Texas Wesleyan Law Review

Volume 15 | Issue 1 Article 4

10-1-2008

Constructive Strict-Approach to Attorney-Client Privilege in Bankruptcy: Lack of Clarity in Rule 502 Makes Its Application to Bankruptcy Unclear

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DOI: https://doi.org/10.37419/TWLR.V15.I1.3

CONSTRUCTIVE STRICT-APPROACH TO ATTORNEY-CLIENT PRIVILEGE IN BANKRUPTCY: LACK OF CLARITY IN RULE 502 MAKES ITS APPLICATION TO BANKRUPTCY UNCLEAR

Jason P. Kathman†

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† The author wishes to thank his wife Katie for her love, support and patience during the writing of this Note. Additionally, the author would like to thank his family for their continued encouragement; Lee Barrett, for his help with developing this topic; and the Texas Wesleyan Law Review for their countless hours reading and editing this paper. Without any of you this would not be possible.

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I. INTRODUCTION

Electronic discovery (e-discovery) creates issues that are fundamentally different from the issues associated with paper discovery.[1] In response to these differences, the United States Congress promulgated the 2006 Amendments to the Federal Rules of Civil Procedure. These amendments address a number of problems associated with e-discovery; however, they do not address many of the specific problems associated with the attorney-client privilege that arise from large amounts of electronically stored information (ESI).[2] The United States House of Representatives Committee on Rules of Practice and Procedure proposed Rule 502 of Evidence (Rule 502) to address these issues. Rule 502 addresses the effects of inadvertent disclosures in discovery, and whether those inadvertent disclosures operate as waivers of the attorney-client privilege. Unfortunately, the proposed rule does not address many of the intricate situations that are present in every bankruptcy case.

This Note first examines broadly the scope of ESI and e-discovery and their effect on the legal field. Next, it discusses generally the attorney-client privilege and how waiver occurs. Then this Note analyzes Rule 502 and how it addresses several problems attorneys currently face with waiver of the attorney-client privilege in e-discovery. Then, it shows how Rule 502 does not address two specific problems in the bankruptcy context. Finally, it will offer attorneys a few suggestions to insure that the client's attorney-client privilege is preserved.

II. E-DISCOVERY

A. *Electronically Stored Information*

Discovery extends to any information relevant to the claim or defenses of a party or relevant to the subject matter of a dispute that would likely lead to the discovery of admissible evidence.[3] Courts recognized that relevant computerized data is discoverable even before

1. *See* Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom: A Primer for Business Lawyers*, BUS. L. TODAY, Sept.–Oct. 2007, at 13.

2. Amy J. Longo & Dale Cendali, *Current Trends in Electronic Discovery*, ELECTRONIC RECORDS MANAGEMENT AND DIGITAL DISCOVERY: PRACTICAL CONSIDERATIONS FOR LEGAL, TECHNICAL, AND OPERATIONAL SUCCESS 263, 269 (ALI-ABA Course of Study, May 17–19, 2007), *available at* http://files.ali-aba.org/old/freearticles/cm098-course.pdf.

3. FED. R. CIV. P. 26(b)(1).

the 2006 Amendments to the Federal Rules of Civil Procedure.[4] E-discovery is often distinguished from other forms of discovery such as *conventional discovery*—discovery of information that can be read without the aid of a computer—and discovery of physical objects or property.[5] E-discovery refers to the discovery of ESI.[6] This includes any "machine-readable electronic information stored on physical media from which it can be retrieved."[7] ESI includes e-mails, web pages, word processing files, computer databases, or anything that can be stored in the memory of computers, hard drives, CDs, DVDs, and flash drives.[8]

E-discovery differs from traditional forms of discovery in several ways.[9] ESI presents unique possibilities that often lead to significant problems in the discovery process.[10] For example, there is a higher volume of information stored electronically as opposed to the volume of information stored in paper documents.[11] More than 99 percent of new information is created and stored electronically.[12] Additionally, ESI is created and replicated more quickly than paper documents.[13] In the United States alone, there are an estimated 105 million e-mail users, who send more than 1.5 billion e-mails daily.[14] That amounts to approximately 547.5 billion e-mails per year archived electronically. In the business world, the dramatic increase in e-mail usage alone poses problems for small and large companies alike.[15] One study showed that the average employee sends or receives about fifty messages per working day,[16] which translates into more than 1.2 mil-

4. *See* Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120, 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995); Bills v. Kennecott Corp., 108 F.R.D. 459, 463–64 (D. Utah 1985).

5. SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: SECOND EDITION—BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf [hereinafter SEDONA PRINCIPLES].

6. *Id.*

7. *Id.* at 11.

8. *Id.* at 1; BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 2 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

9. *See* ROTHSTEIN ET AL., *supra* note 8, at 2.

10. Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *10 (N.D. Ill. May 31, 2002); SEDONA PRINCIPLES, *supra* note 5, at 1; *see generally* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

11. SEDONA PRINCIPLES, *supra* note 5, at 2; ROTHSTEIN ET AL., *supra* note 8, at 2.

12. ROTHSTEIN ET AL., *supra* note 8, at 3; David K. Ipsom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1 (2005).

13. *Id.*

14. ROTHSTEIN ET AL., *supra* note 8, at 3.

15. *See* SEDONA PRINCIPLES, *supra* note 5, at 2.

16. Press Release, Microsoft, *Survey Finds Workers Average Only Three Productive Days Per Week: Most Respondents to New Microsoft Office Survey Say They're Working Longer, But Are Less Productive; They Relate Their Productivity to Technol-*

lion messages per year for an organization of 100 employees.[17] This proliferation of ESI has ultimately led to problems with storage because of the increased accumulation of data.[18] Furthermore, e-mail software and data transfer systems often create multiple copies of messages as they are sent and resent.[19] The result is an amount of relevant information and data that is exponentially greater than that found through other forms of discovery.

Another significant difference is that ESI is more difficult to permanently dispose of than information recorded in paper documents.[20] The fragile nature of paper documents has always been a concern for lawyers.[21] When paper documents are damaged, altered, or thrown away, they are usually considered to be undiscoverable because they are no longer available for production.[22] However, with ESI, when a file is deleted, it does not necessarily mean that the file is lost.[23]

Moreover, the digital aspect of ESI allows it to be changed easily, sometimes without human intervention.[24] This creates a unique challenge both practically and ethically. Unlike paper documents, ESI is not "fixed in a final form."[25] ESI can be modified in a number of different ways. Thus, changes to ESI are sometimes difficult to detect without the assistance of computer forensic techniques.[26] For example, merely opening a file or changing the location where it is saved can change the *metadata* associated with the file.[27] Metadata, which many users do not know exists, provides information, such as: when a file was created, who created it, when it was last edited, what the edits were, and who edited it.[28] Metadata contained in an e-mail can have over 1,200 properties, including: the date the message was sent, the date it was received, the date it was replied to, who was blind carbon copied ("bcc"), and even address book information.[29]

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ogy, Mar. 5, 2005, http://www.microsoft.com/presspass/press/2005/mar05/03-15threeproductivedayspr.mspx.

17. ROTHSTEIN ET AL., *supra* note 8, at 3.

18. SEDONA PRINCIPLES, *supra* note 5, at 2 (explaining that a few thousand paper documents used to fill a file cabinet, but now millions of pages of documents can be stored on hard drives and CDs).

19. *Id.*

20. *Id.* at 3.

21. *Id.*; ROTHSTEIN ET AL., *supra* note 8, at 3.

22. *See* SEDONA PRINCIPLES, *supra* note 5, at 3 (explaining that when a file is "deleted" on a computer, the operating system changes the data's entry in the disk directory to a "not used" status, which allows the computer to write over the "deleted" data. Thus, until the computer writes over the "deleted" data, it can be recovered by a search of the disk instead of the disk's directory.).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; *see* ROTHSTEIN ET AL., *supra* note 8, at 3.

28. ROTHSTEIN ET AL., *supra* note 8, at 3; SEDONA PRINCIPLES, *supra* note 5, at 3.

29. SEDONA PRINCIPLES, *supra* note 5, at 3.

One of the largest practical challenges facing attorneys today is determining when metadata is relevant.[30] In some cases, metadata might resolve a disputed material fact. Absent metadata, some ESI may be incomprehensible if viewed outside of the environment it was created in.[31] Additionally, the disclosure of metadata raises ethical issues.[32] Even though ABA Formal Opinion 06-442 makes it clear that there is no ethical obligation to refrain from using metadata embedded in an e-mail,[33] some states disagree.[34] The most common example is the uselessness of a spreadsheet or any other database when embedded data, such as computational formulas, labels, and columns, are missing.[35]

B. *2006 Amendments to the Federal Rules of Civil Procedure*

In response to the growing importance of e-discovery, the Judicial Conference of the United States approved changes to the Federal Rules of Civil Procedure ("FRCP") "aimed at discovery of electronically stored information."[36] The Supreme Court approved the proposed changes on April 12, 2006, and on December 1, 2006, the amended rules took effect.[37] The changes are divided into five categories: (a) amendments to clarify the rules' application to ESI; (b) amendments requiring attorneys to pay early attention to e-discovery issues; (c) an amendment requiring attorneys to better manage discovery of ESI that is not reasonably accessible; (d) an amendment setting out the procedure for the assertion of a privilege after production; and (e) an amendment clarifying the application of sanctions when spoliation occurs.[38] Additionally, Rule 45 was amended to adapt the changes mentioned above.[39]

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30. *Id.* at 4.

31. ROTHSTEIN ET AL., *supra* note 8, at 3; SEDONA PRINCIPLES, *supra* note 5, at 4.

32. Robert L. Kelly, *The Tech Side of E-Discovery: Understanding Electronically Stored Information*, BUS. L. TODAY, Sept.–Oct. 2007, at 46.

33. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (discussing the review and use of metadata).

34. Kelly, *supra* note 32, at 46 (describing how in Alabama and Florida the "mining" of metadata constitutes judicial misconduct).

35. SEDONA PRINCIPLES, *supra* note 5, at 4.

36. ROTHSTEIN ET AL., *supra* note 8, at 3; Judicial Conference Comm. on Rules of Practice & Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure 22 (2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf [hereinafter JCC Report]; *see also* SHIRA A. SHEINDLIN, MOORE'S FEDERAL PRACTICE E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 20 (2006).

37. ROTHSTEIN ET AL., *supra* note 8, at 2.

38. JCC Report, *supra* note 36, at App. C-18.

39. *Id.*

1. Application of Federal Rules to ESI

The amendments made to Rules 26(a) and 34(a)(1) establish that ESI is a separate category of records that must be addressed in the initial disclosures and responses to production requests.[40] These amendments expand the 1970 "data collections" language to include data and information of all kinds, "stored in any medium."[41] Another important addition to Rule 34(a)(1) is the right to "test, or sample any designated documents of ESI;"[42] creating another obstacle in discovery.[43] Rule 34(b) creates the procedure by which the requesting party can specify what form or forms, including electronic, that it wants the records produced in.[44] When the requesting party does not specify a form, Rule 34 provides that the records should be produced in a form that it is "ordinarily maintained" or "reasonably usable."[45]

2. Early Attention to E-Discovery Required

Because of the common-law duty to preserve evidence, parties are obligated to preserve electronic evidence and should focus on this preservation obligation as early as possible.[46] The amendments to Rule 16 and Rule 26(f) further this goal by requiring parties to address e-discovery issues early in the litigation process.[47] Rule 16 now directs the court to address e-discovery issues in its initial scheduling orders.[48] Specifically, Rule 16(b)(5) states that a court should include in its orders any "provisions for discovery or disclosure of electronically stored information."[49] Rule 16(b)(6) states that the parties should disclose "any agreements they reach for asserting a claim of privilege or of protection for trial-preparation material after production."[50] The parties should make the court aware of these topics after their Rule 26(f) conference. Rule 26(f) now requires that parties dis-

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40. SCHEINDLIN, *supra* note 36, at 20.
41. *Id.*
42. *Id.* at 21 & n.94.
43. *Id.*
44. FED. R. CIV. P. 34(b); SCHEINDLIN, *supra* note 36, at 22.
45. *See* FED. R. CIV. P. 34(b)(2)(E)(ii); *see, e.g.,* Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., No. 04-3109, 2006 U.S. Dist. LEXIS 10838, at *8–9 (N.D. Ill. Mar. 8, 2006) (holding that production of TIFF images was "insufficient" and requiring "production in native format because the TIFF documents [did] not contain all of the relevant, nonprivileged information contained in the designated electronic media").
46. *See generally* FED. R. CIV. P. 26(f); Creative Sci. Sys. Inc. v. Forex Capital Mkts., LLC, No. 04-03746, 2006 U.S. Dist. Lexis 20116, at *17–20 (N.D. Cal. Apr. 4, 2006) (holding that "[t]o preserve includes taking steps to prevent the partial or full destruction, alteration, test, deletion, shredding, incineration, erasing, wiping, relocation, migration, theft or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible.").
47. JCC Report *supra* note 36, at 26.
48. JCC Report, *supra* note 36, at 26; SCHEINDLIN, *supra* note 36, at 4.
49. FED. R. CIV. P. 16(b)(3)(B)(iii).
50. FED. R. CIV. P. 16(b)(3)(B)(iv).

cuss three new topics in their pre-hearing conference: (1) "any issues relating to the preservation of discoverable information,"[51] (2) "any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced,"[52] and (3) "any issues relating to claims of privilege or protection of trial-preparation materials."[53]

3. Discovery of ESI That Is Not Readily Ascertainable

The amendment to Rule 26(b)(2)(B) addresses the scope of information parties must produce in their initial Rule 26(a) disclosures.[54] This amendment is aimed at the specific problems unique to e-discovery.[55] The new rule creates two tiers of information—accessible and not reasonably accessible.[56] The amendment requires that a party determine which sources are not reasonably accessible.[57] Reasonably accessible sources generally include, but are not limited to, files available on or from a computer user's desktop, or on a company's network used in the ordinary course of operation.[58] Not reasonable sources generally are those that require a party to incur an undue burden or cost in order to produce relevant, non-privileged information.[59] The rule requires consideration of technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing ESI as well as the nature of the litigation and amount in controversy.[60] For example, given today's technology, back-up tapes, legacy data, and media acquired from another entity in an unsupported format may be unreasonable sources.[61]

Either party may bring the issue of accessibility to the court's attention, but the parties should make a good-faith effort to resolve the dispute before seeking the court's intervention.[62] Regardless of who files the motion, the burden is on the producing party to demonstrate that the information is not reasonably accessible.[63] The Sedona Prin-

51. *See* FED. R. CIV. P. 26(f)(2).
52. FED. R. CIV. P. 26(f)(3)(C).
53. FED. R. CIV. P. 26(f)(3)(D).
54. FED. R. CIV. P. 26(b)(2)(B); SCHEINDLIN, *supra* note 36, at 14.
55. JCC Report, *supra* note 36, at 31.
56. SCHEINDLIN, *supra* note 36, at 15.
57. FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or costs.").
58. SEDONA PRINCIPLES, *supra* note 5, at 18.
59. FED. R. CIV. P. 26(b)(2)(B).
60. SEDONA PRINCIPLES, *supra* note 5, at 17.
61. FED. R. CIV. P. 26(b)(2) advisory committee's note (2006); *see* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 319 (S.D.N.Y. 2003) ("Inaccessible data . . . is not readily usable. Back-up tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the date is usable. That makes such data inaccessible.").
62. FED. R. CIV. P. 26(b)(2)(B), 26(c)(1).
63. *See* Static Control Components, Inc. v. Lexmark Int'l, Inc., No. A. 04-84, 2006 U.S. Dist. LEXIS 16662, at *19–20 (E.D. Ky. Apr. 5, 2006) (holding that a peculiar

ciples suggest that when courts and parties are balancing the cost and burden of producing ESI, they should apply the proportionality standard embodied in Rule 26(b)(2)(C) and its state equivalents.[64] The proportionality standard requires a balancing of the need for discovery with the burden imposed.[65] Some of the factors pertinent to electronic discovery are: (a) large volumes of data; (b) data stored in multiple repositories; (c) complex internal structures of collections of data and the relationships of one file to another; (d) data in different formats and coding schemes that may need to be converted into text to be reviewed; and (e) frequent changes in information technology.[66]

4. Assertion of Privilege Post-Production

The amendment to Rule 26(b)(5) addresses the burden and expense involved with reviewing the exorbitant amounts of ESI by providing a procedure to retrieve privileged information or work-product materials after they have been produced to the adversary.[67] The rule states that when a party produces information that it claims is privileged, it must give notice of its claim and the basis for the claim to the party that received the information.[68] After receiving notice, the receiving party must return, sequester, or destroy the information, and may not use or disclose the information to third parties.[69] In the alternative, the receiving party may submit the information to the court, under seal, to determine if the information is in fact privileged.[70] An important thing to note is that this rule does not determine whether such production constitutes a waiver of the attorney-client privilege.[71]

5. Sanctions for Spoliation

Finally, the most debated amendment to the FRCP was Rule 37(f), which gives limited safe harbor from spoliation sanctions.[72] Spoliation is the "destruction or significant alteration of evidence or the failure to preserve the property for another's use as evidence in pending or

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computer system is no excuse for not producing information and that production must be made in a reasonably useable form); CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04cv2150, 2006 U.S. Dist LEXIS 27053, at *14 (D. Conn. Feb. 6, 2006) ("[T]he fact that the attachments were created with different software programs" is no excuse for producing the "e-mails and attachments in a jumbled, disorganized fashion.").

64. SEDONA PRINCIPLES, *supra* note 5, at 17.

65. *Id.*

66. *Id.*

67. SCHEINDLIN, *supra* note 36, at 19; JCC Report, *supra* note 36, at 29; *see* FED. R. CIV. P. 26(b)(5)(B).

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

69. *Id.*

70. *Id.*

71. See Section IV *infra* for discussion of Proposed Federal Rule of Evidence 502, which would make such disclosures not a waiver of privilege as long as reasonable steps were taken to preserve the privilege.

72. SCHEINDLIN, *supra* note 36, at 24.

reasonably foreseeable litigation."[73] Courts have never tolerated spoliation[74] and the FRCP provides a number of remedies the courts can use at their discretion.[75] But the amendment to Rule 37(f) was designed to give limited protection against these types of sanctions because of an inadvertent alteration or deletion that might occur through the ordinary use of a computer system.[76] Unless there are "exceptional circumstances, a court may not impose sanctions" under the Rules if ESI has been lost as a result of the "routine, good-faith operation of an electronic information system."[77]

III. WAIVER OF ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is "one of the oldest evidentiary privileges in Anglo American Law."[78] "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[79] Attorney-client privilege requires that legal advice be sought from a professional legal advisor in his capacity as such, the communications between the client and advisor be made in confidence, and the client insist the communications be protected from disclosure unless that protection is waived.[80]

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73. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

74. Stephen W. Teppler, *Spoliation of Digital Evidence: A Changing Approach to Challenges and Sanctions*, THE SCITECH LAW., Fall 2000, at 20, 21; *see also* Pastorello v. City of New York, 2003 WL 1740606 (S.D.N.Y. 2003) ("It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by that favorite maxim of law 'omnia presummuntur contra spoliaterum.'").

75. *See generally* FED. R. CIV. P. 26(a), 26(e)(2), 37(b) (giving the court a right to, among other things, "prohibit evidence, strike the pleadings in whole or in part, dismiss the action or proceeding, or enter default judgment" if a party fails to obey an order under 26(f), 35, or 37(a)).

76. JCC Report, *supra* note 36, at 33; SCHEINDLIN, *supra* note 36, at 25. *See also* Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 268 (2001) (noting that "[s]imply turning on a personal computer might destroy some [electronic] data").

77. FED. R. CIV. P. 37(e).

78. Vincent S. Walkowiak et al., *An Overview of the Attorney-Client Privilege When the Client is a Corporation, in* ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 1 (Vincent S. Walkowiak ed., 2004); *see* Hunt v. Blackburn, 128 U.S. 464 (1888).

79. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980) (holding that "the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out"); *Blackburn*, 128 U.S. at 470 (holding that "the rule . . . is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

80. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950); Carl G. Roberts, *The Attorney-Client Privilege and the Amended Federal Discovery Rules*, L. PRAC. TODAY, Dec. 2006, *available at* http://www.abanet.org/lpm/lpt/articles/mgt12062.shtml; Vincent S. Walkowiak et al., *Loss of Attorney-Client Privilege*

Sound legal advice and advocacy require that the advocate be fully informed of the client's situation. On the other hand, the ultimate goal of the adversary system is to discern the truth.[81] Because the attorney-client privilege may ultimately suppress relevant information, it must be "strictly confined within the narrowest possible limits consistent with the logic of its principle."[82]

A. *Federal Rule of Evidence 501*

The attorney-client and work-product privileges are governed in the federal courts by Federal Rule of Evidence 501 ("Rule 501"). This rule states:

> 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 a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[83]

When Congress adopted the "general mandates" of Rule 501, it specifically rejected a series of specific privilege rules that the Judicial Conference of the United States had promulgated.[84] By doing so, Congress "left the law of privilege in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases."[85]

B. *Inadvertent Waiver*

Privilege can be lost when an attorney inadvertently discloses documents to opposing counsel or a third party. Inadvertent production of privileged material is generally regarded as a *waiver* issue.[86] "Waiver

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Through Inadvertent Disclosure of Privileged Documents, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 313, 315 (Vincent S. Walkowiak ed., 2004).

81. *See* Walkowiak et al., *supra* note 80, at 315.

82. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton rev. 1961); *see* Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 236 (D. Md. 2005) (holding that the attorney-client privilege should not be construed more broadly than necessary to effectuate its purpose).

83. FED. R. EVID. 501.

84. Jaffee v. Redmond, 518 U.S. 1, 8 n.7 (1996).

85. *See* FED. R. EVID. 501 advisory committee's note.

86. Walkowiak et al., *supra* note 80, at 315, 324; *see also* Goldsborough v. Eagle Crest Partners, Ltd., 805 P.2d 723 (Or. Ct. App. 1991), *aff'd*, 838 P.2d 1069 (1992); George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64

[is] an intentional relinquishment or abandonment of a known right or privilege,"[87] but in reality, the courts will look at the actor's intent.[88] When an actor's conduct is objectively inconsistent with the acts usually associated with protecting the privilege, an *implied waiver* occurs.[89] The amendment to Federal Rule of Civil Procedure 26(b)(5) does not address the substantive question of whether a party waives its privilege when it inadvertently discloses privileged information; it merely sets out a procedure for what to do when such an act occurs.[90] Currently, courts do no agree on a single approach for determining whether the privilege was lost.[91] Historically, courts have applied one of three different approaches.[92]

1. Strict-Accountability Approach

The "strict-accountability" approach reasons that any disclosure, even if it was inadvertent, waives the privilege.[93] The justification for the approach is that once the information is disclosed it cannot be undisclosed, because after disclosure, it is impossible to achieve the benefits of the privilege.[94] Some courts favor the "strict-accountability" approach because inadvertent waiver is "merely a euphemism" for negligence, and "certainly . . . one is expected to pay a price for one's negligence."[95]

Perhaps the most persuasive reason courts have chosen the strict-accountability approach is because it encourages self-regulatory behavior.[96] For example, in *In re Sealed Case,* the court explained that even though the attorney-client privilege is of "continuing importance," the party asserting the privilege must make sure to guard

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OR. L. REV. 637 (1986); Wesley M. Ayres, Comment, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 PAC. L.J. 59 (1986).

87. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

88. Walkowiak et al., *supra* note 80, at 316.

89. *See* Chic. Title Ins. Co. v. Superior Court, 220 Cal. Rptr. 507, 512 (Ct. App. 1985).

90. Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 233 (D. Md. 2005).

91. Walkowiak et al., *supra* note 80, at 316; Amy M. Fulmer Stevenson, Comment, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 CAP. U. L. REV. 347, 359 (1997).

92. Walkowiak et al., *supra* note 80, at 316; Jonathan M. Redgrave & Kristin M. Nimsiger, *Electronic Discovery and Inadvertent Productions of Privileged Documents*, 49 FED. LAW., July 2002, at 37, 39.

93. *See, e.g., In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989); Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B., 148 F.R.D. 456, 457 (D.D.C. 1992); Harmony Gold USA Inc. v. FASA Corp., 169 F.R.D. 113, 116–17 (N.D. Ill. 1996); FDIC v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992).

94. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954); W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976).

95. *In re* Standard Fin. Mgmt. Corp., 77 B.R. 324, 330 (Bankr. D. Mass. 1987).

96. *See* Walkowiak et al., *supra* note 80, at 317; *Sealed Case*, 877 F.2d at 980.

against waiver.[97] "In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels."[98]

While this approach arguably is the most consistent with the waiver rules that are typically applied at trial,[99] many courts have refused to apply the doctrine because it is too harsh.[100] These courts argue that this approach "sacrifices the value of protecting the client for the sake of certainty of results."[101] Additionally, courts have criticized this approach because of its "pronounced inflexibility and significant intrusion on the attorney-client relationship."[102]

2. Subjective-Intent Approach

The subjective-intent approach is at the other end of the strictness spectrum.[103] This approach and its several variations focus on the client's intent to waive the privilege.[104] As long as the client did not intend to waive the privilege, the privilege is preserved.[105] Under this approach, an inadvertent disclosure only waives a client's privilege if the client or attorney was grossly negligent.[106] One court applying this approach reasoned that, "inadvertent production is the antithesis of an intentional relinquishment of a known right."[107] Moreover, if the privilege is for the benefit and welfare of the client, then more than the attorney's negligence should be necessary in order for the party's privilege to be lost.[108]

While this approach may be preferable to the strict approach when discovery involves several thousand documents, it is often criticized because it gives more credence to subjective considerations instead of objective evaluations.[109] Further, other courts have expressed a belief that the lenient subjective-intent approach does not encourage tight control over privileged documents.[110]

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97. *See Sealed* Case, 877 F.2d at 980 (holding that the court will grant no greater protection to those who assert the privilege than their own precautions warrant).

98. *Id.*

99. *See, e.g.*, Julrik Prods., Inc. v. Chester, 113 Cal. Rptr. 527, 530 (Ct. App. 1974) (holding that if any attorney's client is asked a question that would invade the privilege, the attorney's failure to object timely results in a loss of the privilege).

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

101. *Id.*; Walkowiak et al., *supra* note 80, at 318.

102. *Gray*, 86 F.3d at 1483; Walkowiak et al., *supra* note 80, at 318.

103. Walkowiak et al., *supra* note 80, at 318.

104. *Id.*

105. *See* Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 411 (D.N.J. 1995); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990).

106. Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 235–36 (D. Md. 2005); Ayres, *supra* note 86, at 74.

107. *See* Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982).

108. *Id.*

109. Walkowiak et al., *supra* note 80, at 318.

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

3. Balancing Test

The third approach rejects both extremes and instead evaluates each situation individually to determine whether a waiver occurred.[111] This approach evaluates the unique circumstances of each case to determine whether reasonable steps were taken to preserve the privilege.[112] Like the subjective-intent approach, the balancing approach focuses on the knowledge and intent of the actor in order to judge whether the act constituted an effective waiver. In this way, the theory is similar to tort law, which requires a higher threshold for liability than "mere negligence."[113] This approach recognizes that mistakes happen and encourages parties to take steps in anticipation. However, when the reviewing judge finds that the party's pre-disclosure acts were grossly negligent, the disclosure is deemed intentional, and a *constructive waiver* occurs.[114]

Courts adopting this approach consider five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness.[115] Because courts have given different weight to each of the five factors, no generalizations can be made about the weight or necessity of any of the factors.[116] To illustrate, in *Lois Sportswear*, the court sustained the privilege because all the factors weighed in favor of the defendant.[117] Conversely, in *Hartford Fire Ins. Co. v. Garvey*,[118] the court found waiver even though the error was rectified quickly because reasonable precautions were not taken and the scope of discovery was limited.[119] The court in *Parkway Gallery v. Kittinger/Pennsylvania House Group*[120] began its analysis with a presumption that an inadvertent disclosure led to waiver, and then used the five factors to determine whether the privilege was preserved.[121] Applying the factors, the court found that the large scope of the discovery did not weigh in

111. Roberts, *supra* note 80, at 5; *Hopson*, 232 F.R.D. at 236.

112. Walkowiak et al., *supra* note 80, at 319; Roberts, *supra* note 80, at 5; EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 442–43 (5th ed. 2007).

113. Roberts, *supra* note 80, at 5.

114. *See Hopson*, 232 F.R.D. at 236; Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 410–11 (D.N.J. 1995);

115. Simon Prop. Group L.P. v. mySimon Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000); *Gray*, 83 F.3d at 1483–84; Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985); Walkowiak et al., *supra* note 80, at 319; Redgrave & Nimsiger, *supra* note 92, at 38.

116. Walkowiak et al., *supra* note 80, at 319.

117. *Lois Sportswear*, 104 F.R.D. at 105.

118. Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

119. *Id.* at 328.

120. Parkway Gallery v. Kittinger/Pa. House Group, 116 F.R.D. 46 (M.D.N.C. 1987).

121. *See id.* at 51.

favor of the defendants because they were not under any time constraints.[122] Further, despite the fact that the defendants discovered the disclosure quickly and attempted to retrieve the documents, the court found that these factors were outweighed by the fact that the disclosure was complete, and confidentiality could not be restored.[123] When confidentiality is lost, a very strong showing from the other factors must occur.[124] Because the defendants did not make such a showing, the court found that waiver occurred.[125]

The growing trend in cases across the nation is to follow this balancing test[126] because it strikes "the appropriate balance between protecting [the] attorney-client privilege and allowing, in certain situations, the unintended release of privileged documents to waive that privilege."[127] In *Gray v. Bicknell*, the Eighth Circuit looked at all three approaches and found that the balancing test was "best suited" for achieving a fair result.[128] This approach leaves the court with broad discretion to determine whether a waiver occurred, and if so, what the scope of the waiver is.[129]

Like the other two approaches, the balancing test is criticized because of its uncertainty and the wide discretion given to judges.[130] Even so, it allows for the inevitable error that occurs in today's document-intensive litigation system, but still punishes carelessness and negligence.[131]

C. *Scope of Waiver*

A decision that an inadvertent disclosure resulted in waiver of the disclosed documents can lead to waiver of all other communications with the same subject matter.[132] Like determining the effect of an inadvertent disclosure, courts are split on the scope of the waiver when an inadvertent disclosure occurs. Some courts have held that even if the disclosure results in a waiver, it waives only the privilege to the disclosed documents.[133] Other courts have held that an inadver-

122. *Id.*
123. *Id.*
124. *Id.* at 52 (relying on *Hartford*, 109 F.R.D. at 330).
125. *Id.*
126. Redgrave & Nimsiger, *supra* note 92, at 38.
127. Gray v. Bicknell, 86 F.3d 1472, 1484 (8th Cir. 1996).
128. *Id.*
129. *Id.*; Walkowiak et al., *supra* note 80, at 321.
130. Walkowiak et al., *supra* note 80, at 321.
131. *Gray*, 86 F.3d at 1484; Walkowiak et al., *supra* note 80, at 321.
132. Kenneth S. Brown & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 224 (2006).
133. *See generally* Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204 (N.D. Ind. 1990) (applying both the "strict approach" and the "balancing approach" to find waiver, but limiting the waiver to actual documents produced); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445 (D. Mass. 1988) (apply-

tent waiver waives the privilege as to all communications of the same subject matter,[134] while still other courts base their determination on the fairness to both parties.[135]

D. *Quick-Peek and Claw-Back Agreements*

In light of the uncertainty resulting from inadvertent disclosures and the increasing amount of information demanded through discovery, courts are encouraging attorneys to enter into non-waiver agreements.[136] In fact, the 2006 amendments to FRCP 16 and 26 encourage the use of non-waiver agreements to facilitate discovery.[137] Under these non-waiver agreements, attorneys agree not to assert waiver of privilege or work-product protection if the opposing party agrees to expedite ESI production without first doing a "full-fledged privilege review."[138] Courts approved non-waiver agreements far before the 2006 amendments.[139] With the FRCP now encouraging non-waiver agreements, their use can be expected to increase in the coming years.[140]

One type of non-waiver agreement attorneys commonly enter into is a *quick-peek* agreement. Under a quick-peek agreement, the responding party provides the requested material without a thorough review for privilege or protection, but with the explicit understanding that production does not waive privilege or protection.[141] Thus, there is a "purposeful disclosure of information, 'without intending to waive

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ing the "strict approach" to determine waiver occurred but limiting the waiver to the document disclosed); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987) (holding that the general rule that a disclosure waives not only the specific communication but the also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage).

134. *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (applying the "strict approach" to find waiver and noting that "if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communication like jewels—if not crown jewels.").

135. *See* United States v. Doe, 219 F.3d 175, 185 (2d Cir. 2000) (stating that implied waiver analysis should be guided by fairness principles); *In re* Grand Jury Subpoena, 341 F.3d 331, 336–37 (4th Cir. 2003) (finding that a party waived the attorney-client privilege to the whole subject matter when he used part but not all of a disclosed matter to its advantage); EPSTEIN, *supra* note 112, at 595.

136. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

137. *See* Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 234 (D. Md. 2005); ROTHSTEIN ET AL., *supra* note 8, at 16 (noting that agreed-on procedures under Rules 16 and 26 are favored over rule-based ones).

138. *Hopson*, 232 F.R.D. at 234.

139. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 309–10 (S.D.N.Y. 2003); VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 11–12 (D. Mass. 2000); Ames v. Black Entm't Television, No. 98 CIV0226, 1998 WL 812051, at *8–9 (S.D.N.Y. Nov. 18, 1998); Dowd v. Calabrese, 101 F.R.D. 427, 439 (D.D.C. 1984); W. Fuels Ass'n v. Burlington N. R.R., 102 F.R.D. 201, 204 (D. Wyo. 1984); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 42 (E.D.N.Y. 1973).

140. *See Hopson*, 232 F.R.D. at 235.

141. ROTHSTEIN ET AL., *supra* note 8, at 14.

a claim of privilege,' prior to production with an express reservation of the right to assert privilege at a later point in the discovery process."[142] The advisory committee's note to Rule 26(f) clarifies the process. The responding party provides the requested material for an "initial examination," after which the requesting party "designates the documents it wishes to have actually produced."[143] The responding party then screens the designated documents for formal production and makes any privilege claims.[144]

Another common non-waiver agreement is the *claw-back agreement.* Under this type of agreement, the responding party reviews the material requested for privilege or protection before it is produced. If privileged or protected information is inadvertently disclosed, the parties agree to a procedure for the return of the information within a reasonable amount of time of its discovery.[145]

E. *Selective Waiver*

Selective waiver is a distinctive type of waiver that arises generally when a party is forced to turn over documents to the government.[146] Under this specific waiver, the privilege is waived as to the government but not to other parties. However, only the Eighth Circuit and some district courts in other circuits have upheld the principle.[147] The First, Third, Fourth, Sixth, Tenth, and District of Columbia Circuits have held that when privileged information is disclosed to a federal agency, the attorney-client privilege is lost to all parties.[148] Furthermore, the Third, Sixth, and Tenth Circuits have held that the privilege is lost even in the presence of confidentiality agreements such as claw-backs and quick-peeks.[149]

IV. PROPOSED FEDERAL RULE OF EVIDENCE 502

Proposed Rule 502 to the Federal Rules of Evidence resolves two major problems that occur in the waiver context. Specifically, the rule addresses: (1) the effect of certain disclosures of communication or information protected by attorney-client privilege or work product; and (2) the increasing costs associated with protecting against waiver in light of electronic discovery.[150] Ultimately, the rule seeks to pro-

142. Ken Withers, *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-Discovery,* 51 FED. LAW., Sept. 2004, at 29, 36.

143. FED. R. CIV. P. 26(f) advisory committee's note, *available at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

144. *Id.*

145. ROTHSTEIN ET AL., *supra* note 8, at 14–15; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

146. EPSTEIN, *supra* note 112, at 492–93.

147. Brown & Capra, *supra* note 132, at 229.

148. *Id.* at 229–30.

149. *Id.* at 230.

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

vide a "predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection."[151]

A. *Background*

On January 23, 2006, the Honorable F. James Sensenbrenner, Chair of the U.S. House of Representatives Committee on the Judiciary, wrote a letter to the Director of the Administrative Office of the U.S. Courts requesting that the Judicial Conference "initiate a rule-making on forfeiture of privileges."[152] The Congressman explained that he was *informed* that an absence of clarity on the subject, particularly as it pertains to the attorney-client privilege, was causing significant disruption and cost to the litigation process.[153] He urged the Judicial Conference to adopt a rule providing clarity that would:

> protect against the forfeiture of privileges where a disclosure is the result of an innocent mistake; permit parties and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and allow persons and entities to cooperate with the government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.[154]

In response to this letter, the Advisory Committee on Evidence Rules of Practice and Procedure ("Advisory Committee") drafted proposed Rule 502 for hearings and comments.[155] These hearings occurred at Fordham University on April 24 and 25, 2006.[156] A revised version of Proposed Rule 502 was approved by the Advisory Committee at its June 22–23, 2006 meeting.[157] On September 27, 2007, the Judicial Conference of the United States submitted the revised version of Proposed Rule 502 to both the Senate's and House of Representatives's Committee on the Judiciary.[158] On December 11, 2007, Pro-

151. *Id.*
152. Brown & Capra, *supra* note 132, at 246; Ashish Prasad & Vazantha Meyers, *The Practical Implications of Proposed Rule 502*, 8 SEDONA CONF. J. 133, 135 (2007).
153. Prasad & Meyers, *supra* note 152, at 135.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. Letter from Lee H. Rosenthal, Chair, Comm. on Rules of Practice & Procedure of the Judicial Conference of the United States, to Honorable Patrick J. Leahy, Chairman, Comm. on the Judiciary of the U.S. Senate, and Honorable Arlen Specter, Ranking Member, Comm. on the Judiciary, U.S. Senate (Sept. 26, 2007) (on file with author), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf; Letter from Lee H. Rosenthal, Chair, Comm. on Rules of Practice & Procedure of the Judicial Conference of the United States, to Honorable John Conyers, Jr., Chairman, Comm. on the Judiciary of the U.S. House of Representatives, and Honorable Lamar Smith, Ranking Member, Comm. on the Judiciary of the U.S. House of Representa-

posed Rule 502 was introduced on the floor of the Senate as Senate Bill 2450.[159]

B. *Proposed Rule 502*[160]

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 or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(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.

(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

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tives (Sept. 26, 2007) (on file with author), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

159. S. 2450, 110th Cong. (2007), *available at* http://thomas.loc.gov/cgi-bin/query/D?c110:4/temp/~c110Fx1YT3.

160. For an in-depth look at the several drafts of Proposed Rule 502 and how it has been modified from its original drafting see Brown & Capra, *supra* note 132, at 247–49.

event the disclosure is also not a waiver in any other Federal or State proceeding.

(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.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, 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.

(g) Definitions. In this rule:

(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.

C. *Disclosures Made in Federal Proceedings or to a Federal Office or Agency*

Subsection (a) states that a voluntary disclosure made in a federal proceeding or to a federal office or agency, if a waiver, generally will result only in a waiver of the communication or information disclosed.[161] Thus, subject matter waiver will occur only when fairness requires "a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[162] Consequently, an inadvertent disclosure of protected information will never result in a subject matter waiver because it is not an act meant to intentionally mislead opposing counsel.[163] In this way, Rule 502 contradicts the result in *In re Sealed Case*[164] where the District of Columbia Circuit held that an inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.[165] Additionally, to provide protection and predictability, Subsection (a) provides that if a disclosure is made at the federal level, the federal rule on subject matter will govern subsequent state court determinations on the scope of the waiver.[166]

161. FED. R. EVID. 502 advisory committee's note subdiv. (a).
162. *Id.*
163. *Id.*
164. *In re* Sealed Case, 877 F.2d at 976, 980 (D.C. Cir. 1989).
165. *See* FED. R. EVID. 502 advisory committee's note subdiv. (a).
166. *Id.*

D. *Inadvertent Waiver*

Subsection (b) attempts to create a uniform position regarding whether an inadvertent disclosure waives the attorney-client privilege or work-product protection.[167] Proposed Rule 502 would adopt the "balancing approach"[168] taken by several courts, which holds that an inadvertent disclosure does not operate as a waiver if the holder took reasonable steps to prevent disclosure and rectify the error.[169] While the five-factor test[170] is not explicitly codified, the advisory note explains that the rule is "flexible enough to accommodate any of those listed factors."[171] Furthermore, the advisory note mentions that other considerations bearing on the reasonableness of a producing party's efforts, such as time constraints and the number of documents to be reviewed, may be taken into consideration.[172]

V. Problems in the Bankruptcy Context

Federal Rule of Bankruptcy Procedure 9017 states that all federal rules of evidence apply in bankruptcy. Bankruptcy proceedings are unique because of the increased demands for disclosure. Bankruptcy law creates a number of situations where an attorney or trustee can waive the attorney-client privilege.[173] There will be some sort of transfer of ESI in practically every bankruptcy case.[174] Nevertheless, waiver of the attorney-client privilege is most likely to occur from the attorney's actions. Although it is often stated that an attorney cannot unilaterally waive the attorney-client privilege, the above discussion shows how inadvertent disclosures of privileged information can

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167. See Section III(b)(ii) *supra* for a discussion of the different approaches courts have taken to analyze this question.

168. See Section III(b)(iii) *supra* for a discussion of the balancing approach.

169. Fed. R. Evid. 502 advisory committee's note subdiv. (b); see also Section III(b)(ii)(3) *supra* for a discussion of the balancing test approach and its application in various courts.

170. See Section III(b)(iii) *supra* (courts that adopted the "middle-ground" approach have used a five factor analysis: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness). *See* Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985).

171. Fed. R. Evid. 502 advisory committee's note subdiv. (b).

172. *Id.*

173. *See* Micheal Fielding & Jack Seward, *You Need to Know This: Bankruptcy and Attorney-Client Privilege in the Electronic Age*, 25 Am. Bankr. Inst. J. 1, 63 ("Examples [of disclosures of privileged communications] include: § 363 sales, liquidations, cancellations/return of leased computers and digital electronic equipment; contracted 'outsourced' accounting and financial operations, production of electronically created, stored and shared information in an adversary proceeding, turnover of property of the estate, and turnover by a custodian.").

174. *Id.*

quickly lead to waiver.[175] Proposed Rule 502 attempts to remedy this problem, but it does not take into account at least three specific problems that arise in the bankruptcy context. First, is the U.S. Trustee a federal officer, and if so, is a disclosure to the trustee protected by the Proposed Rule 502? Second, is the initial meeting of creditors required by Section 341 of the Bankruptcy Code[176] a federal proceeding that would receive the protection granted under Proposed Rule 502? Finally, are disclosures to the various committees[177] covered by the rule?

A. *Disclosures to the U.S. Trustee and 341 Meetings*

Section 341 of the Bankruptcy Code requires that "within a reasonable time" after a person or company has filed for bankruptcy, the United States Trustee shall hold a meeting of the creditors.[178] Further, section 343 requires that, at these meetings, the debtor appear and submit to an examination.[179] The examination is governed by Federal Rule of Bankruptcy Procedure ("FRBP") 2004, which states: "the examination . . . of the debtor under section 343 of the Code may relate to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate [.]"[180] Certainly, voluntary disclosures by the debtor during this meeting would waive privilege. However, Subsection (c) of Rule 2004 allows for documents and testimony to be subpoenaed pursuant to FRBP 9016.[181] If a debtor is called upon to testify about confidential conversations he may have had with his attorney—privileged conversations—would Rule 502 apply in these situations?

The purpose of the 341 meeting is to determine whether assets have been concealed and whether there has been any improper disposition of assets.[182] Debtors will certainly argue that the 341 meeting is a federal proceeding because it is required under federal law and is administered by the United States Trustee. The Office of the United States Trustee is a division of the Department of Justice;[183] and consequently, any meeting he presides over is a federal proceeding. Conversely, the trustee might argue that since the 341 meeting is not a Part VII adversary proceeding or a contested matter governed by

175. *See* Section III(b) *supra*.
176. *See* 11 U.S.C. § 341 (2000).
177. *Id.* § 1102.
178. *Id.* § 341(a).
179. *Id.* § 343.
180. FED. R. BANKR. P. 2004(b).
181. *Id.* § 2004(c).
182. 3 COLLIER ON BANKRUPTCY § 341.02[5][d] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2008).
183. *See* 28 U.S.C. § 581 (2000) (explaining that the Attorney General shall appoint the United States Trustee for Federal Judicial districts set out in the statute).

FRBP 9014 that neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure apply.[184] Furthermore, such privilege is not necessary because the sworn testimony and evidence gathered at a 341(a) meeting is not admissible as direct evidence in a later adversary proceeding or contested matter.[185]

B. *Disclosure to the 1102 Creditor Committee*

Similarly, the Code provides that "as soon as practicable after the order for relief under Chapter 11 of this title, the United States Trustee shall appoint a committee of creditors holding unsecured claims."[186] The committee's purpose is to represent the interests of the unsecured creditors. The Code gives these committees the ability to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."[187] But like the 341 meeting, it is unclear whether the 1102 committee will be considered a federal agency or office for purposes of proposed rule 502.[188]

VI. PROPOSED SOLUTIONS

A. *Adequate Knowledge of E-Discovery and ESI*

In order to prevent the waiver of attorney-client privilege, attorneys must gain an understanding of e-discovery and ESI and acknowledge that these are a crucial part of most lawsuits today. "An attorney now risks committing malpractice if he or she does not adequately understand how electronic information is created, stored, and communicated."[189] Attorneys must know how ESI is created, how it is used, and most importantly how it may be obtained through discovery.[190] In a recent decision from the Southern District of New York, the court found that a law firm committed "gross negligence" when it failed to find its client's ESI.[191] The court ordered both the firm and the defendants to pay monetary sanctions.[192] This decision should serve as a

184. *See* Chapter 7 Trustee Manual 72 (2002), http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/index.htm (follow hyperlink to "Handbook, July 2002" [PDF format]); David S. Kennedy, Vanessa A. Lantin & Alissa York, *Professionalism: Dealing with Unprofessional Conduct in Bankruptcy*, 36 U. MEM. L. REV. 575, 618 (2006).

185. Kennedy, Lantin & York, *supra* note 184, at 618.

186. 11 U.S.C. § 1102(a)(1) (2000).

187. *Id.* § 1103(c)(2).

188. Lee Barrett, *Bankruptcy Secrets and Proposed FRE 502*, ST. B. OF TEX. BANKR. L. SEC. NEWSL., Summer 2007, at 4, 10, *available at* http://www.texasbar.com/bankruptcy/Newsletter_Summer2007.pdf.

189. Fielding & Seward, *supra* note 173, at 1.

190. *Id.* at 65.

191. *See* Phoenix Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006).

192. *Id.*

warning to all attorneys who might rely on their client's representation that there is no ESI, that such reliance will not serve as an adequate excuse for waiver of the privilege.

B. *Adequate Knowledge of Attorney-Client Privilege in the E-Discovery Context*

In order for bankruptcy attorneys to protect the attorney-client privilege, they must understand how it operates and the intricacies of how it may be waived. This understanding includes a comprehensive knowledge of how the privilege operates specifically within the bankruptcy context, and how the various rules of evidence, procedure, and bankruptcy procedure affect the privilege.

C. *Reasonable Steps to Protect Privilege*

To insure that the attorney-client privilege is preserved, attorneys should follow several steps and procedures. Attorneys responding to discovery should follow reasonable procedures to protect privileges in connection with the production of ESI.[193] The amendments to FRCP 16 and 26 require attorneys to address the effects of inadvertent disclosure early in discovery;[194] thus, at the very least, attorneys should discuss with opposing counsel the use of claw-back and quick-peek agreements.[195] But as the decision in *Phoenix Four* suggests, entering into these agreements is not always enough.[196] Attorneys must be diligent in setting up procedures to ensure that their clients' office files and communications are protected—not only from outside intrusion, but from technology risks inside the firm.[197] These procedures should include policies for reviewing documents for privileged information to ensure that the risk of inadvertent disclosure is minimized as much as possible.[198] "In short, attorneys must act as if the 'strict test' to inadvertent disclosure applies."[199]

VII. CONCLUSION

Electronically stored information is becoming an increasingly prevalent part of every lawsuit. Every attorney must now be aware of the unique challenges that e-discovery creates. Consequently, every law-

193. SEDONA PRINCIPLES, *supra* note 5, at 51.

194. *See* FED. R. CIV. P. 16(b)(3)(B)(iv) (requiring that courts include any *agreements* the parties reach in its scheduling orders); FED. R. CIV. P. 26(f)(4) (requiring parties to discuss issues relating to claims of privilege and disclosure).

195. *See* CONFERENCE OF CHIEF JUSTICES, NAT'L CTR. FOR STATE COURTS, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 4, 8–9 (2006), *available at* http://www.nesconline.org/WC/Publications/CS_E1DiscCCJGuidlines.pdf.

196. *See Phoenix Four*, 2006 WL 1409413, at *9.

197. Fielding & Seward, *supra* note 173, at 66.

198. *Id.*

199. *Id.*

suit is now presented with new challenges. Because of these challenges, the Rules Committee promulgated the 2006 amendments to the FRCP. While these rules acknowledge many of the unique situations and challenges that e-discovery and ESI create, much work is still needed to address how the long-standing rules that govern practice apply to present-day fact patterns. Proposed Rule of Evidence 502 attempts to address one distinctive problem that occurs within the attorney-client privilege context—the increased chance of inadvertent disclosure from the vast increase in documents and information. While this rule will undoubtedly have a great impact on the practice of law, attorneys practicing bankruptcy should be especially leery of relying on the new rule. Because it is not yet clear what effect the application of this rule will have on certain areas and provisions of the bankruptcy code, attorneys would be wise to institute and follow the principles discussed above.