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Preserving Attorney-Client Privilege in the Age of Electronic Discovery

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Preserving Attorney-Client Privilege in the Age of Electronic Discovery

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I. INTRODUCTION

> *The rule which places the seal of secrecy upon communications between client and attorney 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.*[1]

The attorney-client privilege, an essential component of the American legal system, fosters open dialogue between clients and their attorneys without fear of compelled disclosure of their confidential communications.[2] Despite the centuries-old importance of the attorney-client privilege,[3] however, the inadvertent disclosure of a client's confidences can result in privilege waiver in many jurisdictions.[4] Once a court finds waiver of the privilege as a result of inadvertent disclosure, such confidential information may be introduced as evidence at trial.[5] The consequences of inadvertent disclosure can therefore be damning even if counsel took important steps to safeguard the client's confidences.[6]

Electronic discovery[7] poses unique problems for preserving attorney-client privilege because the discovery of electronically stored information is immensely

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1. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

2. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); United States. v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997) ("[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system."). Some commentators and judges, however, have argued that the privilege is unnecessary to foster the attorney-client relationship, and some have even reasoned that attorneys have a duty in civil litigation to disclose *all* material evidence regardless of any claim of privilege. *See, e.g.*, Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. Colo. L. Rev. 51 (1982). While this note does not fully address Judge Frankel's argument, his premise would destroy the privilege and undermine the trust required in the attorney-client relationship. *Cf.* Swidler & Berlin v. United States, 524 U.S. 399, 412 (1998) ("The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice." (citing *Upjohn*, 449 U.S. at 389)). For an in-depth discussion and critique of Judge Frankel's proposition, see Albert W. Alschuler, *The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel*, 54 U. Colo. L. Rev. 67 (1982). This note specifically defends a robust privilege rule in its proposal and refutes the premise that the privilege hinders truth seeking. *See infra* Part IV.C.

3. *See infra* Part II.A and sources cited *infra* note 21.

4. *See infra* Part II.B and notes 48–49; *see also* 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5507, at 578 (1986) (introducing the controversy and jurisdictional split over inadvertent waiver doctrine).

5. *See Development in the Law—Privileged Communications: VII. Implied Waiver*, 98 Harv. L. Rev. 1629, 1660–61 (1985).

6. *See, e.g.*, Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000) (finding waiver of privilege due to inadvertent disclosure caused by paralegal's mistake, despite massive privilege review).

7. Electronic discovery is the pre-trial "process of collecting, preparing, reviewing, and producing electronically stored information" relevant to the disposition of a legal matter and shared with opposing counsel in an attempt to discover facts about the matter. The Sedona Conference Glossary: E-Discovery & Digital Information Management 18 (2d ed. 2007), *available at* http://www.

more complex, costly, and time-consuming compared to paper-based discovery.[8] Although the risk of inadvertent disclosure is always an issue with discovery, the sheer volume of electronic information poses an even greater threat that a privileged file or e-mail may be overlooked.[9] As the volume and complexity of electronically stored information has increased, the risk of inadvertent waiver during discovery has correspondingly sky-rocketed.[10] The process of checking electronic data for privileged material is onerous, requiring time-consuming and expensive discovery practices called "privilege review."[11] Privilege review requires counsel to check all discoverable material for privileged information to protect the client because the slightest oversight can be devastating.[12] If counsel fails to conduct a thorough review and a privileged file is mistakenly produced, a court may find the privilege waived because counsel did not adequately safeguard the client's confidences.[13]

Given these concerns, scholars have questioned whether inadvertent disclosure should result in waiver.[14] Indeed, courts are side-stepping waiver rules by encouraging parties to enter into confidentiality agreements that contract around inadvertent waiver of the privilege.[15] However, a confidentiality agreement, because it is merely contractual, is not binding on third parties or in a separate proceeding unless incorporated into a court order,[16] and as such, confidentiality agreements are inadequate to resolving the issue of inadvertent waiver. Some courts have reasoned that they have the authority to issue such non-waiver orders,[17] and Congress sanctioned this approach

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thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf [hereinafter The Sedona Conference Glossary].

8. *See* Byers v. Ill. State Police, No. 99-C-8105, 2002 WL 1264004, at *10 (N.D. Ill. June 3, 2002).

9. *See id.*

10. *See* Sasha K. Danna, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 Loy. L.A. L. Rev. 1683, 1729–30 (2005); Roberta M. Harding, *"Show and Tell": An Analysis of the Scope of the Attorney-Client Waiver Standards*, 14 Rev. Litig. 367, 369–71 (1995).

11. *See* Laura Catherine Daniel, Note, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 Wm. & Mary L. Rev. 663, 673–74 (2005).

12. *See id.* at 674–75.

13. *See id.*; *see also* United States *ex rel.* Bagley v. TRW, Inc., 204 F.R.D. 170, 176–77 & n.10 (C.D. Cal. 2001).

14. *See, e.g.*, McCormick on Evidence § 93, at 144 (John W. Strong ed., 5th ed. 1999) ("Given the scope of modern discovery and the realities of contemporary litigation, a question of great practical importance today is whether . . . inadvertent disclosure should result in waiver.").

15. *See, e.g.*, Employers Ins. Co. of Wausau v. Skinner, No. CV 07-735, 2008 WL 4283346, at *7 (E.D.N.Y. Sept. 17, 2008); *see also* 1 Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 433 (5th ed. 2007) (explaining that these contractual agreements "will be allowed to trump existing case law" on waiver).

16. *See* Fed. R. Evid. 502(e) ("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.").

17. *See, e.g.*, Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 239 (D. Md. 2005); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432 (S.D.N.Y. 2002).

with the enactment of Federal Rule of Evidence 502.[18] Rule 502 permits a federal court to order that inadvertent disclosure during discovery will not waive the privilege and cannot operate as a "waiver in any other Federal or State proceeding."[19] Rule 502, though, is inadequate. The rule does not create uniformity in the law. It fosters unpredictability and an incentive for forum shopping because it provides no guidelines to courts, and it pushes the burden on clients to obtain a non-waiver order—or face the worst.[20]

Part II of this note discusses the history of the attorney-client privilege and the conflicting law among American jurisdictions on inadvertent waiver. Part III explains how electronic discovery threatens the privilege and argues that antiquated waiver rules are undermining it. Finally, Part IV analyzes the current trend by parties to avoid privilege waiver through confidentiality agreements and court-issued non-waiver orders. This approach, now sanctioned by Rule 502, merely circumvents the real problem facing the legal profession: outdated privilege-waiver rules governed by fifty different states, ninety-four federal judicial districts, and twelve federal circuits. This note proposes that Congress should enact a uniform privilege rule that adopts a client-oriented approach to waiver law.

II. ATTORNEY-CLIENT PRIVILEGE AND WAIVER LAW

A. History of the Attorney-Client Privilege

The attorney-client privilege has been the cornerstone of the common law system ever since the reign of Queen Elizabeth I in the sixteenth century.[21] As the late Chief Justice William Rehnquist eloquently made clear, the "attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[22] The purpose of the privilege, however, has changed over time.[23] Centuries ago in England, the privilege developed to preserve the honor of attorneys and to allow them to maintain client confidences in the face of compelled testimony.[24] Since the late eighteenth century, the privilege has been rooted in the theory that clients must fully disclose their legal problems to their attorneys in order to obtain the best possible and

18. *See* Attorney-Client Privilege and Work Product; Limitations on Waiver, Pub. L. No. 110-322, 122 Stat. 3537 (2008) (codified as Fed. R. Evid. 502 (2008)).

19. Fed. R. Evid. 502(d).

20. *See* discussion *infra* Part IV.B.

21. *See* Berd v. Lovelace, (1577) 21 Eng. Rep. 33 (Ch.) (solicitor exempted from compelled testimony); 4 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 2290, at 3193–94 (Little, Brown, & Co. 1905); Epstein, *supra* note 15, at 4.

22. *Upjohn*, 449 U.S. at 389. *Upjohn* was issued before William Rehnquist became Chief Justice of the United States, although I respectfully apply the title here.

23. *See* Epstein, *supra* note 15, at 4.

24. *See* Wigmore, *supra* note 21, § 2290, at 3194; Epstein, *supra* note 15, at 4.

most honest legal advice.[25] The present purpose of the privilege, therefore, is to "encourage full and frank communication between attorneys and their clients. . . . The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer[] being fully informed by the client."[26] The privilege exists to protect the attorney-client relationship.[27]

Three basic presumptions support this rationale. First, clients need attorneys because the legal process is too complex to understand without the assistance of trained legal professionals.[28] Second, the privilege allows clients to disclose—without fear of retaliation—all the necessary facts to their attorneys in order to receive sound advice during the course of representation.[29] Third, clients would hesitate to disclose their confidences to their attorneys without the assurance that a court will not later compel testimony about such information.[30]

Attorney-client privilege is not merely procedural in nature, but substantive law.[31] It is governed by state law even in federal court when a matter concerns a state-created right or, in cases of a federal question, governed by a federal court's interpretation of the common law.[32] Proposed Federal Rule of Evidence 503, while never enacted into law, is commonly accepted as a concise summary of the privilege:[33]

> [The] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.[34]

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25. *See In re* Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961); Wigmore, *supra* note 21, § 2290, at 3194–95; Paul R. Rice, Attorney-Client Privilege in the United States § 1:3 (2d ed. 1999).

26. *Upjohn*, 449 U.S. at 389.

27. *See In re* Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975); Epstein, *supra* note 15, at 19.

28. *See* Restatement (Third) of the Law Governing Lawyers § 68 cmt. c (2000).

29. *See id.*

30. *See id.*

31. *See* Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967).

32. *See* Fed. R. Evid. 501; United States v. BDO Seidman, LLP, 492 F.3d 806, 814 (7th Cir. 2007); Willy v. Admin. Review Bd., 423 F.3d 483, 495 (5th Cir. 2005) (explaining that federal common law governs privilege analysis when claims arise under federal question jurisdiction).

33. Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005) (quoting 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.02 (Matthew Bender 2d ed. 1997)); *see also In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997). The privilege protects clients, that is, persons who consult with lawyers to obtain professional legal services and/or advice. Weinstein & Berger, § 503.01 (stating the text of United States Supreme Court Standard 503, which Congress declined to adopt as Federal Rule of Evidence 503).

34. United States Supreme Court Standard 503, *quoted in* Weinstein & Berger, *supra* note 33, § 503.01.

Under established common law doctrine, the privilege protects attorney-client communications when:

> (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 this communication is acting as a 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*.[35]

Privileged communications include attorney-client conversations through electronic means,[36] and even nonverbal acts and bodily conduct intended to convey information.[37] Despite the privilege's importance, courts sometimes narrowly construe its application on the grounds that the privilege *allegedly* suppresses the free flow of relevant evidence that may impact the resolution of a legal matter.[38] In fact, disputes over the privileged nature of otherwise discoverable material frequently occur in litigation and are hotly contested because the admission of privileged material can be outcome determinative.[39]

B. Safeguard Your Confidences, or Else!

A court may find attorney-client privilege waived if a party does not diligently safeguard its confidences.[40] Nearly all courts will find privilege waiver when a party voluntarily discloses its confidences to a third party or its adversary.[41] More contentious, however, is whether the privilege can be waived by inadvertent disclosure.[42] Under the inadvertent waiver doctrine, counsel can cause privilege waiver by mistakenly disclosing privileged material to the opposing party during discovery.[43]

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35. Suss v. MSX Int'l Eng'g Servs., Inc., 212 F.R.D. 159, 163 (S.D.N.Y. 2002) (emphasis added) (quoting United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950)). New York State defines privilege under N.Y. C.P.L.R. § 4503 (McKinney 2007).

36. *See* Restatement (Third) of the Law Governing Lawyers § 69 cmt. b (2000).

37. *See id.* at cmt. e.

38. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1978); Glen Weissenberger & James J. Duane, Weissenberger's Federal Evidence § 501.3, at 231 (5th ed. 2006).

39. *See* Epstein, *supra* note 15, at 2.

40. *See* United States v. Ary, 518 F.3d 775, 782 (10th Cir. 2008).

41. *See id.*; United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997).

42. *See In re* Grand Jury Proceedings, 219 F.3d 175, 188 (2d Cir. 2000).

43. *See* Daniel, *supra* note 11, at 665.

While American jurisdictions have conflicting common law doctrines on inadvertent waiver, the federal courts generally follow one of three established rules. The first is a strict waiver rule, where unintentional or even innocent disclosure of a client's confidences will result in an automatic waiver of privilege.[44] A minority of courts follow this rule, and, in such jurisdictions, "the confidentiality of communications covered by [a] privilege must be jealously guarded by the holder of the privilege lest it be waived."[45] In stark contrast, an even smaller minority of jurisdictions follow a lenient rule whereby the attorney-client privilege cannot be waived unless the client expressly and voluntarily waives the privilege.[46] The rationale behind this rule is that the attorney's inadvertent disclosure of privileged material should not be imputed to the client, who actually holds the privilege, because the client did not authorize the disclosure.[47]

The third and most popular approach among federal courts is a balancing test or middle-ground approach.[48] This approach takes into consideration:

> (1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure issue; (3) the length of time taken by the producing party to rectify the disclosure; and (4) the overarching issue of fairness.[49]

However, since this approach requires a case-by-case analysis, it is prone to inconsistent results.[50]

Under recently enacted Federal Rule of Evidence 502, inadvertent 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

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44. *See In re* Sealed Case, 877 F.2d 976 (D.C. Cir. 1989); Navajo Nation v. Peabody Holding Co., Inc., 209 F. Supp. 2d 269, 285 (D. D.C. 2002).

45. SEC v. Lavin, 111 F.3d 921, 929 (D.C. Cir. 1997) (citation and internal quotation marks omitted).

46. *See* Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990).

47. *See* Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 Rich J.L. & Tech. 15, ¶ 13 (2006).

48. *See* United States v. Gangi, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998); Kiker, *supra* note 47, ¶¶ 14–15.

49. United States v. Rigas, 281 F. Supp. 2d 733, 738 (S.D.N.Y. 2003). New York courts follow a similar approach:

    > In general, disclosure of a privileged document results in waiver of the privilege unless the party asserting the privilege meets its burden in proving that (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) it promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted.

    AFA Protective Sys., Inc. v. City of New York, 788 N.Y.S.2d 128, 129–30 (2d Dep't 2004).

50. Kiker, *supra* note 47, ¶ 20.

error."[51] The committee notes of Rule 502 explain that the rule "does not explicitly codify [the balancing] test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors."[52] The rule does, however, explicitly reject the strict waiver doctrine.[53] The middle-ground approach, while advocated by some scholars[54] and now sanctioned by Rule 502,[55] has created substantial uncertainly in privilege-waiver law.[56]

C. Waiver Law: An Unpredictable Mess

The two cases discussed below illustrate that even in jurisdictions following the same middle-ground approach, courts still arrive at inconsistent results despite similar fact patterns.

In *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, the United States District Court for the District of Massachusetts held that the defendant's inadvertent disclosure of privileged documents effected waiver of the attorney-client privilege.[57] The court observed that "counsel for [defendant] . . . made the misstep feared by all litigators, inadvertently producing . . . privileged documents."[58] Defense counsel reviewed over 200,000 pages of documents and separated the privileged material into four boxes.[59] Counsel placed these boxes on a separate shelf "to be withheld from production."[60] When counsel's outside vendor came to sort and copy the documents for production, a paralegal mistakenly allowed the vendor to take the four boxes of privileged material.[61] As a result, 3821 pages of privileged documents were copied and included in the mass production sent to plaintiff's counsel.[62] After plaintiff refused to return the privileged material, the defendant moved to compel return of the inadvertently produced documents.[63]

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51. Fed. R. Evid. 502(b).

52. *Id.* at advisory committee's note.

53. *See* Fed. R. Evid. 502(a) advisory committee's note ("The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver."). In addition to these approaches in federal courts, some states have adopted a "significant part test" where the privilege is inadvertently waived when a significant part of privileged communication is disclosed. *See, e.g.*, Cal. Evid. Code § 912(a) (2005).

54. *See* Kiker, *supra* note 47, ¶ 40 ("State and federal courts should adopt the multi-factor standard when evaluating whether an inadvertent disclosure results in a waiver of the privilege.").

55. *See* Fed. R. Evid. 502(b) advisory committee's note.

56. *See* Danna, *supra* note 10, at 1729–30.

57. 190 F.R.D. 287, 293 (D. Mass. 2000).

58. *Id.* at 288.

59. *See id.*

60. *Id.*

61. *Id.* at 288–89.

62. *Id.* at 289.

63. *Id.*

Applying the balancing test, the court concluded that defense counsel failed to take the reasonable precautions necessary and therefore waived the privilege.[64] The court focused on counsel's failure to conduct a final (or even cursory) review of the copied documents before sending them to the plaintiff, the "sheer magnitude" of the disclosure, and counsel's failure to notice the mistake for five days.[65] The court concluded that it would be "unjust to reward such gross negligence by providing relief from waiver."[66] As one commentator noted, "[f]ew cases demonstrate as graphically as the . . . *Amgen* decision that what one judge will find to have been unpardonable carelessness leading to waiver, another, looking at the same set of facts, would readily have found to have been pardonable inadvertence."[67]

The result in *Amgen* is in striking contrast to the result reached by the United States District Court for the District of Maryland in *F.H. Chase, Inc. v. Clark/Gilford*.[68] In *Chase*, the court held that the defendants had not waived the privilege, despite the inadvertent production of privileged material.[69] During the course of discovery, defense counsel produced 7155 documents to the plaintiff, which included over 500 privileged documents.[70] Before production, counsel separated privileged materials in Lotus Notes, an e-mail client program, and created a database containing only "non-privileged and responsive documents."[71] A paralegal, however, mistakenly sent an outside vendor the entire Lotus Notes database, which included the privileged subfolder.[72] The vendor formatted the files, printed the entire electronic database, and sent the material back to defense counsel for final review.[73] Counsel did not review the documents before producing them to the plaintiff.[74] Nevertheless, the court did not find waiver of privilege, despite defense counsel's total failure to conduct even a "cursory review [or spot check] of the documents" after receiving them from

64. *See id.* at 292–93.

65. *Id.* at 292.

66. *Id.* at 293.

67. Epstein, *supra* note 15, at 452.

68. 341 F. Supp. 2d 562 (D. Md. 2004).

69. *Id.* at 565.

70. *Id.* at 563.

71. *Id.* at 564.

72. *Id.*

73. *See id.* at 563–64. In electronic discovery, the requesting party may state whether it wants the data in native format (the original format of the file, for instance, in an e-mail program database) or whether it wants the data converted to a different file format or even printed. *See* Fed. R. Civ. P. 34(b)(1)(C) (providing the requesting party the right to "specify the form or forms in which electronically stored information is to be produced"); Daniel R. Murray et al., *Taking a Byte Out of Discovery: How the Properties of Electronically Stored Information Have Shaped E-Discovery Rules*, 41 UCC L.J. 1 Art. 2, pt. III (2008).

74. *F.H. Chase*, 341 F. Supp. 2d at 564.

the vendor.[75] The court found that the defendants "took reasonable precautions to prevent" disclosure, especially considering the extensive volume of production.[76]

These two cases demonstrate how strikingly similar fact patterns can result in contradictory privilege rulings in different courts—even when the two jurisdictions follow the same doctrinal approach to inadvertent waiver. This inconsistency should give any litigator pause, especially since electronic discovery will only exacerbate inadvertent disclosure issues that have plagued paper-based discovery for decades.

III. ELECTRONIC DISCOVERY AND PRIVILEGE UNCERTAINTY

The current uncertainty in privilege-waiver law is further complicated by electronic discovery. Due to the staggering volume and complexity of electronically stored information produced during discovery, the probability of inadvertent disclosure is exceptionally high and, thus, so is the risk of privilege waiver.[77]

A. What Is Electronic Discovery?

Electronic discovery requires the production and disclosure of electronically stored information during the pre-trial litigation process.[78] The immense volume and duplication of electronically stored information is overwhelming for litigants, especially when compared to paper documents.[79] Today, the majority of information is created or stored electronically; in fact, by some estimates, more than ninety percent of information generated today is electronic.[80] Information subject to electronic discovery includes e-mail; deleted e-mail that can be restored; data, program, temporary, system-history, archived, back-up, and deleted files; Internet cache files and "cookies"; website downloads; applications and application files including word processing and data entry; and electronic information from peripheral devices attached to computers, such as printers, external hard-drives, and fax machines.[81] Most worrisome for litigants is metadata—computer data that reveals

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75. *Id.*

76. *Id.*

77. *See id.* at 563.

78. *See* Junk v. Aon Corp., No. 07 Civ. 4640, 2007 WL 4292034, at *1 n.2 (S.D.N.Y. Dec. 3, 2007); John C. McMeekin II & Thao T. Pham, *The Age of E-Discovery: Practice Pointers for Preserving and Producing Electronic Documents*, The Brief, Summer 2008, at 55.

79. *See* Salvatore Joseph Bauccio, Comment, *E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost*, 45 Duq. L. Rev. 269 (2007).

80. *See* The Sedona Conference Working Group on Electronic Document Retention and Production, *The (2004) Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 Sedona Conf. J. 151, 151 (2004) [hereinafter *Best Practices*].

81. *See* Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 96 (D. Md. 2003); Clint A. Corrie, *Record Retention Requirements in Securities Litigation and Arbitration*, 1686 Prac. L. Inst. 41, 56 (2008); McMeekin & Pham, *supra* note 78, at 55.

"when a document was created, who it was created by, and when it was last accessed or edited."[82]

If electronic discovery were a rare occurrence, the daunting amount of electronically stored information subject to disclosure would be rather trivial to write about in such detail; however, as one study found, e-mail discovery occurs in most federal litigation and major employment disputes.[83] Further complicating this problem, electronically stored information, unlike paper documentation, replicates itself.[84] For example, over the course of a year, a single e-mail likely will reproduce itself an estimated 27,000 to 28,000 times on a computer system.[85] If that single e-mail contains privileged material, making sure that it does not end up in the hands of the opposing party during discovery can indeed be a daunting task.

B. Electronic Discovery's Impact

Attorneys often conduct extensive and expensive privilege review procedures to avoid the heightened risk of inadvertent disclosure that comes with electronic discovery—especially given the propensity of many courts to find privilege waiver when a party fails to take reasonable precautions to prevent inadvertent disclosure.[86] As one litigation associate lamented, "reviewing documents for privileged material is no picnic; actually, it's sheer drudgery."[87] One can only imagine then how dreadful reviewing terabytes of electronically stored information can be for litigators! Undoubtedly, the probability of waiver with electronic discovery has dramatically increased as a result of the volume of electronic data, the complex nature of the data, and the difficulty in retrieving the information, such as metadata, which is often hidden.[88]

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82. Jessica DeBono, Comment, *Preventing and Reducing Costs and Burdens with E-Discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 Mercer L. Rev. 963, 966 (2008).

83. *See* Linda Volonino, *Electronic Evidence and Computer Forensics*, 12 Comm. Ass'n Info. Sys. 457, 462 (2003), *available at* http://aisel.aisnet.org/cais/vol12/iss1/27/.

84. *See* Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 Lewis & Clark L. Rev. 875, 879 (2008).

85. *See id.*

86. *See* Lucia Cucu, Note, *The Requirement for Metadata Production Under Williams v. Sprint/United Management Co: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 Cornell L. Rev. 221, 232–33 (2007); Joseph Gallagher, Note, *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 Geo. J. Legal Ethics 613, 622 (2007); Lee H. Rosenthal, Essay, *Privilege Review*, 116 Yale L.J. Pocket Part 167 (2006).

87. Daniel A. Cohen, *Reviewing Documents for Privilege: A Practical Guide to the Process*, 72 N.Y. St. B.J. 43, 43 (2000).

88. *See* Fed. R. Civ. P. 26(f) advisory committee's note to 2006 Amendment ("Efforts to avoid the risk of waiver [in electronic discovery] can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery."); Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2005), at 22–23, *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.

One of the basic practice recommendations of the Sedona Conference, a renowned research institute that aims to address modern legal issues, is for a "responding party [to] follow reasonable procedures to protect privileges and objections [in connection with the] production of electronic data and documents."[89] Before privilege review begins, counsel must first identify electronic sources of information potentially relevant for discovery and preserve those sources.[90] Then, before turning over relevant information to the opposing party, counsel must conduct a review to identify privileged material within the relevant data.[91] Once counsel has identified the privileged material, it must promptly provide a privilege log to the opposing party and the court;[92] failure to do so will be excused only under rare circumstances.[93]

Privilege review of electronically stored information may take many forms including: traditional manual review, keyword searches using words or word combinations with Boolean operators,[94] conceptual searches using semantics and thesauri to broaden a keyword search, clustering search methods that statistically determine the probability that certain text may be privileged based on conceptual searching, and other more advanced techniques.[95] A keyword search with seventy search terms may not be sufficient to identify all privileged material because, as one judge explained, "even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive."[96] Courts have warned that counsel must test the accuracy of their keyword searches through a careful manual review of the results in order to safely conclude that any given search method is reliable.[97]

Given the risk of waiver inherent in electronic discovery, it should be of no surprise that a party may elect to conduct time-consuming and expensive privilege review, even when it has entered into a confidentiality agreement with the opposing party.[98] While paralegals or industry consultants often assemble and prepare

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89. *Best Practices*, *supra* note 80, at 162.

90. *See* Fed. R. Civ. P. 26, 34; Stephen F. McKinney & Elizabeth H. Black, *The Unsignaled Intersection at 26 & 45: How to Safely Guide Third Parties Across the E-Discovery Superhighway*, 75 Def. Couns. J. 228, 229 (2008); *Best Practices*, *supra* note 80, at 162 ("Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation." (emphasis omitted)).

91. *See* McKinney & Black, *supra* note 90, at 229.

92. *See* Fed. R. Civ. P. 26(b)(5); United States v. O'Keefe, 252 F.R.D. 26, 29 (D. D.C. 2008); Wunderlich-Malec Sys., Inc. v. Eisenmann Corp., No. 05-C-04343, 2006 WL 3370700, at *9 (N.D. Ill. Nov. 17, 2006); *Best Practices*, *supra* note 80, at 169–70.

93. *See, e.g.*, Cartwright v. Viking Indus., Inc., No. Civ. S-07-2159, 2008 WL 4283614, at *2 (E.D. Cal. Sept. 11, 2008) (excusing untimely privilege log).

94. Boolean operators are connectors such as "and," "or," and "not" that include or exclude terms from a search. The Sedona Conference Glossary, *supra* note 7, at 6.

95. *See* The Sedona Conference WG1, *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 200–03 (2007).

96. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 257 (D. Md. 2008).

97. *See id.*

98. *See* Rosenthal, *supra* note 86, at 169–70.

electronic data for review, attorneys should conduct the privilege review themselves—or a court may conclude that counsel failed to take adequate precautions.[99]

Even the most thorough privilege review process, however, may lead to inadvertent disclosure when it comes to electronic data.[100] The case of *Amersham Biosciences Corp. v. PerkinElmer, Inc.*[101] illustrates this problem. In *Amersham*, the district court reversed and remanded the assigned magistrate judge's order over a factual misunderstanding concerning the plaintiff's inadvertent disclosure of electronic data.[102] Before the start of discovery, the magistrate judge issued a stipulation and protective order, whereby the parties agreed that the inadvertent production of any document would not waive attorney-client privilege.[103] The plaintiff's production consisted of 133 CDs with single-page image files, totaling nearly 800,000 printed pages.[104] Included in the plaintiff's massive production effort were four CDs containing over 500 inadvertently produced e-mails with privileged information—all extracted from a single Lotus Notes DVD.[105]

Before producing this electronic data, plaintiff's counsel segregated the privileged e-mails into subfolders within Lotus Notes.[106] Plaintiff's counsel deleted the subfolders containing the privileged e-mails before it sent the Lotus Notes DVD to an outside vendor.[107] The vendor then extracted the e-mails from the DVD and converted them into image-based files on four CDs.[108] However, the Lotus Notes program retained the e-mails in its primary folder, despite counsel's effort to delete them.[109] As a result, plaintiff's counsel inadvertently produced the e-mails to the defendant, notwithstanding its privilege review.[110]

The magistrate judge concluded that the plaintiff did not waive the privilege for the Lotus Notes e-mails because those e-mails "were imbedded in metadata [after they were deleted] and were not apparent on the face of the documents" before the Lotus Notes DVD was sent to the vendor.[111] The district court, though, disagreed

99. *See Hopson*, 232 F.R.D. at 239, 243.

100. *See* Ashish Prasad & Vazantha Meyers, *The Practical Implications of Proposed Rule 502*, 8 Sedona Conf. J. 133, 133 (2007).

101. No. 03-4901, 2007 WL 329290, at *1 (D. N.J. Jan. 31, 2007).

102. *Id.* at *1, *5.

103. *Id*. at *1.

104. Plaintiffs' Supplemental Submission Concerning Inadvertently-Produced Privileged Documents at pt. III.A., Amersham Biosciences Corp. v. PerkinElmer, Inc., No. 203-CV-04901 (D. N.J. Jul. 3, 2007).

105. *See Amersham*, 2007 WL 329290, at *1.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *Id.* at *2.

with the magistrate judge's finding, stating that the privileged nature of the e-mails should have been apparent on their face *after* the vendor converted the e-mails into image-files on the four CDs and plaintiff's counsel should have noticed this during its final spot check.[112] In other words, the court doubted whether counsel's privilege review met the reasonable precautions standard necessary to support a finding of no waiver, and thus remanded the matter to the magistrate judge for a new waiver determination.[113]

Despite the non-waiver provision in the magistrate judge's order, counsel's diligent segregation and deletion of its client's privileged e-mail, and a final spot check before production, the plaintiff in *Amersham* still had to fight to protect its privileged e-mails due to counsel's inadvertent disclosure.[114] Undoubtedly, the issues caused by electronic discovery are by no means simple, even for the most conscientious litigator.

In addition to burdensome review procedures, electronic discovery can cost millions of dollars because counsel must sometimes review years' worth of e-mails in order to determine what is both relevant *and* non-privileged.[115] Smaller clients especially face breath-taking expenses. For example, in one federal case, a booking agency with just nine employees estimated that it would cost nearly $250,000 to conduct a complete privilege review of its electronic data.[116]

The bottom-line is, extensive and expensive privilege review procedures are a necessary component of modern litigation because inadequate privilege review may result in privilege waiver.[117] It is advisable that attorneys undergo full privilege review for their clients—without taking any shortcuts.[118]

C. Amended Federal Rules of Civil Procedure

For some time, courts addressed the issues presented by electronic discovery without any direction from the Federal Rules of Civil Procedure or the United States Supreme Court.[119] Seeking to address these issues, the Supreme Court approved new

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112. *Id.*

113. *See id.* at *5–6.

114. *See id.*

115. *See id.*; Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 557–58 (W.D. Tenn. 2003).

116. *See Rowe*, 205 F.R.D. at 432.

117. *See* Daniel, *supra* note 11, at 665.

118. *Cf.* Julie Cohen, Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 Iowa L. Rev. 627, 663 (2008).

119. United States District Judge Shira Scheindlin issued a series of opinions that are considered preeminent in the field of electronic discovery. *See* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake II*), 230 F.R.D. 290 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004). United States Magistrate Judge James C. Francis IV also addressed electronic discovery issues in *Rowe*, 205 F.R.D. 421, a ground-breaking decision in this field.

amendments to the Federal Rules of Civil Procedure that took effect in 2006.[120] These new amendments made electronic information subject to disclosure just like paper documents,[121] as had already been recognized by many courts.[122] As the Rules Committee explained, the amendments were enacted to alert courts "to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur."[123] While the rules require a party asserting a privilege claim *after* production to promptly notify the opposing party and the court,[124] the rules are merely procedural in nature and do "not address whether the privilege or protection that is asserted after production was waived by the production."[125] Instead, the rules permit courts to apply their own legal rules in determining whether waiver occurred.[126] Inadvertent waiver of privilege is therefore still a possibility under the amended Federal Rules of Civil Procedure.[127]

The rules do, however, encourage parties to enter into confidentiality agreements in order to preserve privilege claims. Federal Rule of Civil Procedure 16, for example, provides that a court may, at its discretion, include in its scheduling order "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced."[128] Under this rule, a court may permit litigants to "agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver."[129] Two forms of confidentiality agreements in Rule 16—quick-peek and claw-back—are sometimes used in litigation as a means by which parties attempt to contract around waiver law.[130] Under these agreements, the litigants agree to forego, or substantially limit, privilege review during discovery with the caveat of having to return any inadvertently produced privileged material.[131] A quick-peek agreement provides that a producing party may

120. These new amendments were codified as Fed. R. Civ. P. 16(b)(3)(iii), 26(b)(2), 26(f), and 37(e).

121. *See* Fed. R. Civ. P. 16(b)(3)(B)(iii).

122. *See Zubulake I*, 217 F.R.D. at 317 ("[E]lectronic documents are no less subject to disclosure than paper records.") (citation and internal quotation marks omitted).

123. Fed. R. Civ. P. 16(b) advisory committee's note to 2006 Amendment.

124. *See* Fed. R. Civ. P. 26 advisory committee's note to 2006 Amendment.

125. Fed. R. Civ. P. 26(b)(5) advisory committee's note to 2006 Amendment.

126. *See id.*

127. *See* Barbara J. Rothstein et al., Managing Discovery of Electronic Information: A Pocket Guide for Judges 16 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

128. Fed. R. Civ. P. 16(b)(3)(B)(iv).

129. Fed. R. Civ. P. 16 advisory committee's note to 2006 Amendment.

130. *See* Kindall C. James, Comment, *Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review—Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?*, 52 Loy. L. Rev. 839, 850 (2006).

131. *See Zubulake III*, 216 F.R.D. at 290.

turn over *all* requested documents to the requesting party for initial examination without waiving any claim of privilege, even if the producing party did not conduct a privilege review.[132] The requesting party designates which materials it wants produced and then the producing party conducts privilege review only for those specifically designated documents.[133] In comparison, a claw-back agreement, as defined by the Rules Committee, provides "that production without intent to waive privilege . . . should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances."[134]

The amended rules do not substantially address privilege concerns beyond encouraging confidentiality agreements. As discussed in Part IV, *infra*, these quick-peek and claw-back agreements do not always protect parties because many courts are reluctant to recognize them and they are not binding on non-parties to the proceeding.[135] This inevitably leaves courts with no choice but to continue applying outdated waiver rules when inadvertent disclosure of privileged information occurs during electronic discovery.[136]

IV. A CLIENT-ORIENTED APPROACH TO PRIVILEGE-WAIVER LAW

A. Court Non-Waiver Orders

To avoid the complicated morass of waiver law, some courts issue non-waiver orders, incorporating confidentiality agreements between the parties.[137] As discussed in Part III.C, *supra*, confidentiality agreements include quick-peek and claw-back agreements. Parties have been entering into confidentiality agreements for some time, with varying degrees of support in different jurisdictions.[138] A confidentiality agreement merely provides contractual protection to a producing party that inadvertently discloses privileged material to its opponent.[139] That agreement,

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132. *See* Fed. R. Civ. P. 26(f) advisory committee's note to 2006 Amendment; *see also* Fed. R. Civ. P. 34.

133. *See* Fed. R. Civ. P. 26(f) advisory committee's note to 2006 Amendment.

134. *Id.*

135. *See* Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 118–19 (D. N.J. 2002); Bowne of N.Y.C., Inc. v. AmBase Corp., 150 F.R.D. 465, 478–79 (S.D.N.Y. 1993).

> A stipulated non-waiver may be defensible as between the two parties inasmuch as they are free to agree between themselves that certain evidence will not be used. But it is questionable whether such agreements should be effective as against third parties. Similarly, since courts cannot change the law of evidence by local rule, it is hard to justify a discovery order that purports to have the effect of altering the law of waiver.

Wright & Graham, *supra* note 4, § 5507, at 579.

136. *Cf.* Christopher M. Santomassimo et al., *Thirteen Steps to Cope with Corporate Privilege Erosion*, Ass'n of Corp. Couns. Docket 28, 32 (2007).

137. *See, e.g.*, *Hopson*, 232 F.R.D. at 246.

138. *See Rowe*, 205 F.R.D. at 432. *But see Koch*, 208 F.R.D. at 117.

139. *See* Fed. R. Evid. 502(e) ("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.").

therefore, does nothing to prevent another court from finding waiver in a separate proceeding if it follows different waiver rules or simply applies the same rules differently.[140] Thus, for a confidentiality agreement to be truly effective, it must be binding on all persons, including non-parties, and in all jurisdictions.[141] A court-issued non-waiver order supposedly accomplishes this goal by stipulating that inadvertent disclosure of privileged material made in accordance with ordered discovery will not constitute a waiver of the privilege in any jurisdiction.[142] While this approach is noteworthy, it remains an inadequate solution.

In *Hopson v. Mayor and City Council of Baltimore*, the assigned magistrate judge concluded that courts have the power to issue binding non-waiver orders.[143] Consequently, *Hopson* is known as the "seminal decision" on the non-waiver approach.[144] In *Hopson*, the magistrate judge grounded his authority to protect parties from privilege waiver on the notion that information produced during discovery is conducted under a judge's order.[145]

The *Hopson* plaintiffs sued the city of Baltimore and the Baltimore City Police Department, alleging that the police department systemically discriminated against African American police officers in enforcing its disciplinary code.[146] During discovery, the plaintiffs sought hard-copy records as well as electronic data from the police department.[147] At a hearing, the police department raised concerns about the cost and burden of performing pre-production privilege review of the records sought by the plaintiffs.[148] With the two parties gridlocked in a contentious electronic discovery dispute, the magistrate judge ordered the two sides to meet and confer "to agree upon a reasonable discovery plan for electronic discovery," and explained that he would subsequently "approve a discovery plan and issue an order implementing it."[149]

In *Hopson*, the magistrate judge emphasized that the matter before him "vividly illustrate[d] one of the most challenging aspects of discovery of electronically stored information."[150] As the magistrate judge explained, because a producing party's screening of vast quantities of electronic data can be especially burdensome,[151] many

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140. *See supra* note 135.

141. *See* Fed. R. Evid. 502(e); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for Federal Rule of Evidence 502*, 58 S.C. L. Rev. 211, 240 (2006).

142. *See Hopson*, 232 F.R.D. at 246.

143. *See id*. at 232.

144. *See* Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 334 (D. D.C. 2008).

145. *See Hopson*, 232 F.R.D. at 245.

146. *Id.* at 230.

147. *Id.* at 231.

148. *Id.*

149. *See id.*

150. *Id.* at 232.

151. *See id.*

jurisdictions have recognized the utility of confidentiality agreements so that expedited production does not result in inadvertent waiver.[152] The magistrate judge warned, however, that such agreements may be risky because their effectiveness against third parties is questionable.[153] Further, the magistrate judge advised that parties "would be unwise to assume that such agreements will excuse them from undertaking any pre-production privilege review, or doing less of a pre-production review than is reasonable under the circumstances."[154] To protect against such circumstances, the magistrate judge promised to consider issuing a binding order that incorporated the parties' confidentiality agreement.[155] The magistrate judge concluded that inadvertent disclosure made pursuant to a court order for compelled, expedited discovery cannot result in waiver,[156] grounding his reasoning on the Ninth Circuit's opinion in *Transamerica Computer Co. v. IBM*.[157]

While the magistrate judge in *Hopson* said he would consider issuing a non-waiver order, he made clear that such an order would not be granted lightly.[158] A party requesting a non-waiver order, according to the *Hopson* decision, "bears the burden of particularly demonstrating th[e] burden [of discovery] and of providing suggested alternatives that reasonably accommodate the requesting party's legitimate discovery needs."[159] For the police department to obtain such an order, the magistrate judge noted various factors that the police department must detail in its request, including the constraints on the number of available information technology personnel, other competing demands for their services within the department, the estimated number of hours that it would take them to review the electronic data, and any adverse fiscal or operational impact.[160] Following *Hopson*, the number of court-issued non-waiver orders has greatly proliferated,[161] suggesting that courts are looking for ways to circumvent privilege-waiver law.

The failure of a party to obtain a non-waiver order can be fatal to its case. In *Victor Stanley, Inc. v. Creative Pipe, Inc.*,[162] the same magistrate judge as in *Hopson* issued

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152. *See id.* at 234–35.

153. *Id.* at 235.

154. *Id.* at 244.

155. *See id.*

156. *See id.*

157. *See id.* at 241 (citing Transamerica Computer Co. v. IBM, 573 F.2d 646 (9th Cir. 1978) (holding that defendant's inadvertent production of privileged material did not constitute waiver of privilege because the production was made under compelled court order for expedited discovery)).

158. *See id.* at 244.

159. *Id.* at 245.

160. *Id.*

161. *See, e.g.*, Williams v. Taser Int'l Inc., No. 1:06-CV-0051-RWS, 2007 WL 1630875, at *7 (N.D. Ga. June 4, 2007); Pinilla v. Northwings Accessories Corp., No. 07-21564-CIV, 2007 WL 2826608, at *4 (S.D. Fla. Sept. 25, 2007).

162. 250 F.R.D. 251. (D. Md. 2008).

another decision demonstrating the absurdity of the non-waiver approach. This time, the magistrate judge explained that despite the defendants' inadequate privilege review of their electronically stored information, "they would have been protected from waiver" had they not abandoned their request for a court non-waiver order.[163] Ultimately, the magistrate judge concluded that the defendants waived privilege because of their failure to conduct extensive privilege review and the absence of a non-waiver order.[164]

Victor Stanley can be synthesized into a simple proposition: producing parties must either engage in extensive (and expensive) privilege review procedures or seek (and obtain) a court-issued non-waiver order; otherwise, waiver of attorney-client privilege is highly probable.[165] The former option is problematic because even extensive privilege review can lead to waiver.[166] The problem with court-issued non-waiver orders is discussed below.[167] The magistrate judge's support of non-waiver orders suggests that he fully recognized the risks posed by electronic discovery, but he then rigidly applied waiver rules outside of the legal fiction of a non-waiver order. The inherent inconsistency with this approach leads to only one conclusion: the underlying law must be changed.

B. *Federal Rule of Evidence 502 Sanctions* Hopson*'s Inadequate Approach*

1. *Congressional Enactment*

The claimed purpose of Federal Rule of Evidence 502 is to provide "protections against waiver of attorney-client privilege."[168] However, Rule 502 inadequately addresses the risks posed by inadvertent disclosure in modern litigation. As acknowledged by the chair of the Rules Committee, waiver law is "responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation lawyers spend significant amounts of time and effort to preserve the privilege."[169] The Rules Committee submitted Rule 502 for "consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery."[170] Congress enacted the new rule in September of 2008.[171] For the purposes of this note, the major implication of Rule 502 is that it permits a federal court—at its discretion—to issue a non-waiver order, and in light of such an order,

163. *Id.* at 262.

164. *Id.* at 262–63.

165. *See generally id.*

166. *See* Prasad & Meyers, *supra* note 100, at 133.

167. *See infra* Part IV.B.2.

168. Letter from Lee Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Patrick Leahy and Arlen Specter, U.S. Senators (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

169. *Id.*

170. *Id.*

171. *See supra* note 18 and accompanying text.

inadvertent disclosure cannot operate as waiver in any other federal or state proceeding.[172] Rule 502 thus adopts the *Hopson* non-waiver approach.[173]

2. *The Inadequacy of Rule 502 and the Non-Waiver Approach*

Rule 502 does not establish a straightforward solution to the current chaos with electronic discovery and waiver law; instead, it only serves as a means of expediency. Fostering the development of clearer waiver rules would be a more legally sound and substantive solution. The Rules Advisory Committee stated that under the non-waiver approach, "[p]arties should be able to *contract around* common-law waiver rules by entering into confidentiality agreements."[174] This statement is tantamount to an admission that common law waiver rules are antiquated and borderline irrelevant. More than two decades ago, Professor Richard Marcus identified the absurdity behind the Ninth Circuit's decision in *Transamerica*,[175] remarking that the "duplicity involved in entering such [non-waiver] orders points up the unsuitability of the rigid waiver doctrine to the actual problems of modern litigation."[176] The magistrate judge in *Hopson*, though, explicitly adopted *Transamerica's* reasoning,[177] and, in turn, Rule 502 follows the *Hopson* approach.[178] By enacting Rule 502, Congress failed to directly modify antiquated, inconsistent, and rigid waiver rules. Instead, Congress has essentially left the courts with the responsibility to sort out modern waiver doctrine and to issue non-waiver orders on an *ad hoc* basis.

In enacting Rule 502, Congress also failed to recognize that, absent a uniform law establishing a clear standard for when courts must issue a non-waiver order at a party's request, a legal patchwork will remain. In fact, Rule 502 permits the current split among courts to continue. Critics have contended that non-waiver orders are an excessive use of judicial power and that such orders cannot be binding in other

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172. *See* Fed. R. Evid. 502(d).

173. *Cf.* Fed. R. Evid. 502(d) advisory committee's note.

> There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding.

Id.

174. Letter from Hon. Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, at 3 (May 15, 2006) (emphasis added), *available at* http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

175. *Transamerica*, 573 F.2d 646.

176. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1612–13 (1986).

177. *See* Hopson, 232 F.R.D. 228; *see also supra* note 157 and accompanying text.

178. *See* Fed. R. Evid. 502(d); *see also supra* text accompanying notes 172–73.

proceedings.[179] For example, Magistrate Judge Ronald Hedges, noting that the *Hopson* approach may be incorrect, pointed out:

> Basically, under [the non-waiver approach], if you make a good faith review of information and you turn it over, and there is an order protecting against waiver, there is no waiver as to third parties. . . . I myself had issues with the non-waiver order. Supposedly, one district court is going to bind every other court and every other litigant, and will operate on the state and federal level. If you stop and think about it, that's a pretty enormous reach.[180]

Whether a federal court has the complete authority to determine admissibility of privileged information under state law has been contentiously debated for some time,[181] and is an issue that Rule 502 does not adequately resolve.

Considering that a number of courts have refused to recognize blanket confidentiality agreements or to issue non-waiver orders,[182] Rule 502's codification of the non-waiver approach will result in unpredictability. What may result is forum shopping among parties to avoid jurisdictions that do not favor non-waiver orders. Congress has failed to create a uniform standard because Rule 502 leaves enormous discretion to courts in determining the applicability of non-waiver orders.[183] Uniformity in the law is necessary if Congress wishes to foster predictability in privilege law and prevent forum shopping.[184] Forum shopping has long been disfavored in the American legal system,[185] but will only increase if litigants are forced to seek out the most favorable jurisdictions to resolve their discovery disputes. A better approach would treat parties equally, regardless of whether they are in a jurisdiction that favors issuing non-waiver orders.

Finally, Rule 502 places the burden on clients to seek counsel experienced in the intricacies of electronic discovery and waiver law to ensure that they can convince a judge, like that in *Hopson*, that a non-waiver order is necessary.[186] The non-waiver approach under Rule 502 places additional burdens on clients, given the unpredictable

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179. *See, e.g.*, *A Magistrate Judge's Perspective on Electronic Discovery: An Interview with Ronald J. Hedges*, N.J. Lawyer, Aug. 2007, at 12.

180. *Id.*

181. *See, e.g.*, Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003) (O'Scannlain, J., concurring).

182. *See, e.g.*, *Navajo Nation*, 209 F. Supp. 2d at 286; *Koch*, 208 F.R.D at 118–19; Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 412 (D. N.J. 1995).

183. Fed. R. Evid. 502(d).

184. *Cf. In re* Grand Jury Investigation, 399 F.3d 527, 536 (2d Cir. 2005) ("We are mindful that uniformity among the circuits fosters predictability in the invocation of the privilege and suppresses forum shopping."); Ceres Partners v. GEL Assocs., 918 F.2d 349, 355 (2d Cir. 1990) (explaining that the "uncertainty and lack of uniformity" concerning the timeliness of a securities action promotes forum shopping by plaintiffs (quoting the American Bar Association Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 647 (1986))).

185. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 73–78 (1938).

186. As discussed, even the magistrate judge in *Hopson* placed a particularly high burden on the defendant police department to obtain a non-waiver order. *See Hopson*, 232 F.R.D. at 244.

nature of how any individual judge may rule.[187] A more sound approach would be a uniform rule that treats parties equally, regardless of whether their counsel seeks and obtains a special "court-fashioned" non-waiver order—a mere legal fiction devised to circumvent waiver rules.

C. Proposal for a Uniform Client-Oriented Solution

Given the complexities of electronic discovery, privilege-waiver law requires a shift from the inconsistent balancing test toward a more predictable and uniform national standard.[188] It is fairly certain that electronic discovery will become, if it has not already, the primary mode of discovery.[189] Considering the inconsistent results in privilege-waiver law,[190] any meaningful solution to the risk of waiver must be in the form of a uniform rule enacted by Congress.[191] In order to bind all courts, Congress must enact such a uniform privilege rule under its lawmaking powers as opposed to the usual rulemaking process.[192]

It is a long-standing principle that attorney-client privilege and waiver rules are governed by state law.[193] Therefore, only a duly enacted congressional statute can establish a uniform privilege rule.[194] Scholars have reasoned that Congress has the full power under the Commerce Clause to nationalize privilege law, and that exercising such power would not run afoul of the Tenth Amendment.[195] The question

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187. *See id.*

188. *See* Cohen, *supra* note 118, at 651–52.

189. *See Best Practices*, *supra* note 80, at 151; Volonino, *supra* note 83, at 462.

190. *See* discussion *supra* Part II.C.

191. *See* Cohen, *supra* note 118, at 651–52.

192. *See* 28 U.S.C. § 2074(b) (2006) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

193. *See* Fed. R. Evid. 1101(a) (limiting applicability of the federal rules of evidence to "actions, cases, and proceedings" in federal courts); *Bittaker*, 331 F.3d at 731 n.4 (O'Scannlain, J., concurring) (reasoning that a federal court's determination of the scope of waiver should have no binding effect on the state courts); Evans v. Raines, 800 F.2d 884, 887 n.4 (9th Cir. 1986) ("Because the attorney-client relationship is created and controlled by state law, the nature and extent of the attorney-client privilege is defined by state law."); City of Tucson v. Superior Court, 809 P.2d 428, 430 (Ariz. 1991) (explaining that even the United States Supreme Court's interpretation of federal privilege law is merely "persuasive, but not binding" in state court); H.R. Rep. No. 93-650, *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082–83 (1973) (stating that "federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason"). Moreover, the regulation of lawyer conduct has been governed by state law for centuries. *See* Leis v. Flynt, 439 U.S. 438, 442 (1979).

194. *See supra* note 192.

195. *See* Nolan Mitchell, Note, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts*, 86 B.U. L. Rev. 691, 694 (2006); Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U. L. Rev. 59, 65 (2002). The Commerce Clause provides Congress with the power to regulate interstate commerce, *see* U.S. Const. art. 1, § 8, cl. 3, which presumptively includes regulation of the legal profession to a large degree. The Tenth Amendment is a general restraint on congressional power, providing that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Given that

remains as to what Congress should do in light of the current burdens and risks of electronic discovery.[196]

The most predictable, fair, and uniform solution would be a new Federal Rule of Evidence permitting a finding of waiver *only* when a client or counsel intentionally discloses privileged material during discovery or a proceeding, absent a few limited policy exceptions. This would comport with the plain meaning of the term "waiver," which for decades has been understood to mean the "intentional relinquishment or abandonment of a known right or privilege," as defined by the Supreme Court.[197] Under this standard, the mere inadvertent production of privileged information would not waive the client's privilege.[198] As noted by one federal judge, "[i]f we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege."[199]

A client-oriented solution would support the proposition that only the client can waive the privilege and that there must be evidence of intent in order to find that waiver occurred.[200] It bears mentioning that this note's proposal would not undermine the agency relationship between clients and their attorneys, because attorney conduct in the scope of such relationships is imputed to the client.[201] This proposal would

the states have historically controlled privilege law, *see Leis*, 439 U.S. at 422, it may be argued that Congress has no power over this area of law. While there may be arguments against nationalizing privilege law, especially among jurists and scholars who advocate a narrowing of the Commerce Clause, such issues are not addressed in this note. Further, given the globalization of the legal profession, it would be bad policy to permit any tension between federal and state privilege law.

196. Other authors have put forward their own privilege rule proposals, such as the uniform adoption of the middle-ground approach, or a federal rule preserving privilege so long as the producing party timely asserts privilege upon learning of inadvertent disclosure. *See* Kiker, *supra* note 47; Matthew A. Reiber, *Latching onto Laches: A Rules-Based Alternative for Resolving Questions of Waiver Following the Inadvertent Production of Privileged Documents in Federal Court Actions*, 38 N.M. L. Rev. 197, 199–200 (2008). While this note does not fully address the inadequacy of these proposals, it is worth noting that such proposals fail to create bright-line uniform rules, are not client-oriented, and do not radically change waiver law. Considering the problem with preserving privilege in electronic discovery today, waiver law requires a radical change. Bland proposals that mimic the waiver rules followed in a majority of jurisdictions—which have clearly not solved the problem and have produced inconsistent results—do little to advance the scholarly discussion.

197. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see also* Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506, 510 (2d Cir. 2002) ("Federal common law and New York common law both define waiver as an intentional relinquishment and abandonment of a known right or privilege.").

198. *See* Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991).

199. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982); *see also* Wigmore, *supra* note 21, § 2327, at 3252 ("[S]ince the domination of the modern theory has it been perfectly plain that the waiver, like the privilege, belongs solely to the client, and not to the attorney.") (internal citations omitted).

200. *See* Conn. Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955).

201. *See* Lolatchy v. Arthur Murray, Inc., 816 F. 2d 951, 956 (4th Cir. 1987); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 50 (M.D. N.C. 1987); Law Office of Douglas T. Harris, Esq. v. Philadelphia Waterfront Partners, LP, 957 A.2d 1223, 1229 (Pa. Super. Ct. 2008).

permit a finding of waiver based on evidence that counsel intentionally disclosed privileged material, or in situations where a client attempted to use privileged material as both a sword and a shield.[202]

Some critics contend that a client-oriented approach immunizes lawyers from the negligent handling of documents and encourages sloppy practice.[203] This critique is wrong because the deterrent effect of rigid waiver rules has minimal benefit compared to the enormous waste of resources and expenditures—both for clients and the judiciary.[204] Further, diligent privilege review and spot-checks before the production of electronic data may prove meaningless because, in some circumstances, inadvertent disclosure still occurs despite counsel's best efforts.[205] When a client is unaware of an inadvertent disclosure by counsel, or when such disclosure is simply inadvertent, finding waiver in such circumstances "serves only to punish the innocent."[206] A better deterrent would be to punish reckless attorney behavior during discovery. The comments to the American Bar Association's Model Rules of Professional Conduct provide that a "lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."[207] Likewise, the comments suggest that "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[208] While it may be argued that such ethical obligations are rarely enforced,[209] there is no reason why they should not be. The goal should be to increase the ethical obligations of attorneys during discovery instead of undermining the privilege. Considering the broad discretion

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202. *See* Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived."); Wigmore, *supra* note 21, § 2327, at 3253 ("He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."). For example, if a defendant stock purchaser claims that its tax position is reasonable and not misleading because of counsel's legal advice, the defendant in effect "puts at issue the tax advice it received" and cannot hide behind counsel's advice without disclosing it. *Chevron Corp.*, 974 F.2d at 1162–63. While the Ninth Circuit has reasoned that the privilege may be implicitly waived this way, the better argument is that such partial disclosure, where the client attempts to use the privilege as a sword and a shield, evidences intent to waive.

203. *Cf.* Dyson v. Amway Corp., No. G88-CV-60, 1990 WL 290683, at *2 (W.D. Mich. Nov. 15, 1990); *Koch*, 208 F.R.D. at 118.

204. *See* Marcus, *supra* note 176, at 1608–17.

205. *See, e.g.*, *Amersham*, 2007 WL 329290.

206. Jones v. Eagle-North Hills Shopping Ctr., L.P., 239 F.R.D. 684, 685 (E.D. Okla. 2007).

207. Model Rules of Prof'l Conduct R. 1.6 cmt. 16 (2007).

208. *Id.*, cmt. 17.

209. *Cf.* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639, 648 (1981) ("[S]tudy after study has shown that the current rules of professional conduct are not enforced.").

that district courts have in imposing sanctions for violations of discovery orders,[210] it would be much more sensible for courts to order attorneys to take measures to preserve client confidences during discovery than to punish clients for inadvertent disclosure.[211] Moreover, counsel should (and likely would) seek to prevent inadvertent disclosure regardless of waiver law because disclosure of confidential material can harm the client or hinder counsel's litigation strategy once opposing counsel has seen it.[212] Critics of a client-oriented proposal would be too swift to dismiss an attorney's incentive to prevent this from happening.

The more compelling argument against a client-oriented approach is that it would hinder truth seeking.[213] Upon close examination, however, this premise fails. The adversarial process is currently the means by which American courts arrive at

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210. *See* Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2006, at 96 (2d ed. 1994) (explaining that reversal of a discovery order on appeal is very unusual considering "the broad discretion the discovery rules vest in the trial court").

211. For an example of a discovery protective order forbidding the disclosure of particular client confidences, see Isaacson v. Keck, Mahin & Cate, 875 F. Supp. 478, 479 (N.D. Ill. 1994) ("In any pleading, discovery document, court appearance or proceedings of any kind, the parties and their attorneys shall not seek or disclose client identities where such disclosure would reveal client confidences or secrets, or where such disclosure is gratuitous or merely incidental to the questions at issue.").

212. *See* David Hricik, *Mining for Embedded Data: Is It Ethical to Take Intentional Advantage of Other People's Failures*, 8 N.C. J. L. & Tech. 231, 231–32 (2007) ("Inadvertent disclosure of confidential information can harm the client by waiving any claim to the protected status of the information or by simply letting the cat out of the bag, harming the client regardless of whether the information is admissible at trial."). The ethical issue of what counsel should do once receiving confidential material is beyond the scope of this note.

213. *Cf. In re* Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003) ("[T]he attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth." (citing United States v. Nixon, 418 U.S. 683, 709–10 (1974))). The First Circuit mistakenly applied *Nixon's* rationale to the attorney-client privilege. *Cf. Swidler & Berlin*, 524 U.S. at 410 ("Finally, the Independent Counsel, relying on cases such as *United States v. Nixon* and *Branzburg v. Hayes* urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law.") (internal citations omitted). *Nixon* concerned a president's abuse of power, where several government and campaign officials were charged with "conspiracy to defraud the United States and to obstruct justice." *Nixon*, 418 U.S. at 687. President Nixon claimed an absolute executive privilege against turning over any documents related to a criminal prosecution, and the Supreme Court held that recognized privileges are not absolute (whether based on the Constitution, statute, or common law) and must be construed "in derogation of the search for truth." *Id.* at 710. The attorney-client privilege, or any other recognized privilege for that matter, should not be construed as absolute when it is being misused as a shield to defraud the public or a court. *See, e.g.*, Matter of Jacqueline F., 47 N.Y.2d 215 (1979) (holding that attorney was required to reveal the whereabouts of his client who had left the state with a child in a possible kidnapping case). This note does not advocate an absolute privilege. It is a misunderstanding, however, for courts to draw the conclusion that the privilege *in general* stands as an obstacle to truth—just because a party can plausibly misuse the privilege does not render the privilege as an obstacle to truth. To analogize, under the First Circuit's erroneous rationale, prescription drugs would also stand as "an obstacle of sorts" to good health because of occasional misuse. *See In re* Keeper of Records, 348 F.3d at 22.

the truth.[214] In order for the adversarial process to properly function, clients must be able to engage in full and frank communications with their attorneys without fear that a court will compel disclosure of their confidences.[215] The privilege permits clients to privately share information with their lawyers that they might otherwise conceal if such confidences were subject to discovery.[216] As one magistrate judge explained, strict waiver rules "create an environment in which parties feel intensified pressure to resist disclosing even inconsequential material as to which some privilege might arguably be invoked."[217] Thus, lawyers are more inclined to assert privilege and to fiercely litigate all discovery disputes when the risks of waiver are high.[218] To the extent that the privilege hinders truth seeking, the absence of the privilege would have the same effect, and possibly an even greater effect, because clients would withhold the truth and, as a result, the free flow of confidential communications with counsel would be hindered.[219] In other words, the privilege creates the "vacuum" in which confidential attorney-client communications can take place—without it, such communications might be chilled. Preservation of the privilege is also important because our adversarial system operates "on the assumption that guilt [or liability] is generally best determined not in the privacy of one lawyer's office but in open court under due process."[220]

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214. *See* United States v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987).

215. *See Swidler & Berlin*, 524 U.S. at 403.

216. *See* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 609–10 (1980).

> In assessing a claim of privilege, some commentators analyze the attorney-client privilege as though it resulted in a clear loss of information that otherwise would be available to a court. This analysis, however, misconstrues a key point about the privilege—the privilege is intended to generate information. The privilege creates a zone of privacy in which an attorney and client can create information that did not exist before and might not exist otherwise.

Id.

217. Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 310 (N.D. Cal. 1987) (discussing Marcus, *supra* note 176).

218. *See id.*

219. *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 309 (6th Cir. 2002) (Boggs, J., dissenting). Judge Boggs explains:

> Although some view privileges as impediments to the truth-seeking process, the calculation is that the attorney-client privilege improves the adversarial process without a net loss in the amount of information produced. Insofar as the existence of the privilege creates the communication sought, the exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege. The absence of the communication would leave the adversarial process with no more information and with counsel less able to present focused arguments to the courts.

Id.

220. Deborah L. Rhode, *Ethics by the Pervasive Method*, *in* The Legal Profession: Responsibility and Regulation 197 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994) (internal quotation marks and citation omitted).

A few studies have examined the empirical evidence on the privilege's role in preserving the attorney-client relationship. In *Swidler & Berlin v. United States*, the Supreme Court addressed such available evidence.[221] In noting the findings of two studies on the privilege, the Court observed "that a substantial number of clients and attorneys think the privilege enhances open communication, and that the absence of a privilege would be detrimental to such communication."[222] The Court also discussed a study that found that the privilege permits open attorney-client communications, but that a few limited exceptions would not hinder this process.[223] In fact, the study found that a majority of laypeople would withhold confidences from their lawyers absent guaranteed confidentiality.[224] Further, as the House Committee on the Judiciary reported, "[r]ecent empirical evidence supports the Supreme Court's conclusions regarding the importance of attorney-client privilege in the organizational context."[225] For example, studies demonstrate that the lack of privilege would chill the flow and candor of confidential information between in-house lawyers and their clients.[226] It is also noteworthy that the New Jersey Supreme Court scrapped its strict duty of candor rule—which completely subordinated the privilege for the purpose of truth seeking—after much criticism about the rule's impact on the attorney-client relationship.[227] In light of the available evidence, the privilege remains vital to the preservation of the attorney-client relationship.

Given the complexity and risks involved with electronic discovery today, absent a uniform rule, clients no longer have certainty over privilege protection—a premise that clearly violates the Supreme Court's warning that clients "must be able to predict

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221. *See* 524 U.S. at 410 n.4.

222. *Id.* (internal citations omitted) (citing Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191, 244–46, 261 (1989); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1236 (1962)).

223. *See id.* (citing Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 352, 382, 386 (1989)).

224. *See* Zacharias, *supra* note 223, at 386.

225. H.R. Rep. No. 110-445, at 2 (2007).

226. *See id.*

227. The New Jersey Supreme Court's about-face to its strict duty of candor rule confirms the importance of privilege. New Jersey's Rules of Professional Conduct previously prohibited lawyers from "fail[ing] to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure." Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 Seton Hall L. Rev. 613, 638 (2005) (citing former version of N.J. Rules of Prof'l Conduct R. 3.3(a)(5)). The New Jersey Court then modified its rule after much criticism that it was undermining the adversarial system and the attorney-client privilege. *See* Johanna M. Ogdon, *Washington's New Rules of Professional Conduct: A Balancing Act*, 30 Seattle U. L. Rev. 245, 278–79 (2006). The current duty of candor rule in New Jersey now prohibits lawyers from "fail[ing] to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is *protected by a recognized privilege* or is otherwise prohibited by law." N.J. Rules of Prof'l Conduct R. 3.3(a)(5) (2004) (emphasis added).

with some degree of certainty whether particular discussions will be protected."[228] It is thus imperative that Congress enact a robust, uniform, and predictable privilege rule that ends the doctrine of inadvertent waiver and prevents further erosion of the attorney-client relationship.

V. CONCLUSION

Electronic discovery poses major obstacles to the preservation of the attorney-client privilege. This problem deserves a serious solution, not a mere circumvention of privilege-waiver law. Congress should enact a new Federal Rule of Evidence that permits a finding of waiver only when a client or counsel intentionally discloses privileged communications, absent a few compelling policy exceptions. The current solution, Rule 502[229] and the *Hopson* approach,[230] gives courts the discretion to issue non-waiver orders to protect parties from waiver during discovery. Such an approach, however, is devoid of clear guidelines and thus will likely permit incentives for forum shopping and for the current legal chaos to continue. The attorney-client privilege has been central to the common law for centuries, ensuring that clients can obtain legal representation without fearing reprisal for divulging their innermost confidences.[231] To allow the complexities of electronic discovery to erode the attorney-client privilege would be an affront to the American legal system and hinder truth seeking in the long-run.

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228. *Upjohn*, 449 U.S. at 393.

229. Fed. R. Evid. 502.

230. *See Hopson*, 232 F.R.D. 228.

231. *See Bauer*, 132 F.3d at 510.