or took measures to rectify things, and whether “overriding interests of justice” would be served by relieving party of error).

Fifth Circuit: *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (analyzing circumstances of disclosure “on a case-by-case basis” is better than “a per se rule of waiver”).

Seventh Circuit: *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388–89 (7th Cir. 2008) (in considering issue of reasonable care when privileged document is disclosed during discovery, court considers volume of documents produced and procedures followed to safeguard privilege; attorney who supervised document production submitted affidavit; there was nothing “clearly inadequate” about process) (no privilege waiver)

Eighth Circuit: *Gray v. Bicknell*, 86 F.3d 1472, 1481 (8th Cir. 1996) (endorsing “middle of the road” approach for unintentional disclosure that balances reasonableness of precautions taken against disclosure in view of extent of document production, number and extent of inadvertent disclosures, promptness of measures taken to rectify things, and whether overriding interest of justice would be served by relieving party of error).

Maryland: *Elkton Care Center Associates Ltd. Partnership v. Quality Care Management, Inc.*, 805 A.2d 1177, 1183 (Md. 2002) (document was “inadvertently included in a half-full box of documents,” then tabbed by plaintiff and copied and turned over by defendant; defendant had two chances to assert privilege; case did not involve hundreds of boxes or thousands of documents; defendant did not raise point until next-to-last day of trial) (quoting authors of this Treatise, and endorsing intermediate view).

North Dakota: *Farm Credit Bank of St. Paul v. Huether*, 454 N.W.2d 710 (N.D. 1990) (similar to *Parkaway Gallery* case)

⁷FRCP 26(b)(5)(B) provides: “If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information, and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

is a waiver.⁸ The five factors listed are the reasonableness of the precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. However, the ACN explains that these factors were not codified because none of them is determinative and the importance of these factors may “vary from case to case.” The ACN further notes that Rule 502(b) “is flexible enough to accommodate any of these listed factors.” Earlier case law is thus helpful in interpreting Rule 502, but it is not binding because Rule 502 was enacted as a statute and supercedes prior case law.⁹

Inadvertent disclosure. The first requirement of Rule 502(b), that the disclosure be “inadvertent,” is not defined in the Rule. The ACN indicates that the term means disclosures that are “mistaken” or “unintentional.”¹⁰ A standard dictionary definition of “inadvertent” is “a result of inattention” or “oversight.”¹¹ The determination under Rule 502(b)(1) whether a disclosure was “inadvertent” should not be conflated with the determination under Rule 502(b)(2) of whether “reasonable steps were taken to prevent disclosure.”¹²

Reasonable steps to prevent disclosure. In examining the degree of care exercised by the privilege claimant, courts often include in their assessment the presence (or absence) of extenuating circumstances, the most obvious being the press of massive discovery going forward under deadlines, where even cautious production of documents is likely to generate occasional

⁸The ACN cites *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. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

⁹Seventh Circuit: *Heriot v. Byrne*, 257 F.R.D. 645, 655 n.7 (N.D. Ill. 2009) (pre-502 common law multi-factor tests for pre-production reasonableness supplement but do not supplant Rule 502(b)(2) standard).

¹⁰ACN Rule 502(b) (referring to determinations of whether privileged information has been produced “by mistake” and contrasting “inadvertent” waiver with “intentional” waiver).

¹¹Webster's Ninth New Collegiate Dictionary 607 (1990)

¹²D.C. Circuit: *Amobi v. D.C. Dept. of Corrections*, 262 F.R.D. 45 (D.D.C. 2009) (inadvertent means mistaken or unintended disclosure without any analysis of whether mistake was reasonable; should not “meld two concepts” of inadvertence and reasonable steps).

Seventh Circuit: *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037–38 (N.D. Ill. 2009) (under Rule 502(b)(1) only question is whether party intended to produce the document or produced it by mistake)

mistakes.¹³ Other factors bear on the calculus as well, including the amount, nature, and importance of disclosed material. Courts also consider the obviousness of privilege issues and whether the privileged documents may have been hidden or obscured in some way.¹⁴ The fact that only a few privileged documents were inadvertently disclosed out of a large volume produced favors a finding of nonwaiver,¹⁵ whereas disclosure of a larger number makes waiver more likely.¹⁶ The more that has been disclosed, the more that disclosure is likely to be careless or even purposeful. Much the same is true if the claimant overlooks an obvious op-

¹³District of Columbia: *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221 n 14 (D.C. Cir. 1981) (inadvertent disclosure during expedited discovery).

Second Circuit: *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 104 (S.D. N.Y. 1985) (inadvertent disclosure during accelerated discovery).

Eighth Circuit: *Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co.*, 109 F.R.D. 12, 21 (D. Neb. 1983) (inadvertent disclosure during production of more than 75,000 documents).

Ninth Circuit: *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 573 F.2d 646, 648 (9th Cir. 1978) (no waiver where IBM was ordered to produce 17 million pages of material in 90 days; IBM made “Herculean effort” to cull out privileged items).

¹⁴Sixth Circuit: *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845, 851 (E.D. Mich. 2010) (disclosure inadvertent when privileged document was sandwiched between pages of otherwise nonprivileged document, hence missed by reviewing attorneys, and where reviewing associate failed to tag privileged documents).

¹⁵Sixth Circuit: *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845, 851 (E.D. Mich. 2010) (lawyers took reasonable steps to prevent disclosure of privileged documents; defendants showed that law firm reviewed 63,025 documents totaling 4.7 million pages, prepared privilege logs for 1,306 documents, and team of sixteen associates (supervised by two senior associates) spent about 2,500 hours reviewing 8,700 hard copy documents and more than 59,000 electronic documents, involving correspondence with eleven law firms).

Eleventh Circuit: *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 692 (S.D. Fla. 2009) (in suit for breach of contract, steps to prevent disclosure of privileged emails were reasonable; screening system released only five privileged documents after review of 10,000 pages in less than a week).

Edelen v. Campbell Soup Co., 265 F.R.D. 676, 698 (N.D. Ga. 2010) (no waiver where only four documents out of more than 2000 produced were inadvertently disclosed).

¹⁶Sixth Circuit: *Inhalation Plastics, Inc. v. MedexCardio Pulmonary Inc.*, 2012 WL 3731483 (S.D. Ohio 2012) (disclosure of 347 privileged pages out of total production of 7500 on given date represented 4.6 percent of the total; waiver found).

portunity to claim the privilege¹⁷ or discloses more than once.¹⁸ The existence or nonexistence of an efficient records management system before litigation also bears on the determination.¹⁹

Despite the attempt of Rule 502(b) to establish more uniform standards, courts vary with respect the level of effort required prior to production to avoid a finding of waiver, with some applying a strict standard²⁰ and others a more forgiving evaluation.²¹ Courts should bear in mind that the standard of Rule 502(b)(2) is

¹⁷District of Columbia: *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 674–675 (D.C. Cir. 1979) (after producing documents, counsel was asked whether those marked “P” were privileged, but failed to assert privilege).

Maryland: *Elkton Care Center Associates Ltd. Partnership v. Quality Care Management, Inc.*, 805 A.2d 1177, 1183 (Md. 2002) (document was “inadvertently included in a half-full box of documents,” then tabbed by plaintiff and copied and turned over by defendant; defendant had two chances to assert privilege; case did not involve hundreds of boxes or thousands of documents; defendant did not raise point until next-to-last day of trial)

¹⁸Federal Court of Claims: *Eden Isle Marina, Inc. v. U.S.*, 89 Fed. Cl. 480, 510 (2009) (in suit against Corps of Engineers for breach of contract, government's disclosure of confidential briefing paper and emails could not be construed as inadvertent where plaintiff acquired paper from agency on three separate occasions via FOIA during environmental investigation).

Second Circuit: *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (giving tax accountant unlimited access to office where documents were kept bears on intent to maintain confidentiality).

Eigenheim Bank v. Halpern, 598 F. Supp. 988, 991 (S.D. N.Y. 1984) (second inadvertent disclosure, after documents were returned following first inadvertent disclosure, waived privilege).

¹⁹Second Circuit: *Eigenheim Bank v. Halpern*, 598 F. Supp. 988, 991 (S.D. N.Y. 1984) (waiver by inadvertence found where procedures used to maintain confidentiality were “lax, careless, inadequate or indifferent to consequences”).

See also ACN, Rule 502(b) (recognizing this factor).

²⁰Third Circuit: *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216, 226–27 (E.D. Pa. 2008) (steps to prevent disclosure of privileged electronic documents were not reasonable where, despite retention of consultant and screening program, privilege holder should have used more search terms to identify privileged documents, search was improperly limited to e-mail address line rather than e-mail body, no quality assurance testing was used, and privilege holder produced documents that search should have intercepted; even so, privilege was not waived because interests of justice weighed against disclosure).

Fourth Circuit: *Mt. Hawley Insurance Co. v. Felman Production, Inc.*, 271 F.R.D. 125 (S.D.W.Va. 2010) (plaintiff failed to take reasonable steps prior to production to avoid disclosure; court reached this conclusion even though plaintiff hired an ESI vendor, used advanced analytical software, which it tested, and employed its own IT depart to assist in review of the ESI; court found that plaintiff failed to perform “critical quality controls sampling” so reasonable steps not taken; other aspects of plaintiff's conduct during discovery process may have influenced court's decision to find waiver).

not “all possible means” to prevent disclosure, it is “reasonable steps.” The reasonableness determination requires consideration of all relevant factors and cannot be made in a vacuum. In evaluating the effort required, courts should be mindful of the proportionality factors set forth in FRCP 26(b)(2)(C)(iii), which require consideration of whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

An additional factor properly considered by courts is “the overriding issue of fairness.” Although this factor is not expressly stated in the Rule, it was a factor considered under prior case law²² and is mentioned with approval in both the ACN²³ and the Congressional Statement of Intent adopted at the time of enactment of the Rule.²⁴ The issue of fairness continues to be a matter considered by courts in applying Rule 502.²⁵ Nonetheless, it must be remembered that the controlling standard under Rule 502(b)

²¹Seventh Circuit: *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1040 (N.D. Ill. 2009) (defendant discovered inadvertent release of an email and asserted an objection and request for return within two days but did not file formal motion to return until five weeks after plaintiff’s final refusal to return; plaintiff had agreed to “quarantine” documents while defendant researched privilege issue; no unreasonable delay under these circumstances).

²²Second Circuit: *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

Ninth Circuit: *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

²³ACN, Rule 502(b)

²⁴Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence (Cong. Rec. H7818, Sept. 8, 2008):

“Subdivision (b)—Fairness Considerations. The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases—for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.”

²⁵Federal Court of Claims: *Eden Isle Marina, Inc. v. U.S.*, 89 Fed. Cl. 480 (2009) (in light of FRCP 26(b)(3)(B), court should consider protections afforded to opinion work product in weighing fairness of granting subject-matter waiver of work-product protection under Rule 502(a)).

Third Circuit: *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216, 226–27 (E.D. Pa. 2008) (steps to prevent disclosure of

is reasonableness, not fairness, and it is generally not unfair to find waiver where a party has failed to take reasonable steps to preserve the privilege or protection.

As the ACN recognizes, the use of advanced analytical software to do privilege review can constitute “reasonable steps” to prevent inadvertent disclosure, depending on the circumstances. The effectiveness of such technology-assisted review procedures continues to improve, and utilization of such methodologies is often essential in order to obtain the cost savings that was an underlying purpose of the Rule. The development of such software is an important innovation that helps reduce the need for what otherwise might be overwhelmingly expensive and burdensome privilege review entirely by the attorneys themselves. Many courts have found “reasonable steps” taken to preserve the privilege or protection based on the use of such software,²⁶ but some

privileged electronic documents were not reasonable where, despite retention of consultant and screening program, privilege holder should have used more search terms to identify privileged documents, search was improperly limited to e-mail address line rather than e-mail body, no quality assurance testing was used, and privilege holder produced documents that search should have intercepted; nonetheless, privilege was not waived because interests of justice weighed against disclosure).

Fourth Circuit: *Richardson v. Sexual Assault/Spouse Abuse Resource Center, Inc.*, 764 F.Supp.2d 736 (D. Md. 2011) (where review in camera of domestic violence reports showed no evidence of misleading or selective disclosure of privileged information, fairness did not require subject matter waiver of all treatment documents).

Sixth Circuit: *Cooley v. Strickland*, 269 F.R.D. 643, 654 (S.D. Ohio 2010) (in civil rights case concerning Ohio's death penalty, defendants did not waive privilege with respect to agency procedures on lethal injection after disclosure of draft procedures to plaintiffs; subject matter waiver did not apply where fairness did not require disclosure of final policy).

Inhalation Plastics, Inc. v. MedexCardio Pulmonary Inc., 2012 WL 3731483 (S.D. Ohio 2012) (failure to identify which documents were privileged or to generate a privilege log, weak efforts to rectify claimed inadvertent disclosure, and plaintiff's reliance on documents suggest that the “interests of justice militate in favor” of finding waiver).

Seventh Circuit: *Thorncreek Apartments III, LLC v. Village of Park Forest*, 2011 WL 3489828 (N.D. Ill. 2011) (fairness favored finding of waiver because receiving party had already used two of the documents in a deposition and disclosing party took nine months to discover it had disclosed all the privileged documents it intended to withhold).

²⁶Seventh Circuit: *Heriot v. Byrne*, 257 F.R.D. 645, 660–61 (N.D. Ill. 2009) (steps to prevent disclosure of privileged electronic documents were reasonable where privilege holder hired electronic discovery vendor and disclosures were attributed to vendor's mistakes; privilege holder could rely on vendor to comply with instructions, despite lack of quality checking measures; Rule 502(b) does not require post-production review to uncover inadvertent disclosure).

have not.²⁷ While it is certainly appropriate for courts to require attorneys to exercise due care in selecting, testing and utilizing such analytical tools, courts must be mindful that the ultimate issue is whether the technology-assisted review was reasonable under the circumstances, particularly considering the cost of privilege review in relation to the amount at stake in the litigation.

Prompt and reasonable steps to rectify the error. The third requirement of Rule 502(b) is that the party took reasonable steps to rectify the error of disclosing privileged or protected material. As the ACN makes clear, there is no requirement for the producing party “to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.”²⁸ Nonetheless, if there are any “obvious indications” that a protected communication has been produced inadvertently, the producing party must take prompt action to assert the privilege to avoid the possibility of waiver.²⁹ Thus the key time period is not how long after initial release the inadvertent disclosure was discovered, but how much time elapsed from discovery of the inadvertent disclosure to the taking of remedial steps by the disclosing party.

In many cases, notice of the inadvertent disclosure will be provided by the receiving party as a matter of professional ethics. Model Rule of Professional Conduct 4.4(b), which has been adopted by many states, provides: “A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

²⁷Third Circuit: *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216, 226–27 (E.D. Pa. 2008) (steps to prevent disclosure of privileged electronic documents were not reasonable where, despite retention of consultant and screening program, privilege holder should have used more search terms to identify privileged documents, search was improperly limited to e-mail address line rather than e-mail body, no quality assurance testing was used, and privilege holder produced documents that search should have intercepted; even so, privilege was not waived because interests of justice weighed against disclosure).

²⁸Seventh Circuit: *Heriot v. Byrne*, 257 F.R.D. 645, 660–662 (N.D. Ill. 2009) (Rule 502(b) does not require post-production review to uncover inadvertent disclosure; how the party discovers and rectifies the disclosure “is more important than when after the inadvertent disclosure the discovery occurs”; notification within twenty-four hours of discovering the error was reasonable under Rule 502(b)(3)).

²⁹ACN, Rule 502(b).

Rule 502(b)(3) states that one appropriate step for rectifying the error of releasing privileged or protected material may be utilization of FRCP 26(b)(5)(B). This rule provides:

If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

FRCP 26(b)(5)(B), like Rule 502(b)(3), does not specify a particular time limit by which the producing party must attempt to reclaim privileged or protected documents or give notice that they were inadvertently produced. But in deciding the “promptness” and “reasonableness” of the steps taken to rectify the error, courts consider the time elapsed from the discovery of the disclosure. A prompt assertion of the privilege is likely to result in its preservation,³⁰ but a long time lapse without adequate explanation is likely to lead to a finding of waiver.³¹ Simply giving notice of the inadvertent disclosure is not necessarily suf-

³⁰Second Circuit: *Briese Lichttechnik Vertriebs GmbH v. Langton*, 2011 WL 253418 (S.D. N.Y. 2011) (when inadvertent disclosure was discovered two weeks after production, and disclosing attorney sent notification by letter to opposing counsel on day of discovery, promptness requirement was satisfied).

Third Circuit: *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845, 851 (E.D. Mich. 2010) (inadvertent production discovered late Friday led to notification of opposing counsel the following Monday, which satisfy promptness requirement).

Seventh Circuit: *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032 (N.D. Ill. 2009) (defendant discovered inadvertent release of an email and asserted an objection and request for return within two days but did not file formal motion to return until five weeks after plaintiff's final refusal to return; plaintiff had agreed to “quarantine” documents while defendant researched privilege issue; no unreasonable delay under these circumstances).

Eleventh Circuit: *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 693 (S.D. Fla. 2009) (in suit for breach of contract, steps to rectify inadvertent disclosure of privileged email were reasonable; recipient of email was told of privilege claim via correspondence within a week of disclosure and was promptly requested to return email).

³¹Federal Court of Claims: *Eden Isle Marina, Inc. v. U.S.*, 89 Fed. Cl. 480, 510 (2009) (in suit for breach of contract against Corps of Engineers, government's disclosure of confidential memoranda was not protected by Rule 502; government did not try hard enough to repair its mistake and instead let deponent testify about document after asserting privilege; government also put

ficient to satisfy Rule 502(b)(3). If the receiving party does not respond within a reasonable time by returning, destroying, or sequestering the disclosed documents, the disclosing party may be expected to seek judicial intervention in order to satisfy the requirements of the rule.³²

Rule 502(b) does not specify which party has the burden of proving the existence or absence of waiver, but the courts have generally placed the burden on the disclosing party to establish the Rule's requirements that "reasonable steps" were taken to prevent the disclosure and promptly to rectify the error.³³ Courts require a specific showing of the steps that were taken by the disclosing party and are unwilling to accept conclusionary state-

memorandum on privilege log seven months after learning of disclosure and did not seek protective order).

Second Circuit: *Ceglia v. Zuckerberg*, 2012 WL 1392965 (W.D.N.Y. 2012) (two month delay in requesting return of inadvertently disclosed email was not reasonable).

Third Circuit: *U.S. v. Sensient Colors, Inc.*, 2009 WL 2905474 (D.N.J. 2009) (waiver found where plaintiff did not attempt to confirm its inadvertent disclosure until three months after receiving notice from defendant that privileged materials had been disclosed and did not complete its privilege "re-review" until nearly seven months later).

Sixth Circuit: *Inhalation Plastics, Inc. v. MedexCardio Pulmonary Inc.*, 2012 WL 3731483 (S.D. Ohio 2012) (failure to file privilege log and failure to use procedures of FRCP 26(b)(5)(B) made steps to rectify unreasonable).

Ninth Circuit: *U.S. v. de la Jara*, 973 F.2d 746, 749–750 (9th Cir. 1992) (privilege waived; holder failed to reclaim letter seized during government search).

Tenth Circuit: *U.S. v. Ary*, 518 F.3d 775, 784 (10th Cir. 2008) (after holder of work-product protection or attorney-client privilege inadvertently discloses, holder must pursue all reasonable means to preserve and restore confidentiality; where documents within work-product protection and privilege were seized from defendant under search warrant, privilege and protection were waived; he waited six weeks after defense counsel reviewed documents during discovery meeting and failed to identify documents in prior communications with US Attorney).

³²D.C. Circuit: *Williams v. District of Columbia*, 806 F. Supp.2d 44 (D.C. 2011)(when receiving party did not respond after receiving notice of inadvertent disclosure, disclosing party was "on notice that further action was required"; disclosing party instead waited two years and eight months before filing a motion seeking Court's intervention; privilege waived).

³³D.C. Circuit: *Amobi v. Dist. of Colum. Dept of Corrections*, 262 F.R.D. 45 (D.C. 2009)(proponent of privilege has burden of proving it was not waived; here disclosing party failed to demonstrate reasonable steps; while Rule 502(b) would allow court "to round up the animals and put them back in the barn" defendants have not provided any evidence "that they took reasonable efforts to keep the barn door closed").

Third Circuit: *Peterson v. Bernardi*, 262 F.R.D. 424, 427 (D.N.J. 2009) (burden on disclosing party).

ments by counsel that they conducted an adequate privilege review.³⁴

Waiver Outside the Discovery Process. Inadvertent or accidental disclosure may happen in circumstances having little to do with the discovery process. The age of electronic filing and transfers, express delivery, FAX machines, e-mail and the internet has brought new opportunities for putting material into the wrong hands through misaddress and misadventure.³⁵ Rule 502 applies to such situations as well, at least if the disclosure was made “in a federal proceeding or to a federal office or agency.”³⁶ However, even where disclosure is beyond the scope of Rule 502, most courts apply the same considerations of fairness and reasonableness, and ethical considerations also apply.³⁷ If materials are

³⁴D.C. Circuit: *Williams v. District of Columbia*, 806 F. Supp.2d 44 (D.C. 2011) (defendant “utterly failed to explain its ‘methodology’ for review and production”; a conclusionary statement is “patently insufficient” to establish that a party has taken reasonable steps).

Third Circuit: *Peterson v. Bernardi*, 262 F.R.D. 424, 427 (D.N.J. 2009) (refusing to “accept plaintiff’s bare allegation that he conducted a ‘privilege review’ as conclusive proof that he took reasonable steps to prevent an inadvertent production”).

³⁵Third Circuit: *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 361–362 (M.D. Pa. 2001) (privilege not waived for inadvertently sent fax; recipient lawyer ordered to return fax).

³⁶Ninth Circuit: *Multiquip, Inc. v. Water Mgmt. Sys. LLC*, 2009 WL 4261214 (D. Idaho 2009) (applying Rule 502 to misdirected email and finding no waiver of privilege; here defendant’s “autofill” address function forwarded an email from his attorney to a third party who passed it along to plaintiff’s attorney; no failure to meet Rule 502(b)(2) pre-production reasonableness requirement because defendant’s actions though “hasty and imperfect” were not unreasonable as the autofill function had not previously resulted in sending an email to the wrong person).

Eleventh Circuit: *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 692 (S.D. Fla. 2009) (in contract suit, privileged email sent from corporate client’s attorney to corporate employee was inadvertent where attorney requested return of email on realizing error, within approximately one week of disclosure).

³⁷See ABA Model Rules of Professional Conduct 4.4(b) (“lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender”) (“document” includes an e-mail message, according to Comment 2).

See also Mitchel L. Winick, et al., *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 *Tex. Tech. L. Rev.* 1225 (2000); David Hricik, *Confidentiality & Privilege in High-Tech Communications*, 60 *Tex. Bar. J.* 104 (1997); Anne G. Bruckner-Harvey, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 *Baylor L. Rev.* 385 (1994).

electronic address, misdialing FAX number) or misadventure (delivery to the wrong address), privilege protection should not be lost. If outsiders seize or steal confidences, the client is entitled later to claim the protection of the privilege.³⁸

Thus employees or adversaries who trespass, eavesdrop, bug phones or rooms, or hack into computers or servers or e-mail accounts, or intercept mails or deliveries, or rummage through dumpsters do not, by such acts, destroy the protection of the client's privilege, at least in the usual setting in which lawyer and client have taken reasonable care to maintain confidentiality. Reasonable care does not require lawyers or parties to shred all sensitive papers, to have soundproofed offices, or to hire security guards or experts to check for bugs, wiretaps, or electronic intercepts (e-mail or hackers breaking into computer memories). The privilege requires ordinary care, not elaborate countermeasures. On the other hand, carelessness in the form of leaving privileged material openly visible in public places or speaking in the visible presence of outsiders or in conference calls knowing of the presence of outsiders does mean that the requisite confidentiality is missing, and the privilege does not apply.³⁹

Scope of Waiver. If inadvertent disclosure is the result of lack of reasonable care and hence is a basis for denying privilege protection for the disclosed document, the question arises whether such waiver extends to any other privileged documents relating to the same subject matter. Rule 502(a) clearly provides that it does not. Under this rule, waiver extends to an undisclosed communication or information only if the waiver was "intentional."⁴⁰ The ACN states that "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" and therefore it follows that "an inadvertent disclosure of

³⁸See proposed-but-rejected Rule 512 and Uniform Rule 511 (privilege not lost where disclosure occurred "without opportunity to claim the privilege").

³⁹Second Circuit: *Matter of Victor*, 422 F. Supp. 475, 476 (S.D. N.Y. 1976) (finding waiver where client left papers in public hallway outside lawyer's office; client could not expect that papers would be "kept from the eyes of third parties").

Minnesota: *Schwartz v. Wenger*, 267 Minn. 40, 124 N.W.2d 489, 492 (1963) (passer-by overheard communications; privilege lost for failure to take reasonable precautions).

⁴⁰See discussion in § 5:35, *infra*.

protected information can never result in a subject matter waiver.”⁴¹

Waiver of Privilege or Loss of Confidentiality. Courts sometimes discuss inadvertent disclosure in terms of waiver and sometimes in terms of failed confidentiality.⁴² The two issues are analytically distinct. Waiver turns on the question whether the holder “voluntarily” disclosed or consented to disclosure.⁴³ Waiver only occurs after the communication, because the privilege does not attach if it was not confidential. In contrast, the confidentiality requirement focuses on the precautions taken and the intent of the communicators at the time of the communication. Confidentiality turns on whether they intended to disclose to outsiders, and later conduct bears on this point only insofar as it might suggest what was intended at the time of communicating.⁴⁴ As a practical matter, similar standards have evolved under both lines of analysis. If the holder (or the attorney as his agent) did not take reasonable steps to protect against interception while communicating, the privilege fails for lack of confidentiality. If the holder (or the attorney as his agent) did not later take reasonable steps to protect against disclosure, the privilege fails because of waiver.

⁴¹ACN, Rule 502(a).

⁴²Seventh Circuit: *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 257 (N.D. Ill. 1981) (plaintiff obtained privileged documents from defendant's trash dumpster; court uncertain whether issue is loss of confidentiality or waiver).

Ninth Circuit: *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 n 11 (9th Cir. 1981) (finding waiver by inadvertent disclosure; other courts reach same result by finding that disclosure has extinguished confidentiality).

⁴³See proposed-but-rejected Rule 511, and see generally § 5:33, *supra*.

⁴⁴See proposed-but-rejected Rule 503(a) (4), discussed in § 5:18, *supra*.

Privileges: Rule 501

§ 5:34
Rule 502