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Waving Goodbye to Waiver? Not So Fast: 
Inadvertent Disclosure, Waiver of the 
Attorney-Client Privilege, and Federal 
Rule of Evidence 502

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1. INTRODUCTION

Waiver of the attorney-client privilege due to inadvertent disclosure is an important issue that courts and litigants have grappled with for a long time. With electronic discovery becoming increasingly common, and with electronic privilege reviews replacing paper reviews, the issue takes on greater importance. The risk of inadvertently disclosing privileged or protected information is heightened in electronic discovery because of the very nature of electronic information.¹ For example, although a party makes an effort to segregate and delete privileged information from a computer drive prior to producing the electronic documents to the opposing party, the deleted files may still be present within a larger folder structure.² A document may be inadvertently produced as a result of an electronic document break error.³ And as the use of electronic discovery consultants and other vendors

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¹ 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, 233 (2007). Professor Hricik explains that

[b]ecause of recent advancements in communication technology, more documents are exchanged today than ever before. This recent proliferation of both electronic communications and electronic documents has dramatically increased the frequency with which mistakes can happen. Consequently, it is easier to make a mistake. Now it only takes the click of a mouse—an accidental “reply to all,” for example—to inadvertently transmit a privileged electronic file.

² See Amersham Biosciences Corp. v. Perkinelmer, Inc., No. 03-4901 (JLL), 2007 WL 329290, at *1 (D.N.J. Jan. 31, 2007) (noting that although privilege holder segregated privileged e-mails by moving them into another folder, copies of the e-mails remained in the larger folder structure and were thus inadvertently produced).

increases, litigants face an increased risk of inadvertent disclosure due to errors made by vendors.\(^4\)

Due to the volume of electronic information and the forms in which it is stored, privilege reviews are more difficult, time-consuming, and expensive.\(^5\) Moreover, the production of electronically stored information can result in a greater number of inadvertently disclosed documents than the production of paper documents. Whereas inadvertent disclosures in paper productions are typically small,\(^6\) inadvertent disclosure in electronic discovery cases normally involves hundreds of pages.\(^7\)

The increased risk of inadvertently disclosing privileged or protected information in electronic discovery cases is important because of its potential effect on the attorney-client privilege or work product protection. In jurisdictions taking a strict approach to waiver, an inadvertent disclosure will result in waiver of the privilege or protection, not only as to the documents produced, but also as to all other privileged or protected information related to the same subject matter.\(^8\) In jurisdictions taking a lenient approach, on the other hand, an inadvertent disclosure will never waive the privilege or protection.\(^9\) The majority of jurisdictions take a middle approach and balance a number of factors to determine whether the inadvertent disclosure resulted in waiver.\(^10\) Because of the strict approach to waiver in some jurisdictions, and the unpredictability associated with the middle approach

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8. This is known as subject matter waiver. See In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989).


taken in the majority of jurisdictions, litigants have spent enormous amounts of money trying to protect against inadvertent disclosure. These costs have become prohibitive in electronic discovery cases because of the high volume of electronic information.11

The costs associated with privilege reviews in electronic discovery cases, the risk of waiver of the attorney-client privilege due to inadvertent disclosure, and the lack of uniformity in the common law rules governing waiver due to inadvertent disclosure prompted the addition of Federal Rule of Evidence 502.12 Rule 502 addresses both the attorney-client privilege and work product protection and places limits on both subject matter waiver and waiver due to inadvertent disclosure.13 The tension between the attorney-client privilege and the search for the truth is at the heart of this issue, and Rule 502 represents Congress's decision to give greater protection to the attorney-client privilege than the harsh and unpredictable approaches afforded by the common law.14

Because Rule 502 adopts the middle approach for resolving issues of waiver due to inadvertent disclosure—which, as discussed infra, can be unpredictable and interpreted by courts to achieve a strict approach result—challenging questions are presented about whether in fact the rule will bring uniformity, predictability, and cost reduction to litigants. Further, Rule 502's standard raises the question of whether courts will abide by Congress's choice to offer greater protection of the attorney-client privilege, or will instead impose judicial preferences contrary to the intent of the rule by applying it as the functional equivalent of the strict approach in order to favor the search for the truth over the attorney-client privilege.

To lay a foundation for this Article's analysis of Federal Rule of Evidence 502 and the cases decided subsequent to Rule 502 addressing waiver due to inadvertent disclosure, Part II of the Article offers a critical analysis of the three common law approaches to waiver of the attorney-client privilege due to inadvertent disclosure: strict, lenient, and middle. It is here that I demonstrate how the middle approach, because it involves a balancing of multiple factors, enables courts to interpret and apply the factors as the functional equivalent of the strict approach in order to protect the search for the truth. Part III of the Article then discusses the issue of waiver of the attorney-client privilege due to inadvertent disclosure in the context of electronic discov-

12. See id.
ery, and provides an analysis of how the inquiries under the common law strict and middle approaches operate in this context. Part III also uses the electronic discovery context to demonstrate how the middle approach can be applied as the functional equivalent of the strict approach.

Part IV turns to Federal Rule of Evidence 502 and distills from it Congress's value choice to offer broad protection of the attorney-client privilege. It is here that I argue that Congress intends Rule 502 to be applied as the middle approach was originally applied. Specifically, Congress intends for courts using Rule 502 to balance the search for the truth and the attorney-client privilege, and not to apply the rule as the functional equivalent of the strict approach. Part IV also questions whether Congress's value choice can withstand the standard it chose to govern the issue of waiver due to inadvertent disclosure, and demonstrates that Rule 502 is susceptible to a judicial imposition of preferences and, like the common law middle approach, can be applied to achieve a strict approach result.

Looking to cases decided subsequent to the advent of Rule 502, Part V examines courts' use of the rule, in both the electronic discovery and traditional discovery contexts, in resolving issues of waiver of the attorney-client privilege due to inadvertent disclosure. Part V aims to test my argument that Rule 502's standard is susceptible to the judicial imposition of preferences and that Congress's value choice may not be able to withstand its own standard. Thus far, courts addressing waiver due to inadvertent disclosure since the addition of Rule 502 are generally abiding by the spirit and intent of the rule. However, evidence of the judicial imposition of preferences contrary to the rule's intent can be found already. Since only a small number of cases addressing this issue have been decided since the addition of Rule 502, only time will tell if courts will continue to respect Congress's value choice or whether the evidence of the judicial imposition of preferences present now will become a trend.

II. THE COMMON LAW APPROACHES TO WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE DUE TO INADVERTENT DISCLOSURE

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law"15 and protects confidential communications between the client and the attorney.

The purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Because the privilege inhibits the search for the truth, it is narrowly construed. Moreover, the attorney-client privilege is not absolute, and it may be waived in many ways, including by inadvertent disclosure.

Prior to the addition of Federal Rule of Evidence 502, there were three common law approaches to determining whether inadvertent disclosure resulted in waiver of the privilege. The two minority approaches were the strict and lenient approaches. Under the strict approach, an inadvertent disclosure of privileged information always resulted in a waiver of the privilege. On the other hand, under the lenient approach, an inadvertent disclosure never resulted in the waiver of the privilege, absent a finding of gross negligence. The middle approach was the dominant approach, and this method balanced a number of factors—including the reasonableness of precautions taken to prevent inadvertent disclosure and the timeliness of efforts taken to rectify the error—to determine whether the inadvertent disclosure should result in waiver.

This part offers a critical analysis of the three common law approaches to determining whether an inadvertent disclosure should result in waiver of the attorney-client privilege. Important to the discussion of Federal Rule of Evidence 502 and the post-Rule 502 cases, infra, this part demonstrates how middle approach courts applied the approach in one of two different ways: some balanced the interests of protecting the attorney-client privilege and the search for the truth, while others applied the approach in a manner that is the functional equivalent of the strict approach in order to offer greater protection to the search for the truth.

17. Upjohn, 449 U.S. at 389.
A. Common Law Strict Approach

1. The Strict Approach's Value Choice

The common law strict approach to waiver due to inadvertent disclosure exemplifies the choice to favor protection of the justice system's interest in the search for the truth over protection of the attorney-client privilege. The court in *In re Sealed Case*[^23^], the leading strict approach case, made this choice when it held that all inadvertent disclosures waive the attorney-client privilege.[^24^]

Because voluntary disclosures of privileged information unquestionably result in waiver of the attorney-client privilege, whether an inadvertent disclosure results in waiver of the privilege depended on the court's definition of "voluntary."[^25^] The D.C. Circuit defined the concept of voluntariness broadly as an uncompelled volitional act, and rejected a definition of voluntariness that would only make intentional disclosures come within its ambit.[^26^] In finding that inadvertent disclosures, even though unintended and born from human error, are nevertheless voluntary, the necessary conclusion was that inadvertent disclosures, just like intentional disclosures, waive the attorney-client privilege.[^27^]

Under the common law strict approach, the only possibilities for not finding waiver of the attorney-client privilege due to inadvertent disclosure occur when there has been a finding of a *de facto* court-compelled disclosure, or when "other equally extraordinary circumstances" are present.[^28^] In order for an inadvertent disclosure to be considered a *de facto* court-compelled production that would not result in the waiver of the attorney-client privilege, a court must have compelled the holder of the privilege to produce an extraordinarily high volume of documents within an extremely short period of time.[^29^]

[^25^]: See *In re Sealed Case*, 877 F.2d at 980.
[^26^]: *Id.*; see also *Wichita Land & Cattle Co.*, 148 F.R.D. at 461 ("One need not intend an act for that act to have an effect or consequence.").
[^27^]: *In re Sealed Case*, 877 F.2d at 980.
[^28^]: *Id.*
[^29^]: *Id.* (citing Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 651 (9th Cir. 1978)).
example, the court-compelled disclosure of 17 million pages within a three-month period of time did not result in the waiver of the attorney-client privilege due to inadvertent disclosure, because under the circumstances, the holder of the privilege did not have an opportunity to assert the privilege.\textsuperscript{30} By "other equally extraordinary circumstances," the \textit{In re Sealed Case} court was referring to the limited situation where a third party acquires information "despite all possible precautions," such as when an employee of the company privilege holder steals documents despite efforts of the privilege holder to safeguard the information.\textsuperscript{31} Courts adhering to the common law strict approach have rejected post-\textit{In re Sealed Case} claims that the inadvertent disclosures have occurred in such "extraordinary circumstances."\textsuperscript{32} However, as discussed infra in Part III, some courts have attempted to use the strict approach’s exception for \textit{de facto} court-compelled disclosures to fashion a procedure by which inadvertent disclosure would not result in the waiver of the attorney-client privilege.

Under the strict approach, all that matters is the fact of disclosure. It is unnecessary, therefore, to consider the reasonableness of the precautions the privilege holder took to preserve the privileged information, because at the end of the day, the precautions taken were not effective to protect the information from disclosure.\textsuperscript{33} Because information was disclosed, precautions were not effective, and because precautions were not effective, someone was negligent; therefore, the negligent holder of the privilege must pay for the negligence.\textsuperscript{34}

2. The Strict Approach’s Unjustified Assumptions

The common law strict approach to waiver due to inadvertent disclosure rests primarily on two assumptions: first, that inadvertent disclosures are a result of carelessness; and second, that inadvertent

\textsuperscript{30} Transamerica, 573 F.2d at 651.
\textsuperscript{31} \textit{In re Sealed Case}, 877 F.2d at 980 n.5.
\textsuperscript{34} \textit{Id.} at 450 (citing \textit{In re Standard Fin. Mgmt. Corp.}, 77 B.R. 324, 330 (1987)).
disclosures necessarily mean that the privilege holder does not consider confidentiality of the information to be important. As to the assumption of carelessness, the strict approach characterizes the inadvertence as carelessness without conducting an inquiry into the circumstances of the disclosure. This core premise leads to the ultimate conclusion in favor of waiver of inadvertently disclosed attorney-client information. Because “[t]he courts will grant no greater protection to those who assert the privilege than their own precautions warrant,” the assumption that inadvertent disclosures occur as a result of carelessness will never lead to a court offering protection of the attorney-client privilege, as carelessness demonstrates a low level of precaution. Therefore, the level of protection of the attorney-client privilege warranted under the strict approach rests on an assumption that inadvertence is carelessness.

If this assumption is not made, the determination of the waiver issue may be different. For example, if a court, instead of making a blanket assumption that inadvertence means carelessness, makes a probing inquiry into the circumstances surrounding the disclosure to determine the nature of the efforts taken to prevent the disclosure and to guard the confidential nature of the information, that inquiry may reveal reasonable precautions taken to protect the privilege. If the court finds that the privilege holder took reasonable precautions, then under the In re Sealed Case reasoning—that “courts will grant no greater protection to those who assert the privilege than their own precautions warrant”—the court should be able to give greater protection to the attorney-client privilege and find no waiver. However, the In re Sealed Case court shut off this possibility by operating under the core assumption that inadvertence is carelessness.

36. In re Sealed Case, 877 F.2d at 980.
37. Id.
38. At least one strict approach court has recognized the possibility of no waiver of the attorney-client privilege due to inadvertent disclosure by allowing the holder of the privilege, under the reasoning of In re Sealed Case, to demonstrate that it intended to preserve the confidentiality of the information and “that it took all possible precautions to maintain...[its] confidentiality.” United Mine Workers of Am., Int'l Union v. Arch Mineral Corp., 145 F.R.D. 3, 6 (D.D.C. 1992) (finding waiver, where privilege holder alleged that privileged documents were misappropriated but where court found that the documents were “leaked,” because holder of the privilege failed to maintain confidentiality of the documents).
39. For an example of an inadvertent disclosure leading to a waiver of the attorney-client privilege under the strict approach where there was an explicit finding that
The strict approach also assumes that because privileged information was inadvertently disclosed, the privilege holder must not have thought maintenance of the confidential nature of the information to be important. Because "the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege," characterizing inadvertence as carelessness automatically leads to the conclusion that the confidentiality of the information was not important to the holder of the privilege. So, again, this core assumption that inadvertence is carelessness is determinative of the waiver result.

However, if instead of making the assumption of carelessness the court probes the precautions taken to preserve the confidentiality, it may discover that the confidential nature of the information was extremely important to the holder of the privilege. Further, even operating under the assumption that the inadvertent disclosure was the result of carelessness, it does not necessarily mean, as In re Sealed Case suggests, that the confidentiality of the information is unimportant to the holder of the privilege. The confidentiality of the information must be important to the holder of the privilege, independent of the character of the inadvertence, by virtue of seeking protection of the privilege from the court.

The primary justification for the common law strict approach is that once disclosure has occurred, the breach of the confidentiality of the information cannot be redressed because it is impossible to erase the privileged information from the minds of those who received it. Since the information is no longer confidential, it follows that the basis for protecting the privilege no longer exists.

the disclosure was not a result of carelessness, see Wichita Land & Cattle Co. v. American Federal Bank, 148 F.R.D. 456, 459 (D.D.C. 1992).

40. In re Sealed Case, 877 F.2d at 980.

41. See SEC v. Cassano, 189 F.R.D. 83, 85 n.4 (S.D.N.Y. 1999) ("Counsel virtually always are ‘concerned’ with protecting the confidentiality of privileged material. The same point might more accurately be put in terms of whether the party producing privileged material has been so careless as to surrender any claim that it has taken reasonable steps to ensure confidentiality.").


In relying on this justification, the strict approach sweeps broadly, giving great weight to the fact of disclosure without considering either the steps taken by the holder of the privilege to safeguard the information or the importance of confidentiality to the privilege holder. Furthermore, the strict approach ignores the power of the court to protect against the use of the information against the holder of the privilege.44

Moreover, this justification does not effectively show that the purpose of the attorney-client privilege can no longer be furthered if inadvertent disclosure of the privilege does not result in a waiver. In fact, the strict approach frustrates the purpose of the privilege in favor of a certainty of result.45 "The purpose of the privilege is to protect the confidences of clients so they may freely discuss their legal concerns with counsel."46 The attorney-client privilege forbids privileged information from being discovered, admitted into evidence, or otherwise used in a legal proceeding.47 Although inadvertent disclosure results in the disclosure of confidential information, the real protection offered by the attorney-client privilege is protection against use of that confidential information in judicial proceedings.48 The court can still protect the confidence of clients against use of the information in judicial proceedings. Because the court can still offer this protection, clients will be encouraged to discuss their legal concerns freely in subsequent proceedings. If inadvertent disclosure of privileged information results in waiver of the attorney-client privilege, even despite reasonable measures taken to protect the privilege, then there is no

44. See United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 184 (C.D. Cal. 2001) ("Although the harm that defendant has suffered due to its inadvertent production of privileged documents cannot entirely be undone, that is not necessarily a reason why the court should refrain from doing what it can."); Mfrs. & Traders Trust Co. v. Servotronics, Inc., 132 A.D.2d 392, 398 (N.Y. App. Div. 1987) ("[A]lthough confidentiality can never be restored to a document already disclosed, a court can repair much of the damage done by disclosure by preventing or restricting use of the document at trial.").

45. See Berg Elec., Inc. v. Molex, Inc., 875 F. Supp. 261, 262 (D. Del. 1995) (noting that the strict approach is "inconsistent with the Supreme Court's admonition that courts should apply the privilege to ensure a client remains free from apprehension that consultations with a legal advisor will be disclosed"); Hydraflow, Inc. v. Endine, Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (criticizing the strict approach for sacrificing the attorney-client privilege for the sake of certainty).

46. Singh, 140 F.R.D. at 253 (emphasis added).


48. See Bagley, 204 F.R.D. at 184 ("The privilege protects against both disclosure and use.").
protection of client confidences. Clients in turn are discouraged from freely discussing their legal concerns.49

By equating inadvertence to voluntariness, assuming carelessness and unimportance of confidentiality to the privilege holder, and refusing to recognize the power of courts to redress a breach of confidentiality (and thus requiring waiver of the attorney-client privilege), the court in In re Sealed Case made a value choice and demonstrated its preference for the search for the truth over protection of the attorney-client privilege. Although the court left room for some remaining protection of the privilege in its decision to remand for a determination of the scope of the waiver—waiver as to only one or all six of the documents50—it nonetheless eroded the attorney-client privilege in holding that inadvertent disclosures can waive the privilege.51

B. The Common Law Lenient Approach

The polar opposite of the common law strict approach to waiver of the attorney-client privilege due to inadvertent disclosure is the common law lenient approach. Unlike the strict approach, which chooses to advance the search for the truth at the cost of the attorney-client privilege, the common law lenient approach exemplifies a value preference for protection of the privilege at the expense of truth-seeking.52

At the heart of the lenient approach is the fundamental proposition that inadvertent disclosures, because unintentional, can never waive the attorney-client privilege. The lenient approach also rejects the strict approach’s view of inadvertent disclosures as volitional acts—which, although unintentional, nevertheless result in waiver—and

49. See id. at 177 n.10 ("It is the client's fear of the subsequent use of his communications against him, and the embarrassment that might result, which inhibits candid communication with the attorney, and the privilege eliminates this fear."); Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass. 2000) (noting that the strict approach "diminish[es] the attorney-client privilege because, in rendering all inadvertent disclosures—no matter how slight or justifiable—waivers of the privileges [sic], the rule further undermines the confidentiality of communications").


51. Id. at 979.

requires intent to waive the attorney-client privilege.53 Once it is established that the holder of the privilege did not intend a waiver, and the disclosure was thus inadvertent, the lenient approach mandates a finding of no waiver.54 Also critical to the lenient approach is the view that the attorney-client privilege belongs to the client and not the attorney, and therefore only the client can waive the privilege.55

One justification advanced in support of the lenient approach and its mandate of non-waiver is that an inadvertent disclosure does not result in a breach of confidentiality. Because information is “‘confidential’ if not intended to be disclosed to third persons,”56 when information is unintentionally (or inadvertently) disclosed, the information is still considered “confidential” because the holder of the privilege never intended to disclose the information. In other words, because the very definition of “confidential” contains an intent requirement,57 it follows that only an intentional disclosure can result in a breach of confidentiality.58 Unlike the strict approach, which considers the fact of disclosure and the fact that the information has been shared with others—whether intentionally or unintentionally—as a breach of confidentiality, the lenient approach preserves confidentiality despite the fact of disclosure and that others have learned the confidential information. Thus, in honoring the intent of the privilege holder, the lenient approach chooses greater protection of the attorney-client privilege and thus greater protection of the client.

The lenient approach’s conclusion that inadvertent disclosures do not waive the attorney-client privilege is also justified on the theory that any negligence of an attorney in inadvertently disclosing information should not harm the client by finding waiver of the attor-

53. See Mendenhall, 531 F. Supp. at 955 (“We are taught from first year law school that waiver imports the ‘intentional relinquishment or abandonment of a known right.’ Inadvertent production is the antithesis of that concept.”); Shields, 18 F.R.D. at 451.


55. See Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (explaining that whereas the work product privilege belongs to both the attorney and the client, the attorney-client privilege belongs only to the client); Shields, 18 F.R.D. at 451 (the attorney-client privilege can only be waived by the client); Helman, 728 F. Supp. at 1104.

56. Mendenhall, 531 F. Supp. at 955 (citing Proposed Rule 503(a)(4)’s definition of “confidential,” which had been approved by the Supreme Court of the United States although not adopted by Congress).


WAVING GOODBYE TO WAIVER?

Under the lenient approach, because of the importance of preserving the attorney-client relationship, the attorney's negligence in inadvertently disclosing the documents is not fatal to the privilege. One of the purposes of the privilege is to ensure that clients will speak to their attorneys freely without worry that their communications will be disclosed. If the inadvertence or negligence of an attorney were allowed to harm the client, the attorney-client privilege would be eroded because clients will be discouraged from freely communicating with their attorneys. Moreover, attorney negligence should not be allowed to result in a “global loss of an expectation of confidentiality” by a “negligence-free client.” Because of the value choice to protect the attorney-client privilege, more than attorney negligence would be required in order for a court to find that the client’s privilege has been waived. Therefore, a finding that the attorney was grossly negligent or reckless in its inadvertent disclosure of privileged information may result in a finding of waiver under the lenient approach.

The lenient approach recognizes that mistakes happen, that a document can slip through the cracks despite precautions taken to protect its confidentiality, and that such a mistake should not result in the harsh result of waiver of a privilege that belongs to the client. However, the lenient approach is criticized as sanctioning attorney negligence and not providing adequate incentive to attorneys to protect the privilege. Further, the lenient approach is criticized for “fail[ing] fully to recognize that even an inadvertent disclosure undermines the confidentiality which undergirds the privileges,” and failing to recog-

60. Id.
64. Mendenhall, 531 F. Supp. at 955.
67. Amgen, 190 F.R.D. at 292; see also Gray, 86 F.3d at 1483 (noting that the lenient approach “ignores the importance of confidentiality”).
nize that when faced with the potential for waiver due to inadvertent disclosure, clients will surely deny intent to waive.\footnote{See Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993).}

C. The Common Law Middle Approach

1. Balancing the Attorney-Client Privilege and the Search for the Truth

The dominant approach used to determine whether the inadvertent disclosure of privileged documents should result in the waiver of the attorney-client privilege is known as the "middle" approach.\footnote{See Amgen, 190 F.R.D. at 292.}

The middle approach aims to strike a balance "between the conflicting policies of facilitating truth-seeking by construing privileges strictly and, at the same time, fairly and adequately" protecting the attorney-client relationship and encouraging full and frank communication.\footnote{See SEC v. Lavin, 111 F.3d 921, 930 (D.C. Cir. 1997) (discussing waiver of marital privilege).}

Although the middle approach "recognizes that mistakes will be made given 'the realities of the discovery process in complex litigation,' it also creates an incentive for counsel to guard the privilege closely, as the failure to take reasonable precautions will result in waiver."\footnote{United States v. Gangi, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998) (quoting Asian Vegetable Research & Dev. Ctr. v. Inst. of Int'l Educ., No. 94 Civ. 6551, 1995 WL 491491, at *7 (S.D.N.Y. Aug. 17, 1995)); see also Amgen, 190 F.R.D. at 292 (stating that the middle approach allows for "errors that inevitably occur in modern, document-intensive litigation").}

The balancing test operates to advance the purpose of the attorney-client privilege by protecting communications intended to be confidential yet inadvertently disclosed despite reasonable precautions, while at the same time refusing to sanction carelessness.\footnote{See Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993); Pinnacle Pizza Co. v. Little Caesar Enter., Inc., 627 F. Supp. 2d 1069, 1074 (D.S.D. 2007).}

Similar to the lenient approach, the middle approach first requires a determination that the disclosure was in fact inadvertent, and not voluntarily disclosed or disclosed under a mistaken belief that the document was not privileged.\footnote{See Bensel v. Air Line Pilots Ass'n, 248 F.R.D. 177 (D.N.J. 2008); Williams v. Sprint/United Mgmt. Co., No. 03-2200-JWL, 2007 WL 38397, at *4 (D. Kan. Jan. 5, 2007) ("There is a distinction, however, between an 'inadvertent' disclosure and a disclosure that is 'advertent and intended where the person making discovery was merely unaware of the legal consequences or nature of the document produced.'") (quoting Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 (D. Utah 2002))); Fidelity & Deposit Co. of Md. v. McCulloch, 168 F.R.D. 516, 521 (E.D. Pa. 1996).}

Unlike the lenient approach, which would
automatically conclude that the privilege is not waived upon a finding of inadvertent disclosure, the middle approach takes a second step. In order to determine whether the inadvertent disclosure should result in a waiver of the attorney-client privilege, courts consider a number of factors relating to the inadvertent disclosure, including: (1) the reasonableness of precautions taken to avoid inadvertently disclosing privileged documents; (2) the promptness of efforts taken to rectify the error; (3) the scope of the discovery and the extent of the disclosure; and (4) the "overreaching issue of fairness and the protection of an appropriate privilege."74 Under the middle approach, the "inadvertent production of a privileged document does not waive the privilege unless the producing party's conduct was 'so careless as to suggest that it was not concerned with the protection of the asserted privilege.'"75

The first factor, whether the holder of the privilege took reasonable precautions to avoid inadvertently disclosing privileged documents, examines not the reasonableness of review and disclosure procedures in general, but more specifically the efforts taken to avoid inadvertent disclosure of privileged documents.76 The reasonableness of precautions taken to prevent inadvertent disclosure principally involves scrutiny of the procedures for reviewing documents for privilege and for segregating privileged documents.77 This reasonableness factor will usually weigh in favor of the privilege holder if it is "demonstrated that it used some sort of system to segregate privileged material from non-privileged material that, though well-fashioned, happened to fail in the particular instance."78 Also bearing on the determination of whether the precautions taken were reasonable may be the size of the document production, as larger document productions will require increased efforts to avoid inadvertent disclosure, and the presence of time constraints.79

76. Amgen, 190 F.R.D. at 292.
The second factor of the middle approach, the time and efforts taken to rectify the error, has two different interpretations. Most courts measure the promptness of efforts taken to rectify the error from the time the privilege holder discovered that a privileged document had been inadvertently disclosed. However, some courts measure the time and efforts taken to rectify the inadvertent disclosure from the time of the inadvertent disclosure itself.

Reasonable efforts to rectify the error range from formally asserting the privilege by filing a motion for a protective order or similar motion with the court, to asserting the privilege to the party who received the inadvertently disclosed privileged document and requesting a return of the document. The steps the privilege holder takes to


81. See Indus. Commc’ns & Wireless, Inc. v. Town of Alton, Civ. No. 07-82-JL, 2008 WL 3498652, at *3 (D.N.H. Aug. 7, 2008) (considering both the length of time it took the privilege holder to discover that documents had been inadvertently disclosed and the length of time it took the privilege holder to assert the privilege once the inadvertence was discovered); Amgen, 190 F.R.D. at 292–93 (measuring time to rectify error from the date of inadvertent disclosure and criticizing privilege holder for recognizing error only after opposing counsel brought error to the privilege holder’s attention); Figueras, 250 F.R.D. at 97 (same); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 263 (D. Md. 2008) (conducting an alternative analysis under the middle approach and criticizing privilege holder for not discovering its own error).

82. See Gangi, 1 F. Supp. 2d at 266 (finding that Government acted “reasonably and promptly” to rectify its error by requesting return of the privileged prosecution memorandum and seeking relief from the court). The Federal Rules of Civil Procedure provide a mechanism for asserting waiver after production:

If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination
prevent additional subsequent inadvertent disclosures once the privi-
lege holder becomes aware of the initial inadvertent disclosure are also
important considerations.\textsuperscript{83}

The middle approach's third factor requires consideration of the
extent of the inadvertent disclosure in relation to the scope of discov-
ery.\textsuperscript{84} Requiring an examination of the scope of discovery and the
extent of disclosure reflects the middle approach's recognition that "a
few privileged documents in a massive disclosure is not necessarily
inconsistent with the exercise of due care to avoid such occurrences, as
it is virtually impossible to avoid any error whatsoever in dealing with
large volumes."\textsuperscript{85}

The extent of disclosure factor was originally interpreted to
require a consideration of the number of pages or documents inadvertently
produced to determine whether the extent of disclosure in relation to the scope of discovery was small or large.\textsuperscript{86} While this
interpretation is still being followed today,\textsuperscript{87} the extent of the inadvert-
ten disclosure factor has also been interpreted as requiring a consider-
ation of the nature of the disclosure, including whether the disclosure
was isolated or widespread, and whether the inadvertently disclosed
documents have been copied, used, shared with others, or publicly
filed.\textsuperscript{88} If the inadvertently disclosed privileged document was widely
disseminated or if the document was read in its entirety or copied or
used, then it is argued that the "disclosure was complete"\textsuperscript{89} and the

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

2d at 266 ("Where numerous documents are involved and thousands of pages are
produced, errors are more understandable.").
86. See, e.g., *Lois Sportswear*, 104 F.R.D. at 105 (noting that 22 documents out of
16,000 pages inspected and 3000 pages produced were inadvertently disclosed).
87. See *Indus. Commc'ns & Wireless, Inc. v. Town of Alton*, Civ. No. 07-82-JL,
2008 WL 3498652, at *3 (D.N.H. Aug. 7, 2008) (stating that only one document was
(D.P.R. 2008) (same).
88. See *Cassano*, 189 F.R.D. at 86 (finding important to extent of inadvertent
disclosure factor that "the memorandum had been distributed to and studied by five
defense attorneys, at least four clients, at least four other persons, and one member of
Congress and his staff"); *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287,
291 (D. Mass. 2000) (considering number of people who saw the inadvertently dis-
closed documents).
court cannot then force the party with knowledge of the contents of the privileged document "to forget what has already been learned."^{90}

The middle approach’s final factor, the “overriding interest of fairness and justice,”^{91} has varied interpretations. It essentially requires a consideration of whether restoring the privilege of an inadvertently disclosed document would be unfair,^{92} balanced against “the harm to the client who suffers a waiver of privilege due to an inadvertent error.”^{93}

Reliance, or the extent to which the inadvertently disclosed information has been woven into the fabric of the case,^{94} is perhaps the most common consideration in connection with the fairness factor.^{95} If the party to whom the privileged document has been inadvertently disclosed has relied on the information, such as by using the information to prepare for and conduct a deposition,^{96} attaching the document in support of a motion for summary judgment or other court filing, expending resources based on the subject matter of the document,^{97} or otherwise using the document for preparation of the party’s case, the fairness factor will weigh in favor of finding a waiver of the attorney-client privilege. In other words, when a party who received the inadvertently disclosed privileged material has relied on the informa-

90. Id.; see also United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 490 (N.D. Miss. 2006) (interpreting “extent of disclosure” factor as requiring a consideration of whether the document’s contents were learned and extensively reviewed).
91. Amgen, 190 F.R.D. at 291.
96. See Figueras, 250 F.R.D. at 98.
tion, a finding that the attorney-client privilege has not been waived, and consequently that the party who received the inadvertently disclosed document may no longer use the information, is said to work an injustice on the relying party.\footnote{See Figueras, 250 F.R.D. at 98; United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 491 (N.D. Miss. 2006) (explaining that while the inability to use inadvertently disclosed documents is not itself prejudicial, when a party has used and relied on the inadvertently disclosed documents, there would be prejudice).} When, on the other hand, there is no demonstration of reliance, such a finding is said to “work a fundamental unfairness” to the privilege holder to deny it the protection of the privilege.\footnote{Hydraflow, 145 F.R.D. at 638.}

The fairness factor has also been interpreted as requiring consideration of the extent to which the subject matter of the inadvertently disclosed privileged information is relevant to the case or supports the position of the party seeking waiver.\footnote{See Atronic Int’l v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 164 (E.D.N.Y. 2005) (considering the fact that the inadvertently disclosed “e-mails contain information that go to the heart of this breach of contract litigation” in connection with fairness and justice factor); United States v. Keystone Sanitation Co., 885 F. Supp. 672, 676 (M.D. Pa. 1994) (finding that fairness factor weighed in favor of waiver because the inadvertently disclosed privileged information was pertinent to claim). But see Redland Soccer Club, Inc. v. Dep’t of the Army of the United States, 55 F.3d 827, 856 (3d Cir. 1995) (rejecting “plaintiffs' contention that the importance of the documents should be factored into the determination of whether the government waived its [deliberative process] privilege”); Kalra, 2008 WL 1902223, at *6 (noting that the fairness and justice factor does not “focus on whether the privilege itself deprives parties of pertinent information” (citation omitted)). The “extent of disclosure” factor is also interpreted as the extent to which the inadvertently disclosed documents are relevant to the merits of the case. See Cont’l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 767 (D. Md. 2008); Bobbitt v. Acad. of Court Reporting, No. 07-10742, 2008 WL 4056323, at *9 (E.D. Mich. Aug. 26, 2008).} If the subject matter of the inadvertently disclosed document is pertinent to a claim or defense in a case, it is reasoned that restoring the privilege to the inadvertently disclosed document would work prejudice to the person who received the information because the documents would not be available to pursue the claim or defense.\footnote{See Atronic, 232 F.R.D. at 164 (restoring privilege to inadvertently disclosed privileged e-mails would prejudice the party who received the inadvertent disclosure); Keystone Sanitation, 885 F. Supp. at 676 (finding that fairness factor weighed in favor of waiver because the inadvertently disclosed privileged information was pertinent to claim).}
2. Applying the Middle Approach as the Strict Approach

A close examination of the cases interpreting and applying the middle approach reveals that the approach has been used to decide waiver due to inadvertent disclosure issues in one of two different ways. Originally, the middle approach interpreted and applied the factors to balance the interests of the attorney-client privilege and the search for the truth. Middle approach jurisdictions, however, have applied that approach as the functional equivalent of the strict approach in order to achieve a strict approach result and thereby give greater protection to the search for the truth.

Cases using the middle approach to balance the interest in protecting the attorney-client privilege and the interest in the search for the truth are the original middle approach cases. Courts in these cases gave deference to the privilege holder’s review procedures and interpreted the reasonableness of precautions taken to prevent inadvertent disclosure as establishing a relatively low standard. For example, these cases required the privilege holder to show that its privilege review procedures were “at least minimally adequate” or were not “so deficient.” The courts interpreted the reasonableness standard as requiring an examination of the precaution “from the standpoint of customary practice in the legal profession . . . [and] not with the 20-20 vision of hindsight.”


103. See, e.g., Keystone Sanitation, 885 F. Supp. at 676 (using middle approach to achieve result of strict approach by only looking at lack of court-ordered discovery production deadline in determining efforts to prevent inadvertent disclosure were unreasonable).

104. See, e.g., Lois Sportswear, 104 F.R.D. at 103.

105. See Judson Atkinson Candies, Inc. v. Latini-Hohberger DhimanTech, 529 F.3d 371, 388 (7th Cir. 2008) (finding that “[t]here is nothing clearly inadequate about the [document review] process described” in the attorney’s affidavit); Miyano Machinery USA, Inc. v. MiyanoHitec Mach., Inc., 257 F.R.D. 456, 461–62 (N.D. Ill. 2008) (giving deference to precautions taken to prevent inadvertent disclosures by not scrutinizing attorney’s privilege review procedures); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 597 (D. Minn. 1999) (finding no waiver without scrutinizing privilege holder’s review procedures and noting that although “the erroneous disclosure is in itself evidence that greater care should have been taken in the document review, the task was not casually placed in the hands of not-lawyer staff”).


107. Judson Atkinson Candies, 529 F.3d at 388.

The courts balancing the interests in the attorney-client privilege and the search for the truth also interpreted the extent of disclosure factor as the number of documents inadvertently disclosed, rather than whether the information in the documents had been learned, or whether the documents had been shared or used. Additionally, these cases measured the promptness of efforts taken to rectify the error from the time the privilege holder learned of its mistake and not from the time of the inadvertent disclosure, and did not fault the privilege holder for learning of the mistake after the receiving party used the information.

On the other hand, the courts that have applied the middle approach as the strict approach have given little deference to a privilege holder's review procedures, have heavily scrutinized the procedures used, and have engaged in "retrospective judicial micromanagement and second-guessing." The very nature of inadvertent disclosure is that a mistake occurred and privileged information was disclosed. The courts that have applied the middle approach as the strict approach engage in hindsight analysis and claim that the holder of the privilege "could have taken further precautions," instead of looking through the eyes of the privilege holder at the time of the review and production to determine if, at that time, the precautions taken were reasonable in light of the circumstances of the case. By heavily scrutinizing the precautions the privilege holder took to prevent inadvertent disclosure, these courts fail to recognize that the holder of the privilege, despite taking what it considers to be reasonable precautions, cannot predict that a court, with the benefit of hindsight, will also find those precautions to be reasonable. These courts always think that something more could have been done.

Courts have also applied the middle approach as the strict approach through the interpretation of the extent of disclosure factor. A middle approach court can achieve the functional equivalent

111. See Bagley, 204 F.R.D. at 179 (criticizing middle approach).
113. See Bagley, 204 F.R.D. at 177 n.10 (criticizing middle approach).
of a strict approach result by interpreting the extent of the disclosure requirement not as the number of documents inadvertently disclosed, but as whether disclosure is "complete" in the sense that it has been learned, shared, or used, and cannot be unlearned, unshared, or unused. This is the rubric of the strict approach. Whereas a breach in the confidence of the information is critical to the strict approach's reasoning that waiver due to inadvertent disclosure is mandatory, the middle approach was designed to protect the attorney-client privilege against waiver despite a breach in confidence as long as reasonable precautions were taken to protect confidentiality.

Middle approach courts have also applied the middle approach as the strict approach through interpretation of the factor measuring the promptness of efforts taken to rectify the inadvertent disclosure. Measuring the time and efforts taken to rectify the inadvertent disclosure from the moment of disclosure, rather than from the discovery of the inadvertence, helps achieve a strict approach result. This is frequently the case because the privilege holder does not immediately realize the inadvertent disclosure of a document, and only discovers the inadvertence some time later when the other party attempts to use the privileged document, for example, at a deposition or in connection with a court filing. If the promptness of taking steps to rectify the

116. See Marine Midland Realty, 138 F.R.D. at 483; Cassano, 189 F.R.D. at 84; Amgen, 190 F.R.D. at 291; United Investors Life Ins., 233 F.R.D. at 490.
118. See Wichita Land & Cattle, 148 F.R.D. at 459-60 (the confidential nature of a document is breached when the person to whom the document was inadvertently disclosed obtained "substantial knowledge" of the contents of the document, or the "gist" of the document); Singh, 140 F.R.D. at 253; Int'l Digital Sys., 120 F.R.D. at 449.
120. See sources cited supra note 81.
121. See Indus. Commc'n & Wireless, 2008 WL 3498652, at *3 (noting privilege holder discovered inadvertent disclosure only after opposing counsel attached document to summary judgment brief months after the inadvertent disclosure); Marine Midland Realty, 138 F.R.D. at 480 (finding privilege holder discovered inadvertent disclosure when document was sought to be marked as exhibit at deposition). The Advisory Committee was advised that

the Committee Note should state that if a party takes reasonable steps to prevent inadvertent disclosures, the time period to rectify errors does not begin to run until the party discovered, or with reasonable diligence should
inadvertent disclosure is measured from the time of the inadvertent disclosure, this factor would almost always weigh in favor of waiver.\textsuperscript{122} Finally, middle approach courts have also applied the middle approach as the strict approach by interpreting the fairness factor as requiring an inquiry into the importance of the inadvertently disclosed information to the receiving party’s claim or defense and the extent to which the receiving party has relied on the information.\textsuperscript{123} The problem with considering the importance of the information to the receiving party is that a party cannot be prejudiced because, by virtue of a court finding against waiver, it is prevented from using documents that it never had a right to use.\textsuperscript{124} The inability to use inadvertently disclosed documents until the opposing party attempts to use a privileged document affirmatively. Consequently, the Committee Note should provide that measures taken to recover a document that has been inadvertently disclosed does not run afoul of the mandates of the rule merely because the proceeding has reached its latter stages.


\textsuperscript{122} The only time this factor would not weigh in favor of a finding of waiver would be when the privilege holder immediately, or nearly immediately, recognizes the inadvertence.


\textsuperscript{124} In re Cooper Mkt. Antitrust Litig., 200 F.R.D. 213, 223 (S.D.N.Y. 2001) (“Depriving a party of information in an otherwise privileged document is not prejudicial.”); see also United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 491 (N.D. Miss. 2006) (explaining that the inability to use inadvertently disclosed documents, without more, is not prejudicial); Nilavar v. Mercy Health Sys. –W. Ohio, No. 3:99CV612, 2004 WL 5345311, at *6 (S.D. Ohio Mar. 22, 2004) (noting that the “prejudice factor focuses only on whether the act of restoring immunity to an inadvertently disclosed document would be unfair, not whether the privilege itself deprives parties of pertinent information” and the receiving party has “no inherent fairness
closed privileged information is not by itself prejudicial enough to tip the fairness factor against the holder of the privilege. Also, all inadvertently disclosed privileged documents are relevant to the parties' claims or defenses, because without relevance, the documents would not be discoverable. Furthermore, inadvertently disclosed privileged documents are always important or beneficial to a party's claim or defense because presumably the parties would not be fighting over the waiver issue if the documents were not in fact important or beneficial. Accordingly, this consideration could be used to support a finding of waiver in every case of the inadvertent disclosure of privileged documents.

Moreover, if the fairness factor is interpreted as a consideration of the extent to which the receiving party has relied on the inadvertently disclosed privileged information, that interpretation impermissibly places control of the waiver issue in the hands of the receiving party. Because the fairness factor will support a finding of waiver if the receiving party has relied on the inadvertently disclosed document, a decision by the receiving party to use the document in some manner, whether in a deposition or in connection with a court filing or otherwise, increases the likelihood that the fairness factor will weigh in favor of waiver. Putting control of the waiver determination in the hands of the receiving party by using reliance as the guidance for fairness gives the receiving party incentive to destroy the confidentiality of

interest in keeping inadvertently disclosed documents (internal quotation marks omitted); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 598 (D. Minn. 1999) ("The interests of justice does [sic] not weigh in plaintiff's favor where the outcome of the dispute is to deny him something to which he was never entitled."); Bagley, 204 F.R.D. at 183 ("The potential value of the inadvertently-produced privileged documents to the receiving party is beside the point.").

125. See FED. R. Civ. P. 26(b)(1) (allowing parties to "obtain discovery of any non-privileged matter that is relevant to any party's claim or defense").

126. See Nilavar, 2004 WL 5345311, at *5 (describing one interpretation of the extent of disclosure element as "the extent to which the documents . . . support the position of the party demanding waiver" and remarking that this interpretation "would undoubtedly always lead to a finding that the factor weighs in favor of disclosure, since a party would presumably only undertake the difficult task of attempting to defeat the attorney-client privilege if the privileged information at stake were beneficial to its case").

127. See id. But see Employers Ins. Co. of Wausau v. Skinner, No. CV 07-735, 2008 WL 4283346, at *9 (E.D.N.Y. Sept. 17, 2008) (finding that contents of inadvertently disclosed email, while containing some relevant information, did not contain "vital information," and therefore, the fairness and justice factor did not weigh in favor of waiver).

128. See Bagley, 204 F.R.D. at 182 n.16 (criticizing middle approach).
the information by disseminating it widely or integrating the information into its case in order to maximize its chances of obtaining a favorable waiver determination. Moreover, because it is more often the case that the privilege holder learns of its mistake only after the inadvertently disclosed information has been used, using reliance as the measure of fairness will usually weigh in favor of waiver.

III. THE STRICT AND MIDDLE APPROACHES IN ACTION IN CASES INVOLVING ELECTRONIC DISCOVERY

This part of the Article sets forth an analysis of how the common law strict and middle approaches operate in the context of electronic discovery. The discussion begins with an examination of the strict approach's exception to waiver for de facto court-compelled disclosures, and proceeds to address the two leading and comprehensive cases dealing with waiver due to inadvertent disclosure in the context of electronic discovery prior to the addition of Federal Rule of Evidence 502—Hopson v. Mayor of Baltimore129 and Victor Stanley, Inc. v. Creative Pipe, Inc.130—to demonstrate how a court has fashioned a procedure by which privilege holders may avoid waiver due to inadvertent disclosure under the strict approach. This part concludes with a discussion of how a court has applied the middle approach as the functional equivalent of the strict approach in the context of electronic discovery.

A. A Closer Look at Transamerica Computer Co. v. IBM Corp.131

In order to understand how the common law strict approach operates in the context of electronic discovery, it is first necessary to examine the foundation for the strict approach's exception to waiver under the circumstance of de facto court-compelled disclosure of privilege. Remember that under the strict approach, the inadvertent disclosure of attorney-client privileged information results in the automatic waiver of the privilege. In re Sealed Case, the principle strict approach case, cited to Transamerica, a Ninth Circuit case addressing the issue of waiver of the attorney-client privilege due to inadvertent disclosure in a prior unrelated proceeding, for the proposition that an inadvertent disclosure of privileged information that occurred under circumstances amounting to a de facto court-compelled disclosure of privileged information would not result in the automatic waiver of the

131. Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978).
privilege.\textsuperscript{132} A closer look at Transamerica reveals what In re Sealed Case’s court-compelled disclosure exception means and why it is an exception to the strict waiver of the attorney-client privilege due to inadvertent disclosure.

In Transamerica, the defendant had inadvertently disclosed attorney-client privileged documents in a prior, unrelated proceeding, and the plaintiff sought a ruling that the defendant’s prior inadvertent disclosure waived the attorney-client privilege and that the documents that were inadvertently disclosed in the prior proceeding were discoverable in the subsequent proceeding.\textsuperscript{133} The court in Transamerica relied on the “unique circumstances” of the disclosure in the prior proceeding in its determination that the defendant had not waived the attorney-client privilege by its inadvertent disclosure there.\textsuperscript{134} Specifically, the judge in the prior proceeding issued a pretrial order that sped up discovery in the case and required the defendant to produce approximately 17 million pages in a three-month period of time.\textsuperscript{135}

During the three-month period in which the defendant was pursuing “herculean”\textsuperscript{136} efforts to review and produce relevant information in the prior proceeding, a dispute arose between the parties over the presence of a representative of the defendant—whose task was to intercept any privileged documents that slipped through the cracks during its review process—in the room where the plaintiff was reviewing documents.\textsuperscript{137} During the hearing to resolve this dispute, the judge ordered removal of defendant’s interceptor yet also ruled that the defendant would not waive the attorney-client privilege due to inadvertent disclosure as long as it continued to employ reasonable measures to prevent the disclosure of privileged documents.\textsuperscript{138} This ruling and the expedited circumstances of the extraordinarily high volume of documents to be produced constitute the most critical aspects of the Transamerica court’s analysis of the waiver issue vis-à-vis the inadvertent disclosure in the prior proceeding.

\textsuperscript{132} In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (“Short of court-compelled disclosure, . . . we will not distinguish between various degrees of ‘voluntariness’ in waivers of the attorney-client privilege.”) (citing Transamerica, 573 F.2d at 651).

\textsuperscript{133} Transamerica, 573 F.2d at 647.

\textsuperscript{134} Id. at 649.

\textsuperscript{135} Id. at 649-50.

\textsuperscript{136} Id. at 648.

\textsuperscript{137} Id. at 649.

\textsuperscript{138} Id. at 649-50.
The Transamerica court made clear that it was not deciding the waiver issue under the framework of inadvertent disclosures. Instead, the court decided the waiver issue under the principle that a party does not waive the attorney-client privilege when the party is compelled to produce the documents. The court in Transamerica held that the defendant’s inadvertent production of attorney-client privileged documents in the prior proceeding was compelled indirectly by the imposition by the judge in that case of an accelerated discovery schedule. Because the accelerated discovery schedule deprived the defendant of an opportunity to assert the privilege as to documents for which it otherwise would have been able to assert the privilege without the accelerated schedule, the judge’s discovery order amounted to a “de facto compulsion” of the production of privileged documents. The court also noted the statistical inevitability of inadvertently producing privileged documents under the accelerated discovery schedule imposed on the defendant, notwithstanding “extraordinary precautions” taken by the defendant.

Also critical to the court’s holding in Transamerica that the defendant had not waived the attorney-client privilege was the judge’s ruling in the prior proceeding that all claims of privilege would be preserved so long as the parties undertook reasonable screening precautions. Specifically, in the prior proceeding, the judge held that neither party “shall be deemed to have waived the attorney-client or other privilege as to any document which heretofore has, or if reasonable precautions as in the past are taken hereafter may, come into the possession of any party to pending litigation.” Accordingly, in ruling that the defendant had not waived the attorney-client privilege in the prior proceeding, the judge made an explicit finding that the precautions being taken by the defendant to prevent the inadvertent disclosure of privileged documents were reasonable. In other words, as long as the same reasonable precautions were taken from that point

139. Id. at 650-51.
140. Id.
141. Id. at 651 (relying on Proposed Rule 512, which “would have prohibited the use of any privileged matter if its disclosure had been ‘compelled erroneously’ or had been ‘made without opportunity to claim the privilege’”).
142. Id. at 650-51.
143. Id. at 652.
144. Id.
146. Id.
forward, as they had been taken in the past, the parties would preserve
the attorney-client privilege.\textsuperscript{147} Returning for a moment to \textit{In re Sealed Case}, the court there cited \textit{Transamerica} for the proposition that a court-compelled disclosure would not amount to a waiver of the attorney-client privilege. In doing so, the court must have been referring to two critical aspects of the \textit{Transamerica} case: first, that the accelerated discovery order amounted to a \textit{de facto} compulsion of defendant's inadvertently disclosed privileged documents because it operated to deprive the defendant of the opportunity to assert the privilege as to those documents despite reasonable precautions to prevent inadvertent disclosure; and second, that the judge in the prior proceeding had made an explicit finding that the screening precautions taken by the defendant were reasonable.

B. Hopson: \textit{Formal Adoption of the Strict Approach}

The Maryland district court's opinion in \textit{Hopson v. Mayor of Baltimore} addresses, in a broad sense, issues associated with privilege reviews and inadvertent disclosure in the context of electronic discovery, and the permissibility and effectiveness of non-waiver agreements purporting to permit parties to assert privilege subsequent to production of the privileged documents.\textsuperscript{148} The court in \textit{Hopson} began by acknowledging that the then-proposed revised Federal Rules of Civil Procedure, in an effort to minimize the expense and difficulties associated with privilege reviews in electronic discovery, and in an effort to minimize the risk of waiver, permit the parties to enter into agreements under which they may assert privilege after production.\textsuperscript{149} Although parties are permitted to enter into "non-waiver" agreements and the Federal Rules of Civil Procedure set up procedures for incorporating these agreements into scheduling orders and for assertion of privilege after inadvertent disclosure, the court noted that waiver of the attorney-client privilege may occur notwithstanding the existence of such agreements because the rules only set up procedures for post-production assertion of the privilege and do not address the substantive question of waiver.\textsuperscript{150} Because the substantive law on waiver of the privilege due to inadvert-

\begin{itemize}
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 231 (D. Md. 2005).
\item \textsuperscript{149} Id. at 231–32.
\item \textsuperscript{150} Id. at 233.
\end{itemize}
tent disclosure varies by jurisdiction,\textsuperscript{151} Hopson indicates that a party who enters into a non-waiver agreement nevertheless risks a finding that an inadvertent disclosure results in the waiver of the attorney-client privilege.\textsuperscript{152} Accordingly, \textit{[a]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule.}\textsuperscript{153}

Because the Fourth Circuit had not adopted an approach to determine issues of waiver of the attorney-client privilege due to inadvertent disclosure, the \textit{Hopson} court proceeded to review Fourth Circuit opinions and decided that it would most likely adopt the strict approach.\textsuperscript{154} In making that determination, the court recognized the \textit{"unavoidable clash"} of the substantive policy of strictly construing the attorney-client privilege against the policy of reducing the expense and difficulties associated with privilege review in voluminous electronic discovery, as envisioned by the then-proposed revisions to the Federal Rules of Civil Procedure.\textsuperscript{155}

In order to resolve this clash, the \textit{Hopson} court devised a \textit{"method of dealing with the practical challenges to privilege review of electronically stored information without running an unacceptable risk of subject-matter waiver."}\textsuperscript{156} In essence, in order to avoid waiver of the attorney-client privilege, in either the present proceeding or in a subsequent proceeding, when there has been the inadvertent production of privileged information, the production of the information must have been at the compulsion of the court.\textsuperscript{157} In other words, as long as the procedures that have been agreed to by the parties for reviewing and screening privileged electronically stored information are determined to be reasonable by the court and are incorporated by the court into a scheduling, protective, or discovery management order prior to the

\begin{itemize}
  \item \textsuperscript{151} \textit{Id.} at 234-35 nn.9-10. The court noted that while some courts have approved of the use of non-waiver agreements, others have refused to give them effect. \textit{See id.}
  \item \textsuperscript{152} \textit{Id.} at 235.
  \item \textsuperscript{153} \textit{Id.} at 234.
  \item \textsuperscript{154} \textit{Id.} at 236-38 (finding that the decisions \textit{"clearly express a very strict interpretation of the attorney-client privilege, and an unambiguous willingness narrowly to confine it to its essential function-preserving communications intended to be kept confidential,"} and that they \textit{"take an unforgiving view of the results of its waiver-subject matter waiver"}); \textit{see also} Victor Stanley, Inc. \textit{v.} Creative Pipe, Inc., 250 F.R.D. 251, 258 (D. Md. 2008) (\textit{"As \textit{Hopson} pointed out, . . . a careful reading of the Fourth Circuit's decisions regarding waiver of the attorney-client privilege, albeit in contexts not closely related to the facts of this case, suggest that it is more inclined to adopt the strict approach than the intermediate or lenient one."}).
  \item \textsuperscript{155} \textit{Hopson}, 232 F.R.D. at 238.
  \item \textsuperscript{156} \textit{Id.} at 239.
  \item \textsuperscript{157} \textit{Id.} at 240.
\end{itemize}
commencement of discovery, waiver of the attorney-client privilege can be avoided.\textsuperscript{158}

In devising this method, \textit{Hopson} claimed to be operating under \textit{In re Sealed Case}’s exception to waiver due to inadvertent disclosure in the limited circumstance of \textit{de facto} court-compelled disclosure. The court also relied heavily on \textit{Transamerica},\textsuperscript{159} reasoning that the \textit{Transamerica} court would allow parties who have entered into an agreement to preserve the privilege after inadvertent disclosure as long as

(a) the party claiming the privilege took reasonable steps given the volume of electronically stored data to be reviewed, the time permitted in the scheduling order to do so, and the resources of the producing party; (b) the producing party took reasonable steps to assert promptly the privilege once it learned that some privileged information inadvertently had been disclosed, despite the exercise of reasonable measures to screen for privilege and, importantly; (c) the production had been compelled by court order that was issued after the court’s independent evaluation of the scope of electronic discovery permitted, the reasonableness of the procedures the producing party took to screen out privileged material or assert post-production claims upon discovery of inadvertent production of privileged information, and the amount of time that the court allowed the producing party to spend on the production.\textsuperscript{160}

Under the \textit{Hopson} procedure, parties who enter into non-waiver agreements should not assume that they are not required to engage in a privilege review or are free to engage in “less of a pre-production [privilege] review than would be reasonable under the circumstances.”\textsuperscript{161} If the parties choose to forgo a privilege review or use less than reasonable procedures, it would be fatal to their claim of privilege after inadvertent disclosure in both strict and middle approach jurisdictions.\textsuperscript{162} To the contrary, the parties should assume that a full privilege review is required.\textsuperscript{163}

If the parties feel that a full privilege review would be unduly burdensome or expensive given the volume of the electronically stored information and the time within which they must produce relevant information, then they must present particularized facts to the court to demonstrate the need for a less than full privilege review.\textsuperscript{164} The par-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{158} \textit{Id.} at 239.
\item \textsuperscript{159} \textit{Id.} at 241–42.
\item \textsuperscript{160} \textit{Id.} at 242.
\item \textsuperscript{161} \textit{Id.} at 244.
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 244–45.
\end{enumerate}
\end{footnotesize}
ties must also present to the court reasonable procedures for conducting the privilege review that have been agreed to by the parties. The court will then make an independent determination of whether a full privilege review is feasible given the volume of discovery and the time limit imposed by the court for discovery, and if not feasible, whether the procedures for a less than full privilege review agreed upon by the parties are reasonable. If the court determines that the agreed-upon procedures for less than full privilege review are reasonable, then the court will enter an order approving the review procedures and finding that compliance with those procedures will not result in waiver of the attorney-client privilege when there has been inadvertent disclosure.

If the parties feel that a full privilege review is warranted or think that they can accomplish one within the time period set by the court, then they must engage in a full review with the risk that any inadvertently disclosed privileged documents will automatically waive the attorney-client privilege. If, however, the parties seek an order from the court for approval of a less than full privilege review and the court then determines on its own that a full privilege review nevertheless is warranted, the parties must engage in a full page-by-page privilege review. If any privileged documents are inadvertently produced, the attorney-client privilege will be waived, notwithstanding the reasonableness of precautions taken during the full privilege review. This is where the strict approach varies from the middle approach. Under the middle approach, the reasonableness of the precautions taken may still weigh in favor of a finding that the privilege has not been waived, regardless of whether the parties engaged in a full or less than full privilege review that was sanctioned by the court.

C. Victor Stanley: Affirmation of the Strict Approach

The Hopson court both clarified and confirmed its strict approach to the issue of waiver of the attorney-client privilege due to inadvertent disclosure in Victor Stanley, Inc. v. Creative Pipe, Inc. Pursuant to court order, the parties in Victor Stanley had agreed to a joint protocol for searching and retrieving relevant electronically stored information,

165. Id. at 246.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
which included a compilation of search terms to be used in the electronic search. Once relevant documents were retrieved pursuant to the search protocol, the defendants started conducting a page-by-page privilege review. However, after realizing that an individualized privilege review would be very expensive and would delay production of the relevant information, the defendants started using search terms to locate and retrieve privileged documents. Realizing that the use of search terms to identify privileged documents could result in inadvertent disclosure of those documents, especially in light of the volume of documents to be produced, the defendants sought a Hopson order to protect against waiver due to inadvertent disclosure. After learning that the deadline for discovery had been extended, the defendants chose to forgo pursuing a Hopson order and instead committed to a page-by-page privilege review.

According to the defendants, they conducted their privilege review of the “text-searchable files” by using keyword search terms, and conducted the privilege review of non-text-searchable files manually. Due to the compressed discovery schedule, the defendants’ manual privilege review of the non-text-searchable files consisted of reviewing only the title pages of the documents. The court found that the keyword search terms used for the privilege review of the text-searchable files successfully identified privileged documents, and inferred that the documents inadvertently produced were a part of the non-text-searchable documents that were produced. The court explicitly found that “as to the non-text-searchable files, [the defendants] did all that could be reasonably expected of them in the time allowed to make the ESI production . . .”

Despite efforts undertaken during the individualized privilege review, the defendants inadvertently produced 165 privileged documents. The court assumed that the inadvertently disclosed documents were privileged and held that “the privilege/protection was waived by the voluntary production of the documents . . . by Defendants.” Fatal to the defendants’ claim that the attorney-client privi-

172. Id. at 254.
173. Id.
174. Id. at 254-55.
175. Id.
176. Id. at 256.
177. Id.
178. Id.
179. Id. at 256.
180. Id. at 253.
181. Id. at 254 (emphasis added).
lege should not be waived due to their inadvertent disclosure of the documents was their failure to obtain a Hopson order, which would have deemed reasonable the agreed-upon review procedures, and which would have deemed any subsequent inadvertent disclosure to have been court-compelled. Accordingly, under the strict approach, the defendants' inadvertent disclosure waived the attorney-client privilege, and in the absence of a Hopson order, the reasonableness of their procedures to prevent inadvertent disclosure was irrelevant.

D. Victor Stanley: Middle Approach Functioning as Strict Approach

Despite its conclusion that the Fourth Circuit would likely adopt the strict approach, and despite its fashioning of a method to avoid waiver due to inadvertent disclosure purportedly pursuant to the strict approach's exception for de facto court-compelled disclosures, the court in Victor Stanley proceeded to analyze the waiver issue under the middle approach, and held that the defendants waived the privilege under this approach as well. The court's analysis of the defendants' privilege review procedures gives helpful guidance to parties litigating in jurisdictions operating under both the strict and middle approaches.

The most influential factor in the court's analysis was the lack of reasonable precautions taken by the defendants to prevent the inadvertent disclosure. Although noting that the search terms developed by the defendants to review the text-searchable files for privilege “successfully culled out the privileged/protected documents,” the court nevertheless proceeded to criticize the defendants' privilege review of the text-searchable documents. In particular, the court noted that although the attorneys and the client developed the search terms to be used in the review, the defendants did not present any evidence of “their qualifications for designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review.”Because “all keyword searches are not created equal,” the court also criticized the defendants for not conducting any

182. Id.
183. Id. at 258.
184. Id. at 258–59.
185. Id.
186. Id. at 259–60.
187. Id. at 256–57. Interestingly, the court did not focus on the defendants' review procedures for the non-text-searchable files from which the court had concluded the inadvertently produced documents were produced.
188. Id. at 256.
sampling of documents the search returned as privileged and the documents it did not return as privileged.\textsuperscript{189} A sampling, the court explained, would have ensured that the search was not over-inclusive, meaning that the search was not identifying documents that were not in fact privileged, or that the search was not under-inclusive, meaning that the search was not failing to identify documents that were in fact privileged.\textsuperscript{190}

In order to prevent a finding of waiver of the privilege under the middle approach, the court emphasized the importance of a proper search methodology designed by a person with the requisite qualifications.\textsuperscript{191} Noting that “proper selection and implementation [of keyword searches] obviously involves technical, if not scientific knowledge,” the court held that selection of a search methodology must be carefully planned by someone with technical knowledge of how to produce an effective search.\textsuperscript{192} The party must also engage in quality control to ensure that the search was effective in identifying privileged documents and was not over- or under-inclusive.\textsuperscript{193} If the search methodology is challenged, the party must be able to “support their position with affidavits or other equivalent information from persons with the requisite qualifications and experience, based on sufficient facts or data and using reliable principles or methodology.”\textsuperscript{194} Under these standards, the defendants in \textit{Victor Stanley} failed to show that its precautions to prevent inadvertent disclosure were reasonable.\textsuperscript{195}

\textit{Victor Stanley}’s excruciating critique of the privilege holder’s precautions to prevent inadvertent disclosure exemplifies the capability of the middle approach to be functionally applied to achieve a strict approach result.\textsuperscript{196} Particularly telling is that the court critiqued the review procedures as to those documents that the court previously found were effective to cull out privileged documents and failed to offer a critique of the review procedures associated with the documents from which the court inferred the inadvertent disclosed documents were produced.\textsuperscript{197} It is almost as if the \textit{Victor Stanley} court was looking for a way to find the review procedures unreasonable in order

\begin{itemize}
\item \textsuperscript{189} Id. at 256–57.
\item \textsuperscript{190} Id. at 257.
\item \textsuperscript{191} Id. at 260–62.
\item \textsuperscript{192} Id, at 260.
\item \textsuperscript{193} Id. at 261.
\item \textsuperscript{194} Id. at 261 n.10.
\item \textsuperscript{195} Id. at 262.
\item \textsuperscript{196} Id. at 263.
\item \textsuperscript{197} Id. at 262–63.
\end{itemize}
WAVING GOODBYE TO WAIVER?

As to the remaining factors, the Victor Stanley court, although claiming to make an evaluation under the middle approach, functionally decided the issue under the strict approach. For example, the court applied the extent of the disclosure factor not just by inquiring into the number of documents inadvertently produced, but also inquiring into the substance of the documents.\textsuperscript{198} Because the documents contained substantive communications between attorney and client, "any order issued now by the court to attempt to redress these disclosures would be the equivalent of closing the barn door after the animals have already run away."\textsuperscript{199} This reasoning—that confidentiality has been breached and cannot be redressed by the court—is the reasoning used by strict-approach courts to find waiver of the attorney-client privilege.\textsuperscript{200}

Further, the Victor Stanley court faulted the defendants for not discovering its own disclosure and found it problematic that the plaintiff had notified the defendants that it had inadvertently produced privileged documents.\textsuperscript{201} Instead of using the middle approach's common interpretation of the time and efforts taken to rectify the disclosure by measuring from the time of learning of the inadvertence, the Victor Stanley court measured the delay from the time of production and faulted the defendants for failing to discover their own inadvertence.\textsuperscript{202} Under the Victor Stanley court's middle approach, the holder of the privilege would have to realize its own inadvertence in order to prevent waiver.\textsuperscript{203} Because it is rare for a privilege holder to realize its own inadvertence, as demonstrated by the fact that privilege holders most commonly learn of the inadvertence when the produced documents are sought to be used by the receiving party in connection with a depos-

\textsuperscript{198} Id. at 263.
\textsuperscript{199} Id.
\textsuperscript{201} Victor Stanley, 250 F.R.D. at 263.
\textsuperscript{202} Id. ("[T]he more important period of delay in this case is the one-week period between production by the Defendants and the time of the discovery by the Plaintiff of the disclosures—a period during which the Defendants failed to discover the disclosure.").
\textsuperscript{203} Id. ("[T]his is not an instance in which a party inadvertently produced privileged information to an adversary, discovered the disclosure promptly, and then took immediate steps to inform the adversary that they had received the information inadvertently, thus demanding that it be returned.").
sition or court filing, it would be rare that this factor would weigh against a finding of waiver. Consequently, interpreting this factor as starting the clock for efforts taken to rectify the inadvertent disclosure from the moment of disclosure amounts to a functional application of the middle approach as the strict approach. Finally, the only injustice, according to the *Victor Stanley* court, was what the defendants did to themselves.

IV. **Federal Rule of Evidence 502: Value Choice to Protect the Attorney-Client Privilege and Susceptibility to Imposition of Judicial Preferences**

On September 19, 2008, President Bush signed Senate Bill 2450 into law, which amended the Federal Rules of Evidence to add Rule 502, which specifically addresses, *inter alia*, the issue of waiver of the attorney-client privilege due to inadvertent disclosure. Rule 502(b) provides that the inadvertent disclosure of attorney-client communication in a federal proceeding or to a federal office or agency does not waive the privilege or protection in a federal or state proceeding if: "(1) the disclosure is inadvertent; (2) the holder of the privilege . . . took reasonable steps to prevent disclosure; and (3) the holder [of the privilege] promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

Rule 502(b) represents a distillation of the common law middle approach into a rule "designed to be predictable in its application." Although the factors the middle approach uses to determine whether

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204. See Indus. Commc'ns & Wireless v. Town of Alton, Civ. No. 07-82-JL, 2008 WL 3498652, at *3 (D.N.H. Aug. 7, 2008) (involving privilege holder who discovered inadvertent disclosure only after opposing counsel attached document to summary judgment brief months after the inadvertent disclosure); FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 480 (E.D. Va. 1991) (discussing privilege holder who discovered inadvertent disclosure when document was sought to be marked as exhibit at deposition).

205. In essence, under the *Victor Stanley* interpretation of the time and efforts to rectify the inadvertent disclosure factor, the privilege holder would have to conduct a post-production review to ascertain whether it had inadvertently produced any privileged documents. As discussed *infra*, newly enacted Federal Rule of Evidence 502 would reject this strict interpretation because it specifically aims to prevent parties from engaging in post-production reviews. *See Fed. R. Evid. 502(b) advisory committee's note.*


208. *See Fed. R. Evid. 502(b).*

inadvertent disclosure results in waiver—namely, "reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness"—do not all appear in the text of the rule, the rule is "flexible enough to accommodate any of those listed factors."210 In determining whether the privilege holder took reasonable steps to prevent disclosure, important factors courts consider include "the number of documents to be reviewed and the time constraints for production."211 Also, "a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure. 212 Finally, Rule 502 does not preclude issues of fairness from informing the waiver inquiry. For example, a fairness consideration may include "whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt . . . where the receiving party has relied on the information disclosed."213

A. Rule 502: Uniformity, Predictability, and Cost Reduction

In passing Rule 502, Congress recognized the unpredictability in the common law approaches to waiver of the attorney-client privilege due to inadvertent disclosure and sought to provide a uniform and predictable standard for determining the effect of disclosures in a federal proceeding.214 Congress sought to provide uniformity and predictability in at least three ways. First, recognizing that "[c]ourts are in conflict over whether an inadvertent disclosure of a communication or information as privileged or work product constitutes a waiver," Rule 502 rejects the strict and lenient approaches to waiver due to inadvertent disclosure and chooses the middle approach.215 Second, recognizing that there is "some dispute on whether a confidentiality order as entered in one case is enforceable in other proceedings," Rule 502 provides that a confidentiality order entered by the court governing the effect of a disclosure in a federal proceeding is enforceable against

210. See Fed. R. Evid. 502(b) advisory committee's note.
211. See id.
212. Id.
214. See Fed. R. Evid. 502(b) advisory committee's note.
215. See id. (stating that Rule 502(b) "opts for the middle ground" and "is in accord with the majority view on whether inadvertent disclosure is a waiver"). While Rule 502(b)'s three-part inquiry to determine waiver due to inadvertent disclosure resembles the common law middle approach, it is not intended to be a codification of that approach.
third parties in a subsequent federal or state proceeding.\textsuperscript{216} Third, Rule 502 makes clear that any agreement entered into by the parties concerning the effect of disclosures in the proceeding is binding only on those parties unless the agreement is incorporated into a court order.\textsuperscript{217}

Congress also intended for Rule 502 to help reduce the expense of costly privilege reviews. Rule 502 aims to achieve cost reduction by providing that a court-entered confidentiality order is enforceable against third parties in subsequent federal or state proceedings.\textsuperscript{218} If a court order is not enforceable against third parties, the parties will still have to undergo a costly privilege review because of the risk that an inadvertent disclosure, while not resulting in a waiver in the instant proceeding because of the confidentiality order, will nevertheless result in a waiver in the subsequent proceeding.\textsuperscript{219} Accordingly, Rule 502’s provision for making court-entered confidentiality orders enforceable against third parties in subsequent proceedings reduces the cost of privilege reviews in the instant proceeding and any subsequent proceedings.

Rule 502(b)’s choice of the middle approach for dealing with the issue of waiver of the attorney–client privilege due to inadvertent disclosure also aims to reduce the costs of privilege reviews. Specifically, Rule 502(b)’s rejection of the strict approach to waiver “responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney–client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.”\textsuperscript{220}

Finally, Rule 502 aims to reduce the costs of privilege reviews by allowing a court to enter an order that “provide[s] for return of documents without waiver irrespective of the care taken by the disclosing party.”\textsuperscript{221} The rule thus provides direct approval of the use of “clawback” or “quick peek” arrangements between parties which allow the parties to forgo privilege reviews altogether in exchange for a promise to return inadvertently produced privileged material,\textsuperscript{222} and in turn significantly reduce the cost of privilege reviews.

\begin{footnotes}
\item[216.] See \textit{Fed. R. Evid.} 502(d) advisory committee’s note.
\item[217.] See \textit{Fed. R. Evid.} 502(e) advisory committee’s note.
\item[218.] See \textit{Fed. R. Evid.} 502(d); \textit{Fed. R. Evid.} 502 advisory committee’s note.
\item[219.] See \textit{Fed. R. Evid.} 502(e) advisory committee’s note.
\item[220.] \textit{Fed. R. Evid.} 502 advisory committee’s note.
\item[221.] \textit{Fed. R. Evid.} 502(d) advisory committee’s note.
\item[222.] See \textit{id}.
\end{footnotes}
While some of the ways Congress sought to distill predictability and uniformity into the waiver inquiry—specifically, by rejecting the lenient and strict approaches to waiver and providing that confidentiality orders entered in one proceeding are binding against third parties in a subsequent proceeding—will actually provide some uniformity and predictability, as discussed infra, the selection of the middle approach as a guideline for determining waiver due to inadvertent disclosure may not provide the uniformity, predictability, and cost reduction that the drafters of Rule 502 intended. Moreover, because Rule 502(b) adopts the middle approach to waiver, it is susceptible to the imposition of preferences contrary to its intent. In other words, Rule 502(b) is susceptible to being applied as the common law strict approach, potentially thwarting congressional intent to offer greater protection than the harsh and unpredictable common law approaches afforded.

B. Value Choice: Broad Protection of the Attorney-Client Privilege

Rule 502 is an explicit affirmation of the attorney-client privilege, and it represents Congress's value choice to offer the privilege broad protection.\footnote{223. See 154 CONG. REC. H7817-01 (daily ed. Sept. 8, 2008).} Rule 502 embodies the principle that “[t]he attorney-client privilege and work product protection are crucial to our legal system”\footnote{224. Id. at *H7818 (statement of Rep. Jackson-Lee).} and recognizes that a rule that results in a waiver of the privilege when privileged material is disclosed during the course of discovery by accident, despite care to prevent the inadvertent disclosure, would “work unfair results.”\footnote{225. See id.; 153 CONG. REC. S15,140-01, at *15,142 (daily ed. Dec. 11, 2007) (statement of Sen. Leahy), 2007 WL 4325497 (“Our proposed legislation would set clear guidelines regarding the consequences of inadvertent disclosure of privileged material, and provides that so long as reasonable steps are taken in the prevention of such a disclosure, or to assure the prompt retrieval of disclosed information, no waiver will result.”).} Rule 502 rejects the principle that the confidentiality must be maintained in order for the attorney-client privilege to be preserved, and aims to preserve the privilege even in those cases where the confidentiality of the information has been breached.\footnote{226. See 154 CONG. REC. H7817-01, at *H7818 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee), 2008 WL 4133109 (noting that traditionally, the attorney-client privilege only protected the client when the confidentiality of the information was maintained, that “[t]his traditional principle can work unfair results in modern-day litigation,” and that the “balance rule . . . appropriately protects confidentiality”).}
Because Rule 502(b) represents Congress's preference for broad protection of the attorney-client privilege, it necessarily represents Congress's intent that the rule be applied as the common law middle approach was originally applied: to prevent waiver of the attorney-client privilege in those cases where privileged material is disclosed by mistake despite reasonable steps to prevent such a mistake. Congress does not intend for Rule 502 to be applied as the functional equivalent of the strict approach—to find waiver of the attorney-client privilege where privileged material is disclosed by mistake because the disclosing party did not meet an impossibly high standard of reasonable precautions imposed by a court under a hindsight analysis, or because the disclosing party never realized the mistaken disclosure until notification by the receiving party, or because the receiving party learned, shared, or used the information in the document inadvertently disclosed.

Congress's choice to offer greater protection of the attorney-client privilege is supported first by Rule 502's implicit adoption of a low standard for reasonableness of steps taken to prevent disclosure. Rule 502's citation to *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.* is evidence that its drafters intended a low reasonableness standard. *Lois Sportswear* is an early case that is frequently cited for adopting the common law middle approach to the issue of waiver due to inadvertent disclosure. This case demonstrates the application of the middle approach as it was originally intended to be applied, and not as the middle approach operating as the strict approach.

In *Lois Sportswear*, the court characterized the issue as being "whether or not the release of the documents was a knowing waiver or simply a mistake, immediately recognized and rectified." In its dis-

227. In discussing the middle approach, the court in *Parra v. Bashas*, Inc. stated:

The rule established in the case law . . . is intended to assure that the opposing party cannot take advantage of a reasonable mistake, while at the same time assuring that the privilege is safeguarded. After all, if there is no penalty to a reckless disclosure, there will be no incentive to diligently review discovery for privileged documents. This "middle test" simply recognizes that where the scope of discovery is vast in light of the narrowness of the disclosure—a reasonable mistake was probably made.


Discussion of the reasonableness of the precautions taken to prevent inadvertent disclosure, the court described the review procedures used by the attorney as consisting of an instruction to paralegals to segregate privileged documents. The court noted that the client "had no practice of designation of confidential documents at the time of origination," that the attorney did not give any detailed instructions to the paralegals for identifying privileged documents other than showing the paralegals a privileged document and instructing them to segregate documents "of that kind," and that there was "no affidavit from the reviewers that in fact a requested search for privileged documents was in fact made."

Despite the minimal precautions taken to prevent the inadvertent disclosure of privileged information, the court nevertheless found that the privilege holder "just adequately protected its privilege." Important to the court was the small number of documents inadvertently produced in relation to the scope of the discovery. The court interpreted the "extent of the disclosure" factor as the number of inadvertently disclosed documents, and not as the extent to which the receiving party learns, shares, or uses the inadvertently disclosed privileged information, as other middle approach courts operating functionally under a strict approach have interpreted the factor.

By citing with approval to Lois Sportswear, Rule 502 intends to incorporate a relatively low standard of reasonableness in order to meet the requirement that the privilege holder must have taken reasonable steps to prevent the disclosure. Arguably, if the steps the privilege holder takes to protect against inadvertent disclosure are "minimally adequate," as the Lois Sportswear test requires, then Rule 502(b)'s reasonableness requirement will be met.

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231. Id.
232. Id.
233. Id.
234. Id. ("[O]nly 22 documents out of some 16,000 pages inspected and out of the 3,000 pages requested to be produced are now claimed to be privileged.").
235. Id. The Advisory Committee's notes to Federal Rule of Evidence 502 also cite Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985), for its use of the middle approach. Hartford Fire applies the middle approach factors outlined in Lois Sportswear in the context of waiver of work product but incorrectly interpreted the "extent of the disclosure" factor. Instead of interpreting this factor in accordance with Lois Sportswear as simply the number of inadvertently disclosed documents, Hartford Fire interpreted the factor as whether the contents of the protected information were learned. See id. at 332 ("[T]he disclosure was complete in that the contents of the documents were probably learned on inspection and copies of the documents were actually turned over.").
Further evidence that Congress intended for a low standard of reasonableness is that such a standard gives effect to Congress's intent to reduce the costs associated with privilege reviews:

In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver.\(^{236}\)

In order to give effect to Congress's aims of reducing costs associated with privilege reviews, the requirement that the privilege holder must have taken reasonable steps to prevent an inadvertent disclosure must be interpreted as a low reasonableness standard. A low reasonableness standard gives assurance to producing parties and their attorneys that as long as they take reasonable steps to prevent privileged information from being inadvertently disclosed, they will not waive the attorney-client privilege from such disclosure. Consequently, producing parties will not have to spend enormous amounts of time and money making sure their privilege procedures are foolproof.

If, on the other hand, the "reasonable steps" requirement were interpreted as a higher standard, such as one that would require the producing party to take "all reasonable measures," producing parties would continue to spend enormous amounts of time and money in an effort to meet that standard for fear that if they do not, the inadvertent disclosure of a document will result in the waiver of the attorney-client privilege. This in turn would not result in the reduction of costs associated with privilege reviews, as Congress intends.

Also evidencing Congress's intent to establish a relatively low standard for reasonableness is the drafters' choice to use the language "reasonable steps to prevent disclosure" as opposed to the language used by the common law middle approach, "reasonable precautions."\(^{237}\) Rule 502(b) was originally drafted with the "reasonable precautions" language, but "steps" was substituted for "precautions" in response to a concern that "reasonable precautions" set too high of a standard:

When you consider the effort involved in attempting to cull relevant e-mails from the millions of other e-mails, it raises questions about the

\(^{236}\) FED. R. EVID. 502(b) advisory committee's note.

\(^{237}\) FED. R. EVID. 502(b) (emphasis added).
standard that should be used to determine whether the company’s conduct was “reasonable.” The standard proposed in Rule 502 may well be too high for most companies and, for this reason, I support changing the language to use the phrase “reasonable steps” instead of “reasonable precautions.”

Moreover, “reasonable precautions” was changed to “reasonable steps” in response to criticism that “reasonable precautions” is too vague and subjective. The concern over subjectivity stems from decisions finding waiver of the attorney-client privilege where courts, with the benefit of hindsight, observe that “[i]t is difficult for a party to show that it took reasonable precautions to prevent production of privileged documents where those precautions obviously failed.” The language “reasonable steps” clarifies that the holder of the privilege “must implement procedures to limit the disclosure of privileged material,” and embodies a standard of “gross negligence or such extreme disregard for protection that the disclosure should be deemed to be intentional.” Consequently, by choosing to use “reasonable steps” instead of “reasonable precautions,” Congress rejected the subjectivity.

238. Letter from Carol Cure to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure, Judicial Conference of the United States 2 (Jan. 12, 2007), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-014.pdf; see also Letter from Theodore B. Van Itallie to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure, Judicial Conference of the United States 2 (Jan. 8, 2007), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV%20Comments%202006/06-EV-035.pdf (expressing concern that “the standard of ‘reasonable precautions’ may appear to set too high a bar in light of the vast scope of electronic data that must be rapidly squeezed through the privilege review screen” and urging the committee to “set a lower threshold of ‘reasonable steps, in light of the extent of and schedule for the review’ to make it clear that the test is more objective, and that it turns on the size of and schedule for the review”).


and high threshold of "reasonable precautions" in favor of an objective and lower standard of reasonableness.\textsuperscript{243}

In addition to Rule 502's low reasonableness standard, its prohibition on post-production reviews supports Congress's value choice to offer greater protection of the attorney-client privilege. The Advisory Committee's notes make clear that Rule 502 "does not require the producing party to engage in post-production review to determine whether any protected communication or information has been produced by mistake" in order to avoid waiver of the privilege.\textsuperscript{244} This interpretation of Rule 502 is an explicit rejection of using the middle approach functionally as the strict approach. As discussed supra in Part II.C.1, courts applying the middle approach as the strict approach measured the promptness of taking efforts to rectify the error from the moment of disclosure, not from the time the privilege holder learned of the mistake, and faulted the privilege holder for not learning of the error until the receiving party notified the privilege holder or used the information.\textsuperscript{245}

While the language of Rule 502 does not expressly state that the reasonable efforts to rectify the inadvertent disclosure are measured from the time of learning of the mistake, Rule 502's statement that a privilege holder is not required to perform a post-production review is an implicit acceptance of the possibility that the privilege holder may not learn of the error until long after the original production took place. Rule 502's proscription on post-production reviews thus mandates the conclusion that Rule 502 will still protect waiver in those cases where the privilege holder first learns of the inadvertent disclosure when the receiving party attempts to use the inadvertently disclosed document, in some cases, long after the inadvertent disclosure. In fact, the Advisory Committee's statement that post-production privilege reviews are not required was arguably added to the notes to clarify that "[n]o matter when the disclosure is discovered, the protection against waiver should be in force."\textsuperscript{246} Consequently, by intending for

\begin{footnotes}
\item[243] Also, allowing parties to agree to forgo privilege reviews altogether is further evidence of Congress's intent to adopt a low standard of reasonableness. See Fed. R. Evid. 502(d) advisory committee's note. By permitting parties to agree to engage in absolutely no steps to protect against disclosure of privileged or protected information, Congress certainly did not intend to impose a high standard of reasonableness.
\item[244] See Fed. R. Evid. 502(b) advisory committee's note.
\end{footnotes}
the clock to run upon the privilege holder learning of the inadvertent disclosure, Rule 502 embodies a value choice to offer greater protection of the attorney-client privilege and for Rule 502 not to be applied functionally as the strict approach.

Finally, by allowing parties to agree to, and for courts to order, the production of documents during discovery without any privilege review whatsoever, Congress not only intended to reduce the costs associated with privilege reviews, but also intended to offer greater protection of the attorney-client privilege. If, for example, a party forgoes a privilege review pursuant to party agreement or court order, and it is later discovered that hundreds of extremely sensitive privileged documents were disclosed, the receiving party has no right to the inadvertently disclosed privileged documents. Rule 502 minimizes the receiving party's interest in the search for the truth and maximizes the justice system's and the producing party's interest in preserving the attorney-client privilege.

C. Will Congress's Value Choice Withstand Its Own Test?

1. The Potential for Judicial Imposition of Preferences

Because 502(b) incorporates the common law middle approach factors, it is susceptible to the judicial imposition of preferences and leaves room for courts to apply the rule as the strict approach in order to prefer the search for the truth against the intent of the rule. Similar to the common law middle approach, there are many areas of Rule 502 that are susceptible to the judicial imposition of preferences for protection of the search for the truth. One such area is the "reasonable" standard found in Rule 502's requirement that the holder of the privilege or protection take reasonable steps to prevent disclosure in order to avoid waiver. As discussed supra in Part III.A, this reasonableness standard is open to varying judicial interpretations, and most problematically, to an impossibly high standard for privilege holders.

Whereas in Lois Sportswear, for example, the court imposed a low standard of reasonableness and found that minimal precautions taken...
by the producing party were sufficient to protect the privilege, other courts have imposed a higher standard for meeting the reasonableness requirement. For example, the Victor Stanley court, in applying the middle approach as an alternative to the strict approach, underwent an excruciating critique of the privilege holder’s review procedures and ultimately found that the procedures did not meet the reasonableness requirement. Even though the court had previously noted that the same review procedures had “successfully culled out the privileged/protected documents,” the court proceeded to analyze the review procedures in an attempt to achieve the same result under the middle approach as it did under the strict approach—waiver of the attorney-client privilege. Victor Stanley set an impossibly high standard of reasonableness for the privilege holder, and its critique of the privilege holder’s review procedures evidences its view that, similar to the strict approach, precautions taken to prevent inadvertent disclosures are unreasonable because something in the review procedure must have gone wrong when a document is inadvertently produced. Because Rule 502 retains the common law middle approach’s “reasonable” standard, the standard is open to being applied functionally like the strict approach, as the court did in Victor Stanley.

Rule 502 is also left exposed to the judicial imposition of preferences in contravention of Congress’s intent by its requirement that the privilege holder take reasonable steps to rectify the error of the inadvertent disclosure. A previous draft of Rule 502(b) required the privilege holder to take “reasonably prompt measures, once the holder knew or should have known” of the inadvertent disclosure.” A concern was raised that the “should have known” language could be interpreted “to require a party to re-review the produced documents immediately after production to determine whether any privileged information was inadvertently disclosed—contravening the rule’s stated purpose of conserving parties’ resources.” Arguing that in most cases a party will not realize that it inadvertently disclosed a privileged document until the receiving party attempts to use it, some suggested that the drafters explicitly state that the time period to rectify

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251. Id. at 256.
253. See Letter from Bruce R. Parker, supra note 239, at 7.
254. Id.
errors begins when the holder of the privilege learns of the mistake, or
has actual knowledge, as opposed to when the mistake occurred.\textsuperscript{255}

Although the "should have known" language was removed from
the final version of Rule 502(b), the rule does not explicitly state,
either in the rule or in the Advisory Committee's note, that the time
period to rectify errors begins to run when the privilege holder learns
of the mistake. It is true that the Advisory Committee's note states that
"[t]he rule does not require the producing party to engage in a post-
production review to determine whether any protected communication
or information has been produced by mistake,"\textsuperscript{256} which indicates
Congress's intent for the time period to make efforts to rectify the mis-
take to begin running upon the privilege holder's learning of the mis-
take. However, because it is not specifically stated when the time
period begins to run, Rule 502(b)'s requirement that the privilege
holder take prompt efforts to remedy the mistake leaves open the pos-
sibility for courts to apply the middle approach functionally as the
strict approach against the intent of Rule 502.

Rule 502 also lends itself to being applied functionally as the
strict approach because of its incorporation of the common law middle
approach's "extent of disclosure and overriding issue of fairness" fac-
tors.\textsuperscript{257} Unlike the common law middle approach, Rule 502 does not
expressly adopt these factors in its language. However, Rule 502 "is
flexible enough to accommodate" the factors.\textsuperscript{258} Because the rule
accommodates these factors, similar to the middle approach, the fac-
tors can be applied to achieve a strict result.

For example, although Congress arguably intended the "extent of
disclosure" factor to refer simply to the number of inadvertent disclo-

\textsuperscript{255} Letter from Michael R. Nelson, \textit{supra} note 239, at 3; Letter from Bruce R.
Parker, \textit{supra} note 239, at 7-8; Letter from Theodore B. Van Itallie to Peter G. McCabe,
Sec'y, Comm. on Rules of Practice & Procedure, Judicial Conference of the United
Policies/rules/EV%20Comments%202006/06-EV-011.pdf; see also Editorial, \textit{Proposed
Federal Rule of Evidence 502—An Important Step Forward}, N.J. LAWYER, Feb. 12, 2007,
at 6, available at 2007 WLNR 28029236 (preferring "the standard urged by the ABA
which looks to the reasonableness of the litigant's actions from the time it actually
learned that a mistake had been made," and arguing that "[s]ince the rule is an effort
to provide some protection for inadvertence, a bright-line test that looks to a reasona-
bale time from when the mistake has been discovered rather than when it 'should have
been discovered' will allow for more predictability and minimize litigation over these
issues").

\textsuperscript{256} See \textit{Fed. R. Evid.} 502(b) advisory committee's note.

\textsuperscript{257} See \textit{id}.

\textsuperscript{258} See \textit{id}. 
sures, because Rule 502 incorporates these factors from existing case law, the factors are open to varied interpretations, as they were before Rule 502 went into effect. Accordingly, instead of interpreting the “extent of disclosure” factor as weighing the number of inadvertent disclosures, a court may interpret it as an inquiry into whether disclosure is “complete” in the sense that it has been learned and cannot be unlearned, which is the reasoning of the strict approach.

Also, by incorporating the indeterminate fairness factor, Rule 502 opens the door for judicial imposition of preferences for the search for the truth. For example, courts are still free under Rule 502 to interpret the fairness factor as requiring an inquiry into the subject matter of the inadvertently disclosed information and the importance to the receiving party’s claim or defense. As discussed supra in Part III.D, these interpretations are attempts by some common law middle approach courts to apply the middle approach functionally to achieve a strict approach result. Because Rule 502 incorporates these same common law factors, it, like the middle approach, is susceptible to being applied functionally as the strict approach.

2. Potential for Unpredictability

Although Congress intended to provide a rule for waiver that is predictable and uniform, Rule 502 lends itself to unpredictability, and this potential for unpredictability may not lead to reduction in costs associated with privilege reviews as Congress intended. The incorporation of the common law middle approach factors—the scope of discovery, the extent of the disclosure, and the overreaching issue of fairness—exemplifies this problem. Because Rule 502 leaves open the question of how these factors should be interpreted, it is an “invitation to uncertainty and inconsistent rulings,” and “[a]n uncertain pri-

259. By citing Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co., where the court interpreted the extent of disclosure factors as the number of documents disclosed, 104 F.R.D. 103, 105 (S.D.N.Y. 1985), Congress arguably intends for the extent of the disclosure factor to be similarly interpreted. Congress’s intent for this factor to be interpreted as the number of documents disclosed is also evidenced by its rejection of the traditional principle that the attorney-client privilege is destroyed if there is a breach of confidentiality. See 154 Cong. Rec. H7817-01, at *H7818 (daily ed. Sept. 8, 2008), 2008 WL 4133109 (noting that traditionally, the attorney-client privilege only protected the client when the confidentiality of the information was maintained, that “[t]his traditional principle can work unfair results in modern-day litigation,” and that the “balance rule . . . appropriately protects confidentiality”).

lege—or one which purports to be certain, but results in widely varying applications by the courts—is little better than no privilege.\textsuperscript{261}

Moreover, the fact that Rule 502 is open to being functionally applied as the strict approach also makes the rule’s goal of reducing the costs of privilege reviews harder to reach. Because of the potential for Rule 502 to be applied functionally as the strict approach, privilege holders may continue to spend enormous amounts of money on privilege reviews out of fear that a court may determine that their review procedures did not meet the high standard of reasonableness; or that they did not promptly take measures to rectify the error as measured from the time the mistake occurred; or that, even if only a few documents are inadvertently disclosed, a finding of waiver is warranted because those documents, once learned, cannot be unlearned, or because they go to the heart of the case. If Rule 502 can be applied functionally to achieve a strict result though interpretation of its own factors and the common law middle approach factors it incorporates, then Rule 502 does not deliver the uniformity, predictability, and cost reduction that it aims to provide.

3. Rule 502(d) and the Potential for the Judicial Imposition of Preferences

Another area of uncertainty associated with Rule 502 concerns the utility of Rule 502(b) governing inadvertent disclosure in a proceeding where one party inadvertently disclosed privileged or protected information in a previous proceeding and there was no party agreement or court order governing the effect of the inadvertent disclosure in that previous proceeding. Rule 502(d) states that “[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.”\textsuperscript{262} The issue is whether the court in the subsequent proceeding is still permitted to analyze whether there has been waiver due to inadvertent disclosure under 502(b) when there was not a court order protecting the inadvertently disclosed information from waiver in the previous proceeding.

A court faced with this issue in the subsequent proceeding may apply Rule 502 functionally as the strict approach and interpret Rule 502 as requiring a court order in the previous proceeding to protect

\textsuperscript{261} In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (quoting In re von Bulow, 828 F.2d 94, 100 (2d Cir. 1987)).

\textsuperscript{262} Fed. R. Evid. 502(d).
against waiver in the subsequent proceeding in order to impose a preference for the search for the truth.\textsuperscript{263} If a court interprets Rule 502 in this way, the rule may make "inadvertent production more lethal, and punitive in result, than it was previously."\textsuperscript{264} In other words, whereas a court in the subsequent proceeding facing this issue may choose to give effect to the intent of Rule 502 and analyze waiver due to inadvertent disclosure under Rule 502(b), which may result in a finding against waiver, another court may apply Rule 502 as the strict approach and forgo making an independent waiver analysis because of the absence of a court order governing the inadvertent disclosure in the prior proceeding, which would result in a finding of waiver.

Accordingly, Rule 502(d), providing that a court order will protect inadvertent disclosures in one proceeding from operating as a waiver in a subsequent proceeding, also leaves open the possibility for the judicial imposition of preferences against the intent of Rule 502. Therefore, it may not accomplish Congress's goal of providing greater protection of the attorney-client privilege, certainty, and predictability. Moreover, because Rule 502 potentially leaves privilege holders unprotected in subsequent proceedings, parties may feel compelled to spend significant resources to protect against waiver, which would be contrary to Congress's goal of cost reduction.

V. Post-Rule 502

Many courts have faced issues of waiver of the attorney-client privilege due to inadvertent disclosure since Federal Rule of Evidence 502 went into effect over a year ago.\textsuperscript{265} Although it is still too early to

\begin{footnotesize}
\textsuperscript{263} See Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 n.5 (D. Md. 2008) (implying that Rule 502's provisions for inadvertent disclosure would not protect against waiver in the absence of a court order by stating that the rule "would solve the problems Hopson discussed and protect against privilege waiver under circumstances similar to those presented in this case if the parties entered into a non-waiver agreement that meets the requirements of the proposed rule, and the court, in turn, approved it"); Letter from George L. Paul to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure, Judicial Conference of the United States 2 (Feb. 12, 2007), available at http://www.uscourts.gov/uscourts/ RulesAndPolicies/rules/EV\%20Comments \%202006/06-EV-008.pdf (expressing fear that "any court interpreting 502 will feel obligated—as a result of legislative substantive law—to hold that if there is no court-endorsed agreement, there is no protection from inadvertent production," and explaining that "an unintended consequence of these efforts may be to cut off the appropriate 'common law function' of courts and actually make inadvertent production more lethal, and punitive in result, than it was previously").

\textsuperscript{264} Letter from George L. Paul to Peter G. McCabe, supra note 263, at 2.

\end{footnotesize}
measure this rule's true impact, it is nevertheless worthwhile to examine the current case law to see what effect, if any, courts are giving to Rule 502 and to assess its potential impact.

Because Rule 502 explicitly uses the two principle middle approach factors—the reasonableness of steps the privilege holder takes to prevent disclosure and the promptness of taking reasonable steps to rectify the error—and incorporates the other middle approach factors into its comment, courts deciding issues of waiver due to inadvertent disclosure under Rule 502 are relying on the rule in varying degrees. Some courts merely cite to Rule 502 and then revert to using the common law middle approach analysis to determine the issue, finding that the rule is consistent with the common law middle approach. Other courts are using the elements set forth in Rule 502 as primary guidance for resolving the issue, and are referencing the common law middle approach factors as a supplement.

It may be that in some jurisdictions Rule 502 and the common law middle approach are consistent because the courts interpret and apply the middle approach factors consistent with Congress's intent. However, Rule 502 is not consistent with the middle approach in those jurisdictions where the courts are interpreting the factors and applying the approach in a manner functionally equivalent to the strict approach. Regardless of whether courts facing issues of waiver due to inadvertent disclosure are reverting to use of the common law middle approach or are relying on Rule 502 and using the common law middle approach factors as a supplement, the inherent danger of adopting

266. FED. R. EVID. 502(b)(2).
267. FED. R. EVID. 502(b)(3).
268. See FED. R. EVID. 502(b) advisory committee's note ("The rule opts for the middle ground... [and] is in accord with the majority view on whether inadvertent disclosure is a waiver.").
270. Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D. 684, 690 (S.D. Fla. 2009) (noting that "there is no substantive difference between the two standards" and using Rule 502 and the middle approach factors); Heriot v. Byrne, 257 F.R.D. 645, 655 n.7 (N.D. Ill. 2009) (stating that the "better approach" is to focus on the requirements of Rule 502 and use the common law middle approach factors as a supplement); Rhoades v. Young Women's Christian Ass'n. of Greater Pittsburgh, No. 09-261, 2009 WL 3319820, at *2-3 (W.D.P.A. Oct. 14, 2009) (noting that courts have continued to use the common law middle approach factors post-Rule 502, and using Rule 502 and common law middle approach factors).
the middle approach is that the rule leaves open the possibility of the judicial imposition of preferences contrary to Congress's intent.

The following sections examine post-Rule 502 cases to assess whether courts are respecting Congress's value choice. It appears that courts addressing this issue, both in the contexts of traditional and electronic discovery, generally are adhering to the spirit of Rule 502 and applying it consistently with Congress's intent and the value choice embodied in Rule 502. However, there is some evidence that courts are not applying the rule consistent with Congress's intent and instead are applying it as the functional equivalent of the strict approach.

A. Are Courts Respecting Rule 502's Value Choice or Applying Rule 502 as the Strict Approach?

Although it is still too early to take a firm stance as to whether courts are respecting Rule 502's value choice or whether courts are applying the rule as the strict approach, it appears that the courts that have faced the issue of waiver due to inadvertent disclosure are adhering to the spirit of Rule 502 and giving effect to the rule's choice to offer broad protection of the attorney-client privilege.

Perhaps the most important factor that is being interpreted to give effect to Rule 502's value choice to protect the attorney-client privilege is the reasonableness of steps taken to prevent inadvertent disclosure. In general, courts are giving deference to the privilege holder's

271. Courts can also choose to give effect to Rule 502's intent or apply Rule 502 as the strict approach through the interpretation and application of two other factors: the promptness of taking reasonable steps to rectify the error and the extent of the disclosure. As with the reasonableness of steps taken to prevent disclosure, it appears that courts are also abiding by the spirit of Rule 502 and its value choice to protect the attorney-client privilege through the interpretation and application of these two factors.

Most courts are starting the clock for assessing promptness of rectifying the error when the privilege holder first learns of the mistake instead of when the inadvertent disclosure occurred, and are not faulting the privilege holder for not discovering the mistake on its own or for having learned of the mistake only after the receiving party has used or attempted to use the privileged information. See, e.g., Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1041, 1041 (N.D. Ill. 2009) ("The Committee's comment that Rule 502 does not require a post-production review supports this view that the relevant time under subpart (b)(3) is how long it took the producing party to act after it learned that the privileged or protected document had been produced."); Am. Coal Sales Co. v. Nova Scotia Power Inc., No. 2:06-CV-94, 2009 WL 467576, at *18 (S.D. Ohio Feb. 23, 2009) (starting the clock for rectifying errors when privilege holder learned of inadvertent disclosure after counsel attempted to use document at deposition and attached it to brief); Clarke, 2009 WL 970940, at *6 (starting
privilege review procedures instead of heavily scrutinizing the procedures under a hindsight analysis. Importantly, courts are not blindly deferring to privilege holders' blanket assertions that there was a process in place to prevent inadvertent disclosure. In fact, if there is no


Most courts are giving effect to the spirit of Rule 502 by interpreting the extent of disclosure factor as requiring a consideration of the number of inadvertent disclosures compared to the scope of production. See, e.g., Coburn Group, 640 F. Supp. 2d at 1040 ("[O]nly three documents . . . slipped through the review of 72,000 pages and production of 40,000 pages."); Kumar v. Hilton Hotels Corp., No. 08-2689, 2009 WL 1683479, at *3 (W.D. Tenn. June 16, 2009) (finding that "the number and magnitude of the disclosures in light of the overall document production weigh against waiver"); Rhoades, 2009 WL 3319820, at *3 (considering that only four privileged pages out of 1600 pages produced were inadvertently disclosed); B-Y Water, 2008 WL 5188837, at *2 (considering that inadvertent disclosure consisted of only three pages out of over 3380 pages produced). However, at least one court has interpreted the extent of disclosure factor not as the number of inadvertent disclosures, but as the extent to which the information in the disclosures has been woven into the case. See Am. Coal Sales, 2009 WL 467576, at *18 (finding that extent of disclosure did not weigh in favor of waiver because the email was not "inextricably woven into the fabric of the litigation, as it has never been extensively used or relied on by Defendant").

Finally, although not related to the promptness of taking reasonable steps to rectify the error and extent of disclosure factors, one court has considered the importance of the inadvertently disclosed document to the claims made in the case in deciding the waiver issue under Rule 502, which is the consideration made by courts applying the middle approach as the strict approach prior to Rule 502. See Clarke, 2009 WL 970940, at *5.

272. See Amobi v. D.C. Dep't of Corrections, No. 08-1501, 2009 WL 4609593, at *8 (D.D.C. Dec. 8, 2009) (finding a vague reference to document reviews insufficient to establish reasonableness of steps taken to prevent inadvertent disclosure requirement). But see Rhoades, 2009 WL 3319820, at *3 (deferring to privilege holder's assertion that "documents in question were carefully reviewed in categories from the . . . files");
evidence that a privilege review procedure was in place, or if there is an insufficient description of the privilege review procedures, courts have no trouble finding that the reasonable disclosure-preventative steps required by Rule 502 have not been taken. 273

In assessing the reasonableness of steps taken to prevent inadvertent disclosure, courts giving effect to Rule 502's value choice are looking to see whether the privilege holder has provided information about the scope of the review, the specific methodology used for the privilege review, how privileged documents were segregated from non-privileged documents, and whether the privilege holder ever identified the inadvertently disclosed document as privileged and included it on a privilege log. 274 However, unlike courts that apply the middle approach functionally as the strict approach, these courts are refusing to use the benefit of hindsight to find that because a document slipped through the cracks that something must have been wrong with the privilege review procedure and are not creating an extremely high burden to establish reasonableness. 275 Instead, these courts are giving careful deference to the privilege holder's procedures and are understanding of mistakes that occur during the privilege review process. 276


273. See Clarke, 2009 WL 970940, at *5 (finding that where defendant did not take any steps to prevent disclosure, reasonableness requirement was not met and privilege was waived); Amobi, 2009 WL 4609593, at *8 (finding waiver where "the efforts taken are not even described, and there is no indication of what specific efforts were taken to prevent disclosure" and finding that "[t]here can be no reasonable efforts, unless there are efforts in the first place"); Eden Isle Marina, 89 Fed. Cl. at 508, 510 (stating that even assuming the disclosure was inadvertent, the adequacy of review procedures could not be assessed because privilege holder did not adequately describe the privilege review procedures).

274. See Amobi, 2009 WL 4609593, at *8; Eden Isle Marina, 89 Fed. Cl. at 508.

275. See Coburn Group, 640 F. Supp. 2d at 1040 (rejecting hindsight analysis); United States v. Sensient Colors, Inc., Civ. No. 07-1275 (JHR/JS), 2009 WL 2905474, at *5 (D.N.J. Sept. 9, 2009) ("[Rule] 502(b) requires plaintiff to demonstrate that it took reasonable precautions to prevent an error, which it has done. Although a reasonable explanation for its error would be helpful to know, this is not a sine qua non to establish that an inadvertent production . . . occurred.").

276. See Coburn Group, 640 F. Supp. 2d at 1039 (deferring to privilege holder's review procedures); Am. Coal Sales, 2009 WL 467576, at *18 (deferring to privilege holder's review procedures based on "evidence that two attorneys reviewed all documents before they were produced"); Preferred Care Partners, 2009 WL 982449, at *5, *12 (deferring to privilege holder's review procedures and finding that the reasonable-
For example, in *Coburn Group, LLC v. Whitecap Advisors, LLC*, the privilege holder's privilege review protocol required, *inter alia*, paralegals to "identify and mark as privileged documents prepared . . . in anticipation of or in preparation for litigation." In finding the protocol to be reasonable, the court rejected an attack on the protocol for "not teach[ing] the paralegals what to look for in determining whether a document was 'prepared in anticipation of litigation.'" In rejecting this attack, the court declined to engage in a hindsight analysis that would require the privilege review to be perfect:

[T]he document review cannot be deemed unreasonable solely because a document slipped through which in close examination and with additional information turns out to be privileged or work product. If that were the standard, Rule 502(b) would have no purpose; the starting point of the Rule 502(b) analysis is that a privileged or protected document was, in fact, turned over.

In addition to rejecting a hindsight analysis, the court in *Coburn* refused to establish an impossibly high standard of reasonableness. Specifically, the court rejected a standard of reasonableness that would require the privilege holder to take "all reasonable means" to prevent disclosure of the privileged information, reasoning that this standard would contradict the admonition in Rule 502's Advisory Committee Note that privilege holders are not required to engage in post-production reviews to prevent waiver due to inadvertent disclosure.

In contrast, the approach taken in *Relion, Inc. v. Hydra Fuel Cell Corp.*, which was rejected by the *Coburn* court, is an example of a court applying Rule 502 as the functional equivalent of the strict approach. Specifically, the court in *Relion* established an impossibly high standard for reasonableness and used a hindsight analysis to conclude that the privilege holder did not take reasonable steps to prevent disclosure.
In *Relion*, the privilege holder inadvertently disclosed two e-mails as a result of the e-mails being “mis-filed” in folders containing non-privileged information. Contrary to the intent of Rule 502, the court established an impossibly high standard to avoid waiver due to inadvertent disclosure. The court interpreted Rule 502(b)’s requirement that the privilege holder take reasonable steps to prevent the disclosure as requiring the privilege holder “to pursue *all reasonable means* of preserving the confidentiality of the privileged matter.” Relion imposes a near-perfection standard impossible of being met because the very nature of the inadvertent disclosure inquiry is that a mistake has happened; therefore, there was a flaw at some point in the privilege review and a privileged or protected document has been produced. On the other hand, the standard Rule 502 establishes—that the privilege holder must have taken reasonable steps to prevent disclosure—envisions protection of the attorney-client privilege against waiver due to inadvertent disclosure as long as the holder has taken steps to preserve the privilege, notwithstanding a flaw or mistake in the privilege review. The “all reasonable means” standard *Relion* establishes would not protect the attorney-client privilege from waiver when there has been a mistake or flaw in a privilege review, even where the privilege holder has taken reasonable steps to prevent disclosure.

Once the court in *Relion* established the high “all reasonable means” standard, it was easy for the court to find that the privilege holder did not meet the standard. Because the defendant provided the privilege holder with both hard copies and electronic, text-searchable copies of the documents the defendant had selected for copying and which the privilege holder had produced to defendant, the court reasoned that the privilege holder had two additional opportunities to re-review the documents that had already been produced. This reasoning typifies the “could have done more” hindsight analysis, which Rule 502 specifically rejects by not requiring privilege holders to engage in post-production reviews to avoid waiver due to inadvertent disclosure.

### B. Post-Rule 502 Electronic Discovery Cases

It is particularly interesting to examine Rule 502 cases dealing with the issue of waiver due to inadvertent disclosure in the context of

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284. *Id.* at *3.
285. *Id.* at *2* (emphasis added).
286. *Id.* at *3*.
287. See *Fed. R. Evid.* 502(b) advisory committee’s note.
electronic discovery because it was the increased cost and risk of inadvertent disclosure associated with electronic discovery that prompted the drafting of Rule 502. Three post-502 cases dealing with the issue of waiver due to inadvertent disclosure in the context of electronic discovery are worthy of discussion: Rhoads Industries v. Building Materials Corp. of America,288 United States v. Sensient Colors, Inc.,289 and Heriot v. Byrne.290 These three decisions generally give effect to the intent of Rule 502(b) and the value choice to protect the attorney-client privilege. However, as discussed below, the extent of disclosure and promptness of taking steps to rectify the error factors are being interpreted under a strict approach.

Rhoads is an example of an electronic discovery case in which the court is split between giving effect to the intent of Rule 502 and interpreting Rule 502 as the strict approach. In Rhoads, over 800 privileged documents were inadvertently disclosed during the course of an electronic document production.291 Reasoning that Rule 502 incorporated the middle approach’s factors, the court analyzed the waiver issue under the common law middle approach and considered “the reasonableness of precautions taken to prevent inadvertent disclosure, the number of inadvertent disclosures, the extent of the disclosure, any delay and measures taken to rectify the disclosure, [and] whether the overriding interests of justice would or would not be served by relieving the party of its errors.”292

In assessing the reasonableness of precautions taken to prevent inadvertent disclosure, the court adhered to the spirit of Rule 502 and imposed a relatively low standard by requiring the privilege holder to demonstrate that it “at least minimally complied” with the reasonableness factor.293 The court rejected the hindsight approach used by the Victor Stanley court, “because no matter what methods an attorney employed, an after-the-fact critique can always conclude that a better job could have been done.”294 Despite imposing a low standard for reasonableness and rejecting the use of hindsight, the court in Rhoads ultimately found that the privilege holder did not take reasonable steps

292. Id. at 219.
293. Id. at 226.
294. Id. at 219.
to prevent the disclosure.\textsuperscript{295} Although the court found it significant that the privilege holder retained a consultant and used a sophisticated computer screening program for the electronic document production,\textsuperscript{296} the court pointed to many inadequacies of the privilege review: the privilege holder should have used more search terms to identify privileged documents, including the names of all attorneys; the search was improperly limited to the e-mail address line instead of the e-mail body; and the privilege holder did not conduct quality assurance testing of the search.\textsuperscript{297} Finally, the court noted that the privilege holder produced documents that its search should have caught, and the privilege holder had no explanation for why those documents were produced.\textsuperscript{298}

The court next assessed the time and measures taken to rectify the disclosure. Contrary to the intent of Rule 502, the court faulted the privilege holder for not catching its own mistake.\textsuperscript{299} Also contrary to the intent of Rule 502, the court implied that it would interpret the extent of disclosure factor as requiring a consideration of the extent to which the documents disclose "significant facts about the substance of any legal opinion."\textsuperscript{300} Because the court had "little knowledge of the contents of [the] privileged documents,"\textsuperscript{301} it found that there was insufficient evidence in the record to determine whether this factor favored the privilege holder or the receiving party.\textsuperscript{302}

\textsuperscript{295} Id. at 227 ("An understandable desire to minimize costs of litigation and to be frugal in spending a client's money cannot be an after-the-fact excuse for a failed screening of privileged documents, just as I refuse to use hindsight to criticize Rhoads for mistakes that were made but were perhaps unforeseeable.").

\textsuperscript{296} Id. at 222 (noting compliance with the Advisory Committee's note to Rule 502, which provides that "[a] party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure"). The court also found it favorable to the privilege holder that the consultant conducted trial searches on the program before purchasing it to be satisfied that the program was reliable and accurate and that the consultant was familiar with the privilege holder's computer system, that the privilege holder believed that its search terms would identify privileged documents, and that the privilege holder did not include terms such as "privileged" or "confidential" in its search because it would have resulted in an over-inclusive result.

\textsuperscript{297} Id. at 218.

\textsuperscript{298} Id.

\textsuperscript{299} Id. at 225.

\textsuperscript{300} Id. at 219.

\textsuperscript{301} Id. at 227.

\textsuperscript{302} Id. at 225.
Despite finding that the privilege holder did not take reasonable steps to prevent the disclosure and finding that the time and measures taken to rectify the disclosure factor did not favor the privilege holder, the court ruled against a finding of waiver.\textsuperscript{303} The court found that the interest of justice factor strongly favored the privilege holder, noting that “[l]oss of the attorney-client privilege in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice,” and assumed that the inadvertently disclosed documents “contain candid assessments of the facts and strategy” of the case.\textsuperscript{304} On the other hand, the court reasoned that denying the documents to the receiving party would not be prejudicial because the receiving party had no right or expectation to the inadvertently disclosed privileged documents.\textsuperscript{305}

\textit{Sensient Colors} provides another example of a court giving effect to the intent of Rule 502 in the court’s assessment of the reasonableness of steps the privilege holder took to prevent the disclosure and the promptness of efforts taken to rectify the error.\textsuperscript{306} Important to the court’s finding that the privilege holder took reasonable steps to prevent inadvertent disclosure\textsuperscript{307} was that the privilege holder used a computer program for its privilege review, employed attorneys and paralegals who were trained on privilege issues, and performed quality assurance measures to ensure that the review was complete and was not over-inclusive or under-inclusive.\textsuperscript{308} The court rejected a hindsight analysis\textsuperscript{309} and refused to punish the privilege holder for mistakes that

\begin{itemize}
\item \textsuperscript{303} Id. at 227. The court found that the inadvertently disclosed documents that the privilege holder placed on a privilege log upon being notified of the error were protected from waiver. However, the court found that attorney-client privilege was waived as to any inadvertently disclosed documents that were not placed on the supplemental privilege log after the error was brought to the privilege holder’s attention. \textit{Id.} at 226.
\item \textsuperscript{304} Id.
\item \textsuperscript{305} Id.
\item \textsuperscript{307} The court interpreted a provision dealing with inadvertent disclosure and waiver in the parties’ joint discovery plan as incorporating the “flexible” standard to determine if waiver occurred and proceeded to address the waiver issue under Rule 502. If the court had, on the other hand, interpreted the provision as a “clawback provision,” a Rule 502 analysis would not have been necessary because “[a] clawback arrangement involves the return of documents without waiver irrespective of the care taken by the disclosing party.” \textit{Id.} at *2 n.6.
\item \textsuperscript{308} Id. at *2, *4.
\item \textsuperscript{309} Id. at *5 (“[Rule] 502(b) requires plaintiff to demonstrate that it took reasonable precautions to prevent an error, which it has done. Although a reasonable explana-
occurred notwithstanding use of the computer program for the privilege review.\textsuperscript{310}

Moreover, the court did not fault the privilege holder for not catching its own mistake. Instead, it measured the promptness of the privilege holder's efforts to rectify the error from the time when the receiving party notified the privilege holder of the inadvertent disclosure.\textsuperscript{311} This interpretation of the promptness of taking steps to rectify the error comports with Rule 502's intent not to require the privilege holder to engage in post-production privilege reviews to protect against inadvertent disclosure.\textsuperscript{312}

Finally, \textit{Heriot v. Byrne} is another electronic discovery case in which the court gave effect to the intent of Rule 502 through its interpretation and application of Rule 502.\textsuperscript{313} There, the privileged documents were inadvertently disclosed as a result of an error made by an electronic discovery vendor hired by the privilege holder.\textsuperscript{314} The court refused to punish the privilege holder for the vendor's mistake, finding that the privilege review procedures used by the privilege holder were reasonable.\textsuperscript{315} The court concluded that the privilege holder "relied, and should be able to rely, on their Vendor to faithfully carry out the instructions it has been given."\textsuperscript{316}

Specifically addressing the privilege holder's review procedures, the court did not engage in a detailed critique, but instead found that "the multi-step process Plaintiffs used to produce the Sequestered Documents . . . entailed reasonable precautions to prevent disclosure."\textsuperscript{317} Interestingly, the court did not fault the privilege holder for not using computer software to screen for privileged documents and found the privilege review to be reasonable without the use of such software.\textsuperscript{318} The court also refused to impose a duty on the privilege holder to...
engage in a re-review of the documents after it had given the documents to the vendor, reasoning that such a requirement "would be duplicative, wasteful, and against the spirit of FRE 502." \(^{319}\)

Finally, although the privilege holder in *Heriot* discovered its own mistake, the court implied that it would not have faulted the privilege holder had it not discovered the mistake until the receiving party notified it or used the inadvertently disclosed document. \(^{320}\)

### VI. Conclusion

When Congress passed Federal Rule of Evidence 502, it expressly rejected the strict and lenient approaches to waiver of the attorney-client privilege due to inadvertent disclosure, and sought to achieve uniformity, predictability, and cost reduction by adopting the common law middle approach. Like the common law middle approach, Rule 502 aims to balance the interests in truth-seeking and protection of the attorney-client privilege through consideration of a variety of factors, such as the reasonableness of steps taken to prevent the inadvertent disclosure and the promptness of taking efforts to rectify the disclosure. Rule 502, however, arguably tips the balance in favor of more protection of the attorney-client privilege. Because it incorporates the middle approach factors for determining whether waiver should result from the inadvertent disclosure, Rule 502 is susceptible, like the common law middle approach, to being applied as the functional equivalent of the strict approach.

Congress, however, does not intend for Rule 502 to be applied as the functional equivalent of the strict approach. Specifically, Congress intends for a low standard of reasonableness to govern the inquiry of whether the privilege holder took reasonable steps to prevent an inadvertent disclosure, and rejects the impossibly high standard of reasonableness and hindsight approach employed by courts applying the middle approach as the strict approach. Moreover, Rule 502's rejection of the need for privilege holders to engage in post-production reviews evidences Congress's intent to measure the promptness of efforts taken

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319. *Id.* at 660 (noting that such a requirement would chill the use of electronic discovery vendors).

320. See *id.* at 662 (citing with approval to *B-Y Water District v. City of Yankton*, 2008 WL 5188837, at *2 (D.S.D. Dec. 10, 2008), and *Laethem Equipment Co. v. Deere & Co.*, No. 2:05-CV-10113, 2008 WL 4997932, at *9 (E.D. Mich. Nov. 21, 2008), where the privilege holders learned of the inadvertent disclosure after the documents were sought to be used at a deposition, and stating that "how the disclosing party discovers and rectifies the disclosure is more important than when after the inadvertent disclosure the discovery occurs").
to rectify the error from the time the privilege holder learned of the mistake, and not at the time of disclosure as courts applying the middle approach as the strict approach have measured promptness.

Despite strong evidence of Congress's intent for Rule 502 not to be applied as the functional equivalent of the strict approach, because the rule adopts the common law middle approach it is susceptible to the judicial imposition of preferences. Although there have only been a few cases addressing waiver due to inadvertent disclosure since the addition of Rule 502, and even fewer cases in the electronic discovery context, it appears that courts are generally adhering to the spirit of the rule and are giving effect to Congress's choice to protect the attorney-client privilege. Courts in these cases are giving effect to Rule 502 by ensuring that privilege review procedures are in place and carefully deferring to those procedures and by refusing to engage in a hindsight analysis. Also, these courts understand that mistakes often occur during discovery productions and are refusing to impose on privilege holders a duty to engage in a post-production privilege review. Finally, these courts are not faulting privilege holders for not catching their own mistakes and are measuring the promptness of efforts to rectify the error from when the privilege holder discovers the inadvertent disclosure instead of when the inadvertent disclosure was made.

Even though it appears right now that courts are abiding by the spirit of Rule 502, evidence of judicial imposition of preferences against Congress's intent can be found in Rhoads. There, the court faulted the privilege holder for not discovering its own mistake and indicated that the extent of disclosure should be interpreted as the extent to which the inadvertent disclosure disclosed significant facts about the substance of a legal opinion. Only time will tell whether courts will continue to abide by the spirit of Rule 502 or will impose judicial preferences for truth-seeking, contrary to Congress's intent.