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ATTORNEY-CLIENT PRIVILEGE: INADVERTENT DISCLOSURE AND A PROPOSED CONSTRUCTION OF FEDERAL RULE OF EVIDENCE 502

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I. INTRODUCTION

The phrase "To Err is Human[,] to Forgive, Divine" is the source for Federal Rule of Evidence 502's take on the inadvertent disclosure of privileged communications.[1] Although attorney-client privilege requires that a communication be kept confidential, Rule 502 rejects perfection in

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1. ALEXANDER POPE, AN ESSAY ON CRITICISM 30 (W. Lewis 1711) (General Books LLC, 2010) (1711).

this regard. A noble effort that, nonetheless, falls short is good enough to ward-off a waiver.

Usually, the inadvertent disclosure occurs during discovery; a privileged document that should have been withheld is mistakenly turned over to an adversary. If Rule 502's provisions are satisfied, the attorney-client privilege will remain intact, even though the document lost its confidentiality.[2] In essence, the inadvertent disclosure is excusable and, in turn, forgiven.

However, distinguishing inadvertent disclosures from disclosures that cause a waiver is far from certain. Case law has created three conflicting tests and even the one used by the majority of courts has predictability problems.[3] Federal Rules of Evidence 502 was enacted to clear up the confusion.[4] Unfortunately, some courts' constructions of Rule 502 have sown the seeds, that if allowed to sprout, will entangle Rule 502 in its own variety of unpredictability and confusion.[5]

This article will replant the garden. It will assert that Rule 502 formed a special category under the waiver doctrine of the attorney-client privilege: document disclosures during discovery. Thus, the term "inadvertent disclosure" should be deemed a term-of-art, describing this setting rather than whether the disclosure itself was unintended. The focus should not be one's "intention" but whether a disclosure during document discovery is excusable.

The proposed construction bypasses the uncertainty engendered by some courts' reading of Rule 502. Thus, it enhances predictable applications of the rule. Further, as will be discussed hereafter, the proposal is consistent with the policies underlying the attorney-client privilege and the goals of Rule 502.

However, as a prelude, a few words follow outlining the attorney-client privilege, waiver, and inadvertent disclosure.

II. A BRIEF DISCUSSION OF ATTORNEY-CLIENT PRIVILEGE[6]

The attorney-client privilege shields communications between a lawyer and client from discovery. These communications remain

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

3. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE, §§ 5.28-5.33 (3d. ed. Supp. 2009).

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

5. *See infra* notes 58-81 and accompanying text.

6. *See generally* GERGACZ, *Supra* note 3, §§ 3.16-3.66 (discussing pertinent issues within the attorney-client privilege).

confidential.[7] The underlying information, however, is not protected.[8] The discovering party may acquire the information from any source except the privileged attorney-client communication.[9]

Attorney-client privilege dates to at least Elizabethan times[10] and has always been a part of American law.[11] Its confidentiality protection is considered essential to the effective operation of our adversary system of justice.[12] The justification may be summarized as follows:[13] Law is formidable, and complying with its requirements is not a do-it-yourself project. Consequently, attorneys are needed to provide guidance.

However, the quality of an attorney's guidance depends on the information upon which it is based. The more complete the information, the more accurate the advice. Since clients are a vital source of information, their candor is needed. By conferring a confidentiality shield for client-attorney communications, the privilege induces full and unreserved discussion. Without this protection, a client would risk that what was provided to counsel would be available to adversaries too. A key source of information needed by counsel would then be compromised.

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7. *See* Jenkins v. Bartlett, 487 F.3d 482, 490 (7th Cir. 2007) ("The attorney-client privilege protects communications made in confidence by a client to his attorney in the attorney's professional capacity for the purpose of obtaining legal advice.") (citing United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997)).

8. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

9. *See* GERGACZ, *supra* note 3, § 3.51 at 87-88; *Upjohn*, 449 U.S. at 395; Grant v. United States, 227 U.S. 74, 79 (1913); United States v. Motorola Inc., No. Civ. A. 94-2331TFH/JMF, 1999 WL 552553, at *2 (D.D.C. May 28, 1999).

10. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 542 (John T. McNaughton ed., Little, Brown, & Co. 1961) (1904); *see also* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069-70 (1978); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 489 (1928).

11. *See* United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915) ("The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.").

12. *See* Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833) ("[S]o numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.").

13. *See generally* GERGACZ, *supra* note 3, §§ 1.06-1.07.

However, not every attorney-client communication is privileged. An oft-cited test for identifying those that are protected appeared in *United States v. United Shoe Machinery Corporation*.[14]That test has three principal conditions. First, the communicators must be an attorney and a client. For the privilege to apply, the attorney must both be licensed[15]and acting in a lawyer-like role.[16] A lawyer who teaches is not functioning as an attorney. This lawyer, instead, is a professor. Similarly, a person must seek legal guidance to be deemed a client. Merely speaking with an attorney is not enough to satisfy this privilege component.[17]

The second *United Shoe Machinery* condition focuses on the purpose for the communication: to assist an attorney in providing legal advice to a client.[18] Information exchanged for a different reason does not bear upon the policies of the privilege. Thus, there is no need to cloak it with a confidentiality protection. In a corporate setting, the distinction is often made between business-oriented communications, which are discoverable, and communications that seek legal advice.[19]

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14. 89 F. Supp. 357, 358-59 (D. Mass. 1950) ("The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.").

15. *See* Fin. Tech. Int'l, Inc. v. Smith, No. 99 Civ. 9351 GEL RLE, 2000 WL 1855131, at *5 (S.D.N.Y. Dec. 19, 2000) (applying New York law).

16. *See, e.g.*, Great Plains Mut.Ins. Co. v. Mut. Reinsurance Bureau, 150 F.R.D. 193, 197 (D. Kan. 1993) ("In sum, the court is satisfied that Great Plains' attorney was acting in his capacity as an attorney during the relevant portions of the board meetings. The advice rendered by Great Plains' attorney required the skill and expertise of an attorney. In addition, it appears clear from the minutes of the board meetings that the purpose of the conversations during the board meetings was to render legal advice, and that both Great Plains and its attorney understood that the purpose of the communications was to review and consider legal issues pertaining to Great Plains' litigation with MRB.").

17. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) (stating a "communication is not privileged simply because it is made by or to a person who happens to be a lawyer"). For example, the privilege would not arise where the person communicating with counsel is merely an independent witness. *See, e.g.*, Martin v. Workers' Comp. Appeals Bd., 69 Cal. Rptr. 2d 138, 147 (Ct. App. 1997); Leer v. Chi., Milwaukee, St. Paul & Pac. Ry. Co., 308 N.W.2d 305, 309 (Minn. 1981).

18. *See* GERGACZ, *supra* note 3, §§ 3.43-3.55; *see also* Sedco Int'l v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982) (noting legal advice concerning commercial transactions is often intimately inertwined with and difficult to distinguish from business advice); United States v. Willis, 565 F. Supp. 1186 (S.D. Iowa 1983).

19. *See* Marceau v. Int'l Bhd. of Elec. Workers, 246 F.R.D. 610 (D. Ariz. 2007) (suggesting four factors to distinguish legal from business purpose).

United Shoe Machinery's third condition concerns confidentiality. This condition has two aspects. First, the attorney-client communications must occur in confidence.[20] The privilege does not bestow its protection if the attorney and client were not, at the outset, concerned about privacy. After all, the privilege is not warranted if the client did not need a confidentiality protection to encourage candor.

Second, the communications must remain confidential afterwards.[21] The attorney-client privilege imposes an obligation to safeguard confidential communications from disclosure. Failure to do so breaks the seal that the privilege provides, and the communications, thereafter, are as discoverable as any other. The doctrines of waiver and inadvertent disclosure concern this aspect of confidentiality.

III. THE DOCTRINES OF WAIVER AND INADVERTENT DISCLOSURE[22]

Not every disclosure of a privileged communication waives the privilege. For example, disclosure to the attorney's law clerk[23] or to certain employees of a corporate client will not cause a waiver, even though the initial confidentiality of the attorney-client communication has been breached.[24] These recipients are deemed extensions or proxies of the attorney or client. Further, revealing privileged materials to enhance the rendering of legal advice is also acceptable. Thus, several defendants may share privileged communications to further their common legal interests.[25] In addition, the attorney may consult with other lawyers in the process of providing the client with legal advice.[26] In neither situation is confidentiality maintained. However, the provision of legal advice is furthered as a result.

Thus, waiver is not synonymous with a loss of confidentiality. Instead, an issue of fairness predominates.[27] That is, once the privileged materials have been disclosed, would it be unfair for those materials to retain the privilege protection?

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20. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

21. *See, e.g.*, *In re* Penn Cent. Commercial Paper Litig., 61 F.R.D. 453, 463 (S.D.N.Y. 1973) ("It is hornbook law that the voluntary disclosure or consent to the disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege.").

22. *See generally* GERGACZ, *supra* note 3, §§ 5.01-5.64.

23. *In re* French, 162 B.R. 541 (Bankr.D.S.D. 1994).

24. ClubCom, LLC v. Captive Media, Inc., No. 02:07-CV-1462, 2009 WL 1885712, at *2 (W.D. Pa. June 30, 2009).

25. *See* GERGACZ, *supra* note 3, § 3.64.

26. Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 567 (N.D. Ill. 2007).

27. *See* John Doe Co. v. United States, 350 F.3d 299 (2d Cir. 2003).

Evaluating this "fairness" question differs depending on the disclosure scenario. First, some disclosures are consistent with the policies of the privilege and no waiver will arise. The examples above illustrate this point. Second, certain disclosures may be considered "tactical:" information is revealed to further the client's interest and later the privilege is asserted when confidentiality is advantageous. Courts call this "pick[ing] and choos[ing]" or a "voluntary waiver."[28] Here, the privilege protection is lost. Finally, some disclosures are found to be excusable and, thus, do not affect the privilege, even though confidentiality has been breached.[29] Two inquiries predominate: the extent of pre-disclosure confidentiality safeguards and the vigor with which the documents' return was sought. Courts often describe this scenario as "inadvertent disclosure."[30]

The doctrine of inadvertent disclosure was developed for large-scale document productions in which privileged documents were turned over along with discoverable ones.[31] The question was whether the privilege disclosure was excusable and, thus, did not affect the confidentiality protection or whether the disclosure caused a waiver. Three inconsistent approaches arose from case law and even the majority approach had predictability problems.[32] Consequently, elaborate, costly document-screening practices were implemented to guard against the possibility that a privileged document would be produced.[33]

Federal Rule of Evidence 502 was enacted to counteract the effects of avoiding inadvertent disclosures.[34] However, several recent cases construed the rule in such a way so that the rule's hoped-for mitigation of discovery costs and extensive document screening practices may be blunted.[35]

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28. *See In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982).

29. Maldonado v.New Jersey, 225 F.R.D. 120, 126-32 (D.N.J. 2004) (unauthorized leak of privileged communications); Delta Fin. Corp. v. Morrison, No. 011118/2003, 2006 WL 3068853, at *7-8 (N.Y. Sup. Ct. Oct. 24, 2006) (misdirected e-mail).

30. *See* GERGACZ, *supra* note 3, §§ 5.28-5.41.

31. *See generally*, Lois Sportswear v. Levi Strauss, 104 F.R.D. 103 (S.D.N.Y. 1985).

32. *See* GERGACZ, *supra* note 3, §§ 5.29-5.33.

33. United States *ex rel*. Bagley v. TRW, Inc., 204 F.R.D. 170, 177 n.10 (C.D. Cal. 2001).

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

35. *See, e.g.,* King Pharm., Inc. v. Purdue Pharma, L.P, No. 1:08CV00050, 2010 WL 2243872, at *4-5 (W.D. Va. June 2, 2010); Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471-PAB-KMT, 2009 WL 4949959, at *11 (D. Colo. Dec. 14, 2009); Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 52-54 (D.D.C. 2009); Multiquip, Inc. v. Water Mgmt. Sys., L.L.C., No. CV08-403-5-EJL-REB, 2009 WL 4261214, at *3 (D. Idaho Nov. 23, 2009); N. Am. Rescue Prods., Inc. v. Bound Tree Med., L.L.C., No. 2:08-CV-0101, 2009 WL 4110889, at *9 (S.D. Ohio Nov. 19, 2009), *aff'd by* '2010 WL 1873291 (S.D. Ohio, May 10, 2010)); United States v. Sensient Colors, Inc., No. 07-1275-JHR/JS, 2009 WL 2905474, at *6 (D.N.J. Sept. 9, 2009).

Consequently, a review of the inadvertent disclosure doctrine and Rule 502 is called for. Thereafter, a proposed construction of Rule 502 will be offered.

IV. INADVERTENT DISCLOSURE: CASE LAW DEVELOPMENT

Three procedures arose for evaluating the effect of an inadvertent disclosure. First, some courts emphasized the confidentiality perspective and treated inadvertent disclosures no different from any other: documents that remained confidential were privileged. Those that were disclosed caused a waiver.[36]

A second procedure focused on an intent element. Loss of confidentiality alone was not enough to waive the privilege. The disclosure must be willful or purposely done. In effect, the loss of confidentiality was a choice consciously made by the client. Disclosures because of a mere mistake or error would not produce a waiver.[37] Most courts, however, applied a multiple-factor test to determine whether an inadvertent disclosure waived the privilege. This procedure was a mixture of the strict confidentiality and the intent approaches, noted above.

Under the majority approach, the disclosure did not affect the privilege if adequate precautions had been taken to prevent it and if retrieval was promptly and vigorously sought.[38] On the other hand, the disclosure could be deemed "intentional" if a satisfactory level of concern for preserving the privilege was not established.[39] "Intent" was not merely derived from a purposeful disclosure. It could be inferred from a lack of care.

The doctrine of inadvertent disclosure, as developed by the courts, created uncertainty for litigants engaged in document discovery. Several reasons can be offered.

First, as noted above, the procedures used to evaluate the effect of an inadvertent disclosure led to different conclusions, depending on which was applied. For example, a privileged document produced by mistake would

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36. *See, e.g.*, Fed. Deposit Ins. Corp. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) ("One cannot 'unring' a bell."); *see generally* GERGACZ, *supra* note 3, § 5.30, at 57-58 (stating that privilege is waived when documents are not kept confidential).

37. *See, e.g.*, Jones v. Eagle-North Hills Shopping Ctr., L.P., 239 F.R.D. 684, 685 (E.D. Okla. 2007); *see generally* GERGACZ, *supra* note 3, § 5.31, at 59 (stating no waiver unless client voluntarily waives).

38. *See, e.g.*, Alldread v. City of Grenada, 988 F.2d 1425, 1433-34 (5th Cir. 1993); *see generally* GERGACZ, *supra* note 3, § 5.32, at 65.

39. *See, e.g.*, Scott v. Glickman, 199 F.R.D. 174, 180 (E.D.N.C. 2001) (finding waiver existed because appropriate confidentiality protective safeguards were not taken).

cause a waiver if the strict confidentiality test was applied,[40] but no waiver if the intent test is used.[41] Under the majority factors test, the circumstances surrounding the particular disclosure would be the focal point. However, one could not know what the particular circumstances were beforehand and prepare accordingly.[42]

Furthermore, there was no uniformly accepted document screening procedure and no template existed for conducting privilege searches or what needed to be done for retrieval.[43] For example, some cases suggest that lack of attorney involvement in the screening shows inadequate commitment for preserving the privilege.[44] Others suggest that disclosures arising from an attorney's screening mistake were not excusable.[45]

In addition, some cases so strictly evaluated the disclosure that virtually no screening process would pass muster.[46] These cases heavily emphasized the loss of confidentiality, similar to the strict confidentiality approach. In effect, the document screening had to be suspect since a privileged document slipped through.[47]

Finally, a finding that the disclosure was a waiver raised the possibility, in some courts, of a subject matter waiver applying.[48] If that occurred, other related privileged documents would also lose their

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40. Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988) ("[I]n the real world, unforced disclosure is disclosure and should support the waiver argument.").

41. United States *ex rel*. Bagley v. TRW, Inc., 204 F.R.D. 170, 176 n.10 (C.D. Cal. 2001) (refusing to find waiver based on a "gotcha" theory; that is, a slip-up in production yields a waiver).

42. *See* GERGACZ, *supra* note 3, § 5.32 (citing Transamerica Computer Co., Inc. v. IBM, 573 F.2d 646 (9th Cir. 1978) (discussing screening processes to comply with IBM's discovery requests); Bank Brussels Lambert v. Chase Manhattan Bank N.A., No. 93-5298, 1996 WL 944011 (S.D.N.Y. Dec. 19, 1996) (stating that failure to label documents as privileged amounts to waiver for inadvertent disclosure); Draus v. Healthtrust, Inc., 172 F.R.D. 384 (S.D. Ind. 1997) (stating that labeling documents as privileged gives reason for finding their disclosure to not be inadvertent); Stewart v. Gen. Motors Corp., No 86-4741, 1988 WL 6297 (N.D. Ill. Jan. 27, 1988) (discussing inadvertence test and six factors for determining whether waiver occurred)).

43. *See TRW, Inc*., 204 F.R.D. 176 n.10.

44. *See* Mfrs. & Traders Trust Co. v. Servotronics, Inc., 522 N.Y.S. 2d 999, 1004-1005 (App. Div. 1987).

45. Williams v. Sprint/United Mgmt. Co., No. 03-2200-JWL, 2007 WL 38397 at *5 (D. Kan. Jan. 5, 2007) (stating disclosure by counsel who mistakenly believed document was not privileged was not an inadvertent disclosure).

46. *See* GERGACZ, *supra* note 3, § 5.33 (citing Fed. Deposit Ins. Co. v. Marine Midland Reality Corp., 138 F.R.D. 479 (E.D. Va. 1991)).

47. *See* Air-Ride, Inc. v. DHL Express (USA), Inc., No. CA2008-01-001, 2008 WL 4766832, at *4 (Ohio Ct. App. Nov. 3, 2008) ("The inadvertent disclosure of documents is, in itself, indicative of a failure to take reasonable precautions to protect privilege.").

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

confidentiality protection.[49] Consequently, planning to avoid a waiver during document discovery was fraught with difficulties. Elaborate screening procedures were encouraged to minimize privilege disclosures and, perhaps, satisfy the majority approach if applied. Increasing costs, delay, and battles over the fate of inadvertently disclosed documents followed. These impediments laid the groundwork for Federal Rule of Evidence 502.[50]

V. INADVERTENT DISCLOSURE: FEDERAL RULE OF EVIDENCE 502

Rule 502 was designed to deal with the concerns, noted above, that arose from the cases construing inadvertent disclosures. An inadvertent disclosure would no longer put at risk the confidentiality of related privileged materials, too.[51] Second, the rule adopted the majority approach for determining whether an inadvertent disclosure would yield a waiver.[52]

Rule 502(a) requires that three factors be satisfied before a party may demand the production of additional undisclosed communications.[53] First, the waiver must be intentional. Second, the disclosed and undisclosed privileged communications relate to the same subject matter. Third, in fairness, these communications should be considered together.

Rule 502(b) also has a three factor test.[54] Its focus is whether a disclosure was excusable and, thus, did not waive the privilege. First, the disclosure must have been inadvertent. Second, reasonable steps must be in place to prevent the disclosure and, third, prompt and credible steps must have been taken to rectify the error.

However, Rule 502 defines neither an "intentional waiver" nor "inadvertent disclosure." Further, the relationship between Rule 502(a)'s subject matter waiver and Rule 502(b)'s inadvertent disclosure is not clearly spelled out. In short, the language of Rule 502(a) and (b) presents a more modest reform package than the advisory committee notes suggest. Thus, Rule 502's effect on discovery practices will turn on how the courts apply it.

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49. *See* GERGACZ, *supra* note 3, § 5.16 ("The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to the subject matter.") (quoting Hercules v. Exxon, 434 F.Supp. 136, 156 (D. Del. 1977)).

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

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

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

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

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

Some recent cases focused strictly on the rule's language.[55] Others were less rigid.[56] Nonetheless, these early decisions create uncertainty in the application of the rule.

A. Uncertain Application of Rule 502(b)'s Inadvertent Disclosure Provisions

Even at this early date, two means for interpreting Rule 502(b) may be identified.[57] One approach, called the "prerequisite approach," requires that the disclosure be deemed "inadvertent" before the confidentiality safeguards that were in place or the steps taken after the disclosure are evaluated.[58] That is, satisfying subparagraph one is a prerequisite for applying the balance of Rule 502(b). Under the prerequisite approach, a waiver can arise under two circumstances. First, if subparagraph one is not satisfied; that is, the disclosure was not deemed "inadvertent." Second, in circumstances where subparagraph one was *satisfiedif* either the protective measures, subparagraph two, or, the steps taken to rectify, subparagraph three, are found wanting.

A second approach, called the "blend approach," slides over subparagraph one. Inadvertent disclosure is treated as a conclusion arising from the terms of subparagraphs two and three being established.[59] In essence, Rule 502(b)'s subparagraphs blend together. Unlike the prerequisite approach, categorizing the disclosure as inadvertent is not the focus. Instead, under the blend approach, the key is the context in which the disclosure occurred. Thus, the greater care to preserve confidentiality, the more likely the disclosure will be excusable. The blend approach is like the one used in most inadvertent disclosure case precedent prior to Rule

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55. Silverstein v. Fed. Bureau of Prisons, No. 07-02471-PAB-KMT, 2009 WL 4949959 (D. Colo. Dec. 14, 2009); N. Am. Rescue Prods., Inc. v. Bound Tree Med., L.L.C., No. 2:08-101, 2009 WL 4110889 (S.D. Ohio Nov. 19, 2009).'

56. King Pharm., Inc. v. Purdue Pharma, L.P., No. 1:08CV00050, 2010 WL 2243872 (W.D. Va. June 2, 2010); Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45 (D.D.C. 2009); Multiquip, Inc. v. Water Mgmt. Sys., L.L.C., No. CV-08-403-S-EJL-REB, 2009 WL 4261214 (D. Idaho Nov. 23, 2009); United States v. Sensient Colors, Inc., No. 07-1275 JHR/JS, 2009 WL 2905474 (D.N.J. Sept. 9, 2009).

57. FED. R. EVID. 502(b) contains three subparagraphs: "(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 . . . ."

58. *Silverstein*, 2009 WL 4949959; *N. Am. Rescue Prods., Inc*., 2009 WL 4110889 *aff'd byN. Am. Rescue Prods., Inc*.,'2010 WL 1873291 (S.D. Ohio May 10, 2010).

59. Bd. of Trs. v. Palladium Equity Partners, L.L.C., 722 F. Supp. 2d.845 (E.D. Mich. 2010); *King Pharm., Inc*., 2010 WL 2243872; *Amobi*, 262 F.R.D. 45; *Sensient Colors, Inc*., 2009 WL 2905474.

502(b).[60]

Application of these approaches may not yield the same conclusion. Although the case precedent is thin, use of the prerequisite approach appears more likely to lead to a finding of waiver than use of the blend approach.[61] For example, consider a disclosure that was caused by an attorney's misstep. "Prerequisite approach" courts have found that lawyer production mistakes fall outside Rule 502(b)(1).[62] Under this view, "not every mistake or error qualifies as inadvertent."[63] Ones made by counsel were found to arise from poor judgment rather than inadvertence. Thus, a waiver resulted.[64]

Use of the blend approach produced the opposite result: lawyer-caused disclosures were not outside the scope of Rule 502(b).[65] One court noted that finding otherwise would undermine the rule: "It would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege."[66]

Complicating matters further, courts construing Rule 502(b) have defined "inadvertent disclosure," differently.[67] For example, the court in *Multiquip v. Water Management* asserted that an inadvertent disclosure was not intentional nor was a mistake.[68] Consider that *Silverstein v. Federal Bureau of Prisons* defined inadvertent as, "unintended rather than mistaken."[69] Then, add to these particulars, *United States v.*

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60. *See* GERGACZ, *supra* note 3, § 5.32.

61. *Compare N. Am. Rescue Prods., Inc.*, 2009 WL 4110889, at *9 ("The circumstances of the disclosure demonstrate that it was not unintentional, accidental or unknowing. Rather, the documents were purposefully produced because, as NARP explained, they were reviewed." Review done by counsel, Rule 502(b)(1) not satisfied) *withKing Pharm., Inc.*, 2010 WL 2243872, at *2 ("The fact that the document had been reviewed and partially redacted does not by itself prevent the disclosure from being inadvertent. The nature of the mistake in disclosing a document is not limited by the rules, and logically ought to include mistaken redaction as well as other types of mistakes that result in disclosure." Review done by counsel, Rule 502(b)(1) was satisfied).

62. *Silverstein*, 2009 WL 4949959, at *11.

63. *Id.* ("This court is not convinced that this type of mistake was Congress' concern when creating Rule 502.").

64. *See Id.*; *N. Am. Rescue Prods., Inc.*, 2009 WL 4110889.

65. *King Pharm., Inc.,* 2010 WL 2243872; *Amobi*, 262 F.R.D. 45 (D. D.C. 2009).

66. *Amobi*, 262 F.R.D. at 54.

67. *See, e.g.*, Silverstein v. Fed.Bureau of Prisons, No. 07-CV-02471-PAB-KMT, 2009 WL 4949959, at *11 (D. Colo Dec. 14, 2009); Multiquip, Inc. v. Water Mgmt. Sys., L.L.C., No. CV08-403-S-EJL-REB, 2009 WL 4261214, at *4 (D. Idaho Nov. 23, 2009); United States v. Sensient Colors, Inc., No. 07-1275 (JHR/JS), 2009 WL 2905474, at *4 (D.N.J. Sept. 9, 2009).

68. Multiquip, Inc. v. Water Mgmt. Sys., LLC, No. CV08-403-S-EJL-REB, 2009 WL 4261214, at *4 (D. Idaho Nov. 23, 2009).

69. *Silverstein*, 2009 WL 4949959, at *11.

SensientColors, Inc: "All inadvertent disclosures are by definition unintentional."[70]

Some courts turned to dictionaries for help. The court in *Silverstein* quoted from *Webster'sDictionary*: "not attentive or observant; heedless; due to oversight; unintentional."[71] The court in *Amobi* used the *Oxford English Dictionary* definition instead: "Not properly attentive or observant, inattentive, negligent; heedless . . . characterized by want of attention or taking notice; hence, unintentional."[72]

Although these dictionary definitions are similar, the courts' use of them were not. *Silverstein* focused exclusively on "unintentional," finding that a mistaken disclosure would not qualify as inadvertent.[73] By way of contrast, *Amobi* seemed to include "not properly attentive or observant," when holding that a lawyer's mistaken disclosure may be deemed inadvertent.[74]

In addition, reading further from these definitions muddles the application of Rule 502(b) even more. Note the term, "heedless," in *Webster'sDictionary* definition and the word, "negligent," in the *OxfordEnglish Dictionary*.[75] Courts have suggested that seemingly negligent or heedless disclosures of privileged documents are not inadvertent and a waiver, thus, arises.[76]

However, the unpredictable application of Rule 502(b) is not the only concern. There is also uncertainty regarding the relationship between Rule 502(a), subject matter waiver, and Rule 502(b) inadvertent disclosures.

B. Uncertain Relationship Between Rule 502(a) Intentional Waivers and Rule 502(b) Inadvertent Disclosure

Under Rule 502(a)(1), a party may not demand undisclosed communications unless "the waiver is intentional," the disclosed and undisclosed communications concern the same subject matter and the

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70. United States v. Sensient Colors, Inc., No. 07-1275(JHR/JS), 2009 WL 2905474, at *4 (D.N.J. Sept. 9, 2009).

71. *Silverstein*, 2009 WL 4949959, at *10.

72. *Amobi*, 262 F.R.D. at 53.

73. *Silverstein*, 2009 WL 4949959, at *11.

74. *Amobi*, 262 F.R.D. at 54.

75. *See supra* text accompanying notes 70 and 71.

76. Raytheon Co. v. Indigo Sys. Corp., No. 4:07-CV-109, 2008 WL 5422872, at *1 (E.D. Tex. Dec. 29, 2008) (holding disclosure after two reviews was not inadvertent); Williams v. Sprint/United Mgmt. Co., No. 03-2200-JWL, 2007 WL 38397, at *5 (D. Kan. Jan. 5, 2007) (holding poorly judged disclosure not inadvertent); U.S. Fid. & Guar. Co. v. Baspetro Oil Servs. Co., Nos. 97 CIV. 6124(JGK)(THK); 98 CIV. 3099(JGK)(THK), 2000 WL 744369 (S.D.N.Y. June 8, 2000) (holding reckless disclosure not inadvertent).

disclosed and undisclosed communications ought in fairness to be considered together.[77] An "intentional waiver," however, is not defined nor is there a provision that sets out the relationship between Rule 502(a)'s subject matter waivers and Rule 502(b).

Nonetheless, the Advisory Committee's Notes state that, under the rule, subject matter waivers never apply to inadvertent disclosures.[78] In addition, courts have noted that Rule 502 rejected prior case precedent that had applied subject matter waivers in those settings.[79] Further, the terms in each section: "intentional" and "inadvertent," suggest a separation between subject matter waivers and inadvertent disclosures.

However, recent constructions of Rule 502 raise doubts. Consider the "prerequisite approach" used by some courts when applying Rule 502(b).[80] These courts defined inadvertent as "unintended." Mistaken or poorly judged disclosures were not deemed "unintended." Such disclosures may, thus, be considered "intentional" and, if so, may come under Rule 502(a)'s subject matter waiver provisions.

Note the analysis used in *Silverstein*.[81] A privileged document was disclosed by mistake.[82] The lawyer who produced it erred in classifying the document as discoverable based on inaccurate information he had received.[83] The court found that this mistake was not "inadvertent" because Rule 502(b)(1) covers unintended rather than mistaken disclosures.[84] Further, the court also found that neither Rule 502(b)(2)'s reasonable precautions nor Rule 502(b)(3)'s rectifying steps were satisfactory.[85] Thus, since the disclosure fell short of fulfilling Rule 502(b), the court applied Rule 502(a)'s subject matter waiver provisions.[86] Not only was the lawyer's mistake not deemed "inadvertent," it led to the waiver of related privileged documents, too.[87] In fact, the court suggested that failure to satisfy any one of Rule 502(b)'s subparagraphs would have the same effect: "In this case the failure to cure the disclosure of the October 2004

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

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

79. *Silverstein*, 2009 WL 4949959, at *9 (noting that the prerequisite approach was used and the disclosure deemed not inadvertent.Thus, a subject matter waiver applied.); *Amobi*, 62 F.R.D. at 53.

80. *See supra* text accompanying notes 58-64.

81. *Silverstein*, 2009 WL 4949959.

82. *Id*. at *1.

83. *Id*. at *11.

84. *Id*.

85. *Id*.

86. *Id*. at *12.

87. *Id*. at *8.

Document lendssupport to an inference of intentional waiver." [88]

Consequently, the uncertainty arising from judicial construction of Rule 502 risks undermining the rationale for the rule. The efficient, less costly, and less contentious discovery practices that the rule was designed to encourage may be in jeopardy. In fact, parties may find themselves little better off than before the rule was enacted.

Thus, a fresh approach is needed when construing Rule 502.

VI. A PROPOSED CONSTRUCTION OF RULE 502

Rule 502 should apply only when privileged materials are produced during document discovery. Thus, its scope should be limited. Consider Rule 502, then, as a special set of waiver principles that arise only in this setting. The rule's goals, its language,[89] and the advisory committee notes support this approach. Further, the case law, from which the rule was derived, came from the document discovery setting too.[90]

Breaches of confidentiality that occur in other situations, even by mistake, would be outside Rule 502's scope.[91] Case law would provide the waiver test, not Rule 502.

The reason for this distinction is to clear up the confusion surrounding the term "inadvertent disclosure." Under Rule 502(b)(1), the expression should be considered a term of art, describing the locality of the disclosure: document discovery. The cause for the disclosure—a mistake, or something was overlooked, or one made a misjudgment or it was unintentional—should be beside the point. Mistakes and misjudgments would not even be germane. Instead, whether the discovery production disclosure caused a waiver would depend upon the measures used to

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88. *Id.* at *13.

89. Other sections of Rule 502 concern document discovery settings. Rule 502(d) formalizes the use of protective orders during document discovery to protect the privilege. Rule 502(c) does the same for parties' agreements. These sections were derived from practices litigants used to manage the cost and risk to privilege during document discovery. *See*GERGACZ, *supra* note 3, § 5.41.

90. *See generally* Alpert v. Riley, 267 F.R.D. 202, 209 (S.D. Tex. 2010) ("Much of the case law concerning inadvertent disclosure developed in the context of privileged materials unintentionally produced to an opposing party during discovery."); GERGACZ, *supra* note 3, § 5.32

91. *See Alpert*, 267 F.R.D. at 209 n.2 (noting that Rule 502 is inapplicable when the accidental disclosure occurred outside of discovery. Common law applied instead.); Multiquip, Inc. v. Water Mgmt. Sys., L.L.C., No. CV 08-403-S-EJL-REB, 2009 WL 4261214, at *4 (D. Idaho Nov. 23, 2009) (applying Rule 502(b) inadvertent disclosure provisions to a misdirected e-mail. It was an awkward fit. The court noted, when applying Rule 502(b)(2) that there was no protocol to compare and critique because the nature of the e-mail mistake was different than document production,).

prevent it[92] and the actions taken to rectify it.[93]

Furthermore, the proposed term of art construction removes "inadvertent disclosure" from being deemed conclusory; that is, an inadvertent disclosure is one in which no waiver occurs. Conversely, if the disclosure is not inadvertent, then the privilege is waived. Instead, the waiver/no waiver conclusion would arise from the application of Rules 502(b)(2) and (3). The analysis would not be connected to a dictionary definition of inadvertence.

Construing inadvertent disclosure this way eliminates the uncertainty that has arisen in the cases. For example, the privilege disclosures in *Bound Tree* and *Silverstein*, as well as in *King Pharmaceuticals*, *Amobi* and *Sensient* would now all satisfy Rule 502(b)(1).[94] They occurred during document discovery. Determining whether a disclosure was sufficiently mistaken to be within that subparagraph would not take place. Predictability would be enhanced because whether the disclosure came about because of a faulty document screening process or whether an attorney erred or used poor judgment in deciding what to disclose would no longer be at issue.

Nonetheless, not every inadvertent disclosure will avoid a waiver. Rule 502(b)(2)—reasonable protective measures in place—and Rule 502(b)(3)—prompt measures to rectify the disclosure—must also be satisfied. All the proposed construction does is trigger the application of the distinctive Rule 502(b) privilege waiver rules that apply in document discovery settings.

Consider how the proposed construction would affect the courts' findings in *Bound Tree* and *Silverstein*.[95] Both cases would now satisfy Rule 502(b)(1) because the disclosures occurred during document discovery. Nonetheless, the privilege would still be waived in those cases because neither Rule 502(b)(2) nor Rule 502(b)(3) was established.

Parties, hereafter, will know that the key for protecting privilege during document discovery is not the unfathomable "how" a disclosure may

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

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

94. King Pharm., Inc. v. Purdue Pharma, L.P., No. 1:08CV00050, 2010 WL 2243872 (W.D. Va. June 2, 2010); Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471-PAB-KMT, 2009 WL 4949959 (D. Colo. Dec. 14, 2009); Amobi v. D.C. Dep't of Corrections, 262 F.R.D. 45 (D.D.C. 2009); N. Am. Rescue Prod., Inc. v. Bound Tree Med., LLC, No. 2:08-CV-101, 2009 WL 4110889 (S.D. Ohio Nov. 19, 2009) *aff'd by* N. Am. Rescue Prods., Inc. v. Bound Tree Med., L.L.C., No. 2:08-CV-101, '2010 WL 1873291 (S.D. Ohio May 10, 2010)); United States v. Sensient Colors, Inc., No. 07-1275 (JHR/JS), 2009 WL 2905474 (D.N.J. Sept. 9, 2009).

95. *Silverstein*, 2009 WL 4949959; *Bound Tree Med.,* 2009 WL 4110889.

occur (e.g., by mistake, poor judgment, or unintended disclosure). Instead, the key is predictable planning: put reasonable safeguards in place and create a procedure for prompt action if a disclosure occurs.[96]

Finally, the proposed construction also clarifies the relationship between Rule 502(b), inadvertent disclosure, and Rule 502(a), subject matter waiver. That is, a subject matter waiver will not apply when privilege disclosures occur during document discovery. Limiting the scope of waiver to the disclosed privileged document itself is consistent with the purpose of Rule 502 and the Advisory Committee's Note. The proposed construction eliminates the concern, noted earlier, that if Rule 502(b) is not satisfied, then a Rule 502(a) subject matter waiver may follow.[97] Consider also, that if "inadvertent disclosure" is deemed a term of art, referring to privilege disclosures during discovery, then by its terms, a Rule 502(a) subject matter cannot apply. Under privilege law, waiver uses the term, "intentional," in a limited way. It is not a question of whether the disclosure itself was intended. After all, a waiver may arise if a thief absconds with a document.[98]

Instead, what is intended is the relinquishment of the privilege. This is assessed by evaluating whether the loss of confidentiality has compromised the goals of the privilege. Thus, a "waiver intent" is linked to the privilege policies.[99] It does not arise merely because the act of disclosure itself was voluntary.

Both discovery and the privilege have the same purpose: furthering justice through the adversary system. However, they do so in conflicting ways. Discovery promotes justice by mandating disclosure. Privilege promotes justice through confidentiality. During document discovery, these justice interests clash. Disclosing privileged documents risks causing a waiver. Failure to disclose relevant documents risks discovery sanctions.

Rule 502 made a choice: in the interest of justice, the balance between discovery and privilege confidentiality needed to be remade. Consequently, document disclosure was encouraged through strengthening the privilege; its confidentiality requirement was eased, thus limiting waiver. This

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96. An agreement between the parties or a protective order may also be sought beforehand. *See*FED. R. EVID.502(c)-(d). A discussion of these methods is beyond the scope of this article. *See generally* GERGACZ, *supra* note 3, § 5.41.

97. *See supra* text accompanying notes 76-81.

98. *See* Bower v. Weisman, 669 F. Supp. 602, 605-06 (S.D.N.Y. 1987) (finding a letter that was stolen after being left on a table was not confidential); GERGACZ, *supra* note 3, §§ 5.42, 5.44.

99. Not all disclosures of privileged communications create a waiver. *See supra* text accompanying notes 23-27; GERGACZ, *supra* note 3, § 5.15.

article's proposed construction of Rule 502 ensures that this accommodation is maintained.

VII. SUMMARY

Rule 502 was enacted to counteract problems that occurred when applying the attorney-client privilege's waiver doctrine to inadvertently disclosed privileged communications. Provisions were included in the rule that clarified when an inadvertent disclosure occurred and whether it affected a claim of privilege.

However, several recent cases have cast doubt about how effective Rule 502 will be. These cases offered different, inconsistent interpretations of the rule. Unless resolved, predictable application will be endangered and the uncertainty will undermine Rule 502's goals.

This article proposes a better construction so that Rule 502 may be predictably applied and its policies furthered. In short, the term "inadvertent disclosure" should not refer to how a disclosure came about (e.g., by mistake, misjudgment, or unintentionally). Instead, "inadvertent disclosure" should be considered a term of art, referring only to the scenario in which the disclosure occurred during document discovery.

Whether the disclosure was excusable or caused a waiver would depend on the confidentiality safeguards in place and the steps taken after the disclosure occurred. The word "inadvertent" in Rule 502 would, thereby, be severed from its dictionary definition. Furthermore, a subject matter waiver will never arise from disclosures during document discovery.

This proposed, preferred construction of Rule 502 will enhance its predictability, anchor it to the case law underlying waiver of the attorney-client privilege, and promote the policies Rule 502 was designed to foster.