

Comment,
“WHAT’S YOURS IS MINE”: INADVERTENT
DISCLOSURE OF ELECTRONICALLY
STORED PRIVILEGED INFORMATION
IN DIVORCE LITIGATION

Introduction

The attorney-client privilege and the questions it presents permeate the legal field, with the area of divorce litigation being no exception. Increased availability and use of electronic media create unique challenges for the family law attorney who must juggle the need to maintain the attorney-client privilege while representing clients who often share electronic storage space and medium with their adversaries. The usual complexities of the electronic discovery are only exacerbated by the discovery of documents stored on the shared family computer and communication between attorney and client that is often accessible by adverse parties through shared email accounts and other electronically stored communications. Electronic discovery is only made more difficult by the variety of approaches used by different states, the varying interpretation of those approaches within states, and the lack of relevant case law directly addressing the distinctive circumstances of electronic discovery and divorcing parties.

This Note provides an overview of the history of attorney-client privilege and the current state of the law in relation to electronic discovery. Part I of this note will provide a brief overview of the attorney-client privilege and the varying views as to the doctrines, benefits, and detriments within the legal system. This Part will also examine the various approaches courts take when privileged information is inadvertently disclosed to opposing parties, and how these approaches further or hinder the purpose of the attorney-client privilege. Part II will focus on the proliferation of electronically stored information in recent years and how the increased use of electronic data has exponentially increased the amount of work required during the discovery process and the risk of inadvertent disclosure. Part II also provides a synopsis of several family law cases that address the issue of electronic

discovery and inadvertent disclosure. Finally, Part III examines the legal response to the issue of inadvertent disclosure in the age of electronic discovery. This Part examines recent changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence that attempt to alleviate the confusion and burden of preventing inadvertent disclosure of privileged information.

I. Overview of Attorney-Client Privilege and Waiver

A. Definition and Purposes of the Attorney-Client Privilege

The attorney-client privilege is the oldest of all privileges recognized under the law¹ and the only privilege recognized by every state.² Wigmore defined the attorney-client privilege using eight elements:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal advisor in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal advisor,
- (8) except the protection to be waived.³

Modern courts essentially adopted Wigmore's definition of attorney-client privilege in *United States v. United Shoe Machinery Corp.*⁴ This decision slightly refined Wigmore's definition of the attorney-client privilege by indicating that the client is the holder of the privilege and laying out circumstances in which the privilege is automatically waived.⁵

The attorney-client privilege's long history and universal acceptance result from the indispensable role the privilege plays in the legal system and the legal profession. The attorney-client privilege promotes "freedom of consultation of legal advisers by clients"⁶ and encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public

¹ Robert A. Pikowsky, *Privilege and Confidentiality of Attorney-Client Communication Via E-Mail*, 51 BAYLOR L. REV. 483, 488 (1999).

² 81 AM. JUR. 2D *Witness* § 329 (2008).

³ 8 JOHN WIGMORE, EVIDENCE § 2290, at 545 (McNaughton rev. 1961).

⁴ 89 F. Supp. 357, 358-59 (D. Mass. 1950).

⁵ *Id.* ("the asserted holder of the privilege is or sought to become a client; [and] the communication relates to a fact [that is not relayed] for the purpose of committing a crime or tort.").

⁶ 81 AM. JUR. 2D *Witness* § 329 (2008).

interest in the observance of law and administration of justice."⁷ The attorney-client privilege offers assurance to individuals who are hesitant to reveal personal or damaging information for fear that it will not remain confidential.⁸ The importance of the attorney-client privilege has led some to describe it as "sacred."⁹

Despite its importance in the legal system, the attorney-client privilege also works to impede the truth finding process that courts seek to facilitate. The attorney-client privilege compels courts to bar the admittance of evidence that is otherwise relevant.¹⁰ The benefits of the attorney-client privilege undoubtedly outweigh its role as an "obstacle to the investigation of truth,"¹¹ but because of the negative effect the attorney-client privilege has on the adversary system, generally courts will narrowly construe privilege.¹² The courts' attempts to balance the need to promote communication between attorneys and their clients while minimizing obstacles to the truth finding process are further aided by the law of waiver. Since clients are the holder of the privilege, they may also decide to waive that privilege.¹³ In addition, the attorney-client privilege must be affirmatively asserted when privileged information is sought by outside parties or it is ultimately waived.¹⁴

Traditionally, waiver was defined as "an intentional relinquishment or abandonment of a known right or privilege."¹⁵ This intent based definition does not cover all aspects of waiver of the attorney-client privilege,¹⁶ thus courts have recognized im-

⁷ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁸ *Pikowsky*, *supra* note 1, at 489. *See also* Vincent S. Walkowiak & Thomas J. Leach, *Loss of Attorney-Client Privilege Through Inadvertent Disclosure of Privileged Documents*, in *THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION* 385 (Vincent S. Walkowiak, ed., 4th ed., 2008).

⁹ *Walkowiak & Leach*, *supra* note 8, at 389.

¹⁰ *Pikowsky*, *supra* note 1, at 489.

¹¹ 8 JOHN WIGMORE, *EVIDENCE*, § 2292 at 554 (McNaughton rev. 1961).

¹² *See e.g.*, *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("[T]he privilege has the effect of withholding relevant information from the factfinder, [so] it applies only where necessary to achieve its purpose.").

¹³ *Pikowsky*, *supra* note 1, at 494.

¹⁴ *Id.*

¹⁵ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁶ For example, when a third party requests information covered by the attorney-client privilege the individual must affirmatively assert the privilege or it is waived.

plied waiver of the privilege. Implied waiver occurs when a “course of conduct pursued evidences intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party.”¹⁷ The lack of a single definition of “waiver” means that the term “waiver” covers several different situations in which the courts refuse to recognize the privilege.¹⁸ This leaves courts with a great amount of discretion when determining what actually constitutes waiver of the attorney-client privilege.

B. *Does Inadvertent Disclosure Waive the Attorney-Client Privilege?*

Courts’ discretion in determining what constitutes waiver is apparent in the multiple approaches used in determining whether an individual has waived his or her attorney-client privilege through the inadvertent disclosure of privileged information. Court decisions regarding whether inadvertent disclosure constitutes waiver of the attorney-client privilege are “all over the map.”¹⁹ Inadvertent disclosure is a common occurrence in any type of litigation, and the lack of regularity with which it is handled by courts is a reflection of differences in the level of tolerance courts have for attorney carelessness as well as the importance placed on the attorney-client privilege.²⁰ Currently, courts employ one of three tests, meaning the holder of the privilege faces three possible results in regards to inadvertent disclosure.²¹ These three approaches are: (1) the strict approach, (2) the lenient approach, and (3) the middle ground approach.

1. *The Strict Approach*

Courts that follow the strict approach find that the benefits of the attorney-client privilege are automatically lost upon the inadvertent disclosure of previously privileged information, whether the documents were intentionally produced or not. The strict approach is consistent with Wigmore’s idea that attorney-

¹⁷ *Airoulofski v. State*, 922 P.2d 889, 894 (Ala. 1996).

¹⁸ Walkowiak & Leach, *supra* note 8, at 390.

¹⁹ Richard J. Heafey, *Return to Sender?: Inadvertent Disclosure of Privileged Information*, 28 AM. J. TRIAL ADVOC. 615, 615 (2005).

²⁰ *Id.* at 616.

²¹ Walkowiak & Leach, *supra* note 8, at 390.

client privilege should be “strictly confined within the narrowest possible limits.”²² The basis of the strict approach is that the waiver only applies to information that the client intends to remain confidential. Once that confidential information is revealed to a third party, it is no longer confidential; thus the privilege no longer applies.²³

A second rationale for the strict approach is the idea that inadvertent disclosure of privileged information is nothing more than negligence and parties must be responsible for their own negligent acts.²⁴ Under the attorney-client privilege doctrine, the parties themselves have a duty to maintain the confidentiality of information so courts that follow a strict approach are unwilling to “grant no greater protection to those who assert the privilege than their own precautions warrant.”²⁵ This rationale creates strong incentives for attorneys to participate in careful document management. Attorneys have the power to retain the attorney-client privilege but it is their duty to ensure that it is properly preserved.²⁶

2. *The Lenient Approach*

While the strict method uses a per se approach that completely disregards intent in determining whether there has been waiver, the lenient approach is purely intent based. This approach is based upon the traditional definition of waiver as the “intentional relinquishment or abandonment of a known right or privilege” adopted by the Supreme Court in *Johnson v. Zerbst*.²⁷

²² WIGMORE, *supra* note 3, § 2291 at 544.

²³ *Int’l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 449 (D. Mass. 1988) (“It cannot be doubted that the confidentiality of the document has been destroyed by the ‘inadvertent’ disclosure no less than if the disclosure had been purposeful.”). See Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 RICH. J.L. & TECH. 15, *9 (2006).

²⁴ *United States v. Kelsy-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954).

²⁵ *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). See Kiker, *supra* note 23, at *9.

²⁶ *In re Sealed Case*, 877 F.2d at 980. See Walkowiak & Leach, *supra* note 8, at 391.

²⁷ 304 U.S. 458, 464 (1938).

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Under this rationale, the parties involved must intend to disclose the privileged information before there can be a waiver.²⁸ The lenient approach goes even further in protecting the attorney-client privilege by emphasizing that the client is the holder of the privilege and any inadvertent disclosure by the attorney cannot be imputed to the client. Therefore, if an attorney inadvertently discloses confidential information the client will not be found to have authorized such disclosure if they did not know of it.²⁹ Courts have reasoned that if the privilege is for the welfare of the *client*, more than *attorney's* negligence should be required before the *client* loses the privilege.³⁰

3. *The Middle Ground Approach*

Courts in the majority have rejected the extreme nature of the strict and lenient approaches and instead adopt the middle ground approach.³¹ This approach strikes a balance between the strict approach's goal of letting negligent actors deal with the consequences of their own negligence and the lenient approach's goal of protecting clients who intend to keep communications with their attorney confidential.³² Under the middle ground approach courts consider the "circumstances surrounding a disclosure on a case-by-case basis."³³ The case-by-case analysis requires the court to consider a number of factors in whether an inadvertent disclosure results in waiver of the attorney client privilege:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.³⁴

²⁸ See Kiker, *supra* note 23, at *13.

²⁹ See *id.*

³⁰ Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (emphasis in original).

³¹ See Walkowiak & Leach, *supra* note 8, at 393.

³² Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993). See Kiker, *supra* note 23, at *15.

³³ Alldread, 988 F.2d at 1434.

³⁴ Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993).

By considering all the surrounding circumstances, the middle ground approach is best suited to achieving a fair result because it is flexible. The moderate approach continues to "provide incentives for attorneys to protect confidential communications with their clients, but it also recognizes that truly unpreventable and inadvertent disclosures occur at great costs to the client's interests."³⁵

II. The Proliferation of Electronic Discovery

A. Generally

The problems that arise when privileged information is inadvertently disclosed are only exacerbated by the enormous increase in the use of electronic media to share and store information. The University of California Berkeley conducted a comprehensive study in 2003 to determine how much new media was created each year.³⁶ Researchers estimated that new information grew approximately 30 percent each year between 1999 and 2002.³⁷ The largest increase in stored information was in magnetic forms of media, with an increase in 80 percent between 1999 and 2002.³⁸ In terms of information exchange and flow, the Internet is by far the fastest growing medium of communication. "Although the Internet is the newest medium for information flows, it is the fastest growing new medium of all time, becoming the information medium of first resort for its users."³⁹ The amount of information on the web tripled between 2000 and 2003, and at the time of the study researchers estimated that the amount of e-mail sent and received would double between 2002 and 2003.⁴⁰

The increased use of electronically stored information has led to a similar increase in the volume of information subject to

³⁵ *Sitterson v. Evergreen Sch.* Dist. No. 114, 196 P.3d 735, 741 (Wash. Ct. App. 2008). *See also* *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996).

³⁶ Peter Lyman & Hal R. Varian, *How Much Information?* 2003, <http://www.sims.berkeley.edu/how-much-info-2003/execsum.htm> (last visited Apr. 4, 2009).

³⁷ *Id.*

³⁸ *Id.* This category encompasses what is typically thought of as "electronic data" including hard disk drives and flash memory drives.

³⁹ *Id.*

⁴⁰ *Id.*

discovery in the legal process. Attorneys should expect that all parties involved in a case will have communicated electronically or produced a large amount of electronically stored information. The heightened use of these electronic media means that “the volume of information that attorneys must review in the course of discovery is increasing exponentially.”⁴¹ The rules and statutory time frames for discovery have been unable to keep up with and account for the extra work required when electronic information is part of the discovery process. Increased pressure to sift through such high volumes of information has made the inadvertent production of confidential information inevitable.⁴²

B. *Electronic Evidence in Family Law Litigation*

Like other areas of law, the use of electronic information as evidence has increased substantially in family law litigation. In a 2008 survey the American Academy of Matrimonial Lawyers (AAML) indicated that 88 percent of survey respondents had seen an increase in the number of family law cases introducing electronic evidence in the past five years.⁴³ E-mail was the most frequently used type of electronic evidence in divorce litigation with text messaging and internet browsing history tying for the second most commonly sought electronic information.⁴⁴

Family law attorneys should also consider using electronically stored information in addition to electronic communication. Word processing files, financial management programs and contact lists, to name a few, can also serve an important role in family law litigation.⁴⁵ Often electronically stored evidence may be the only surviving evidence regarding certain issues, or it may show that there are inconsistencies in hard copy evidence that has been exchanged during the discovery process.⁴⁶ In *Stafford*

⁴¹ Kiker, *supra* note 23, at *6.

⁴² *See id.* at *6.

⁴³ American Academy of Matrimonial Lawyers, *Nation's Top Divorce Lawyers Note Dramatic Rise in Electronic Evidence*, available at <http://www.aaml.org/go/about-the-academy/press/press-releases/nations-top-divorce-lawyers-note-dramatic-rise-in-electronic-evidence/?keywords=Electronic%20Dat> (last visited Apr. 9, 2009).

⁴⁴ *Id.*

⁴⁵ *See* Laura W. Morgan, *GOTCHA!: Finding the Stuff You Just Know They're Hiding*, 28 FAM. ADVOC. 10, 12 (Winter 2006).

⁴⁶ *See id.*

v. Stafford the Vermont Supreme Court considered the introduction of such evidence.⁴⁷ A wife was seeking to introduce evidence of her husband’s repeated infidelity during the marriage as part of their divorce proceeding.⁴⁸ Originally, she had sought to introduce a notebook that contained a hand-written list and description of sexual encounters her husband had had with other women, but the notebook had mysteriously disappeared.⁴⁹ The wife found a similar document titled “My List” saved on the family computer.⁵⁰ The court ultimately concluded that there was no error in admitting the evidence and inferring the husband’s infidelity from the document.⁵¹ Without the discovery and admittance of this electronic evidence, the wife’s claim of marital misconduct would have been without any support.

Courts have held that electronic discovery in divorce litigation extends beyond documents stored on the family computer. In *Byrne v. Byrne* a New York court determined that a wife was entitled to access to information stored on a laptop owned by her husband’s employer.⁵² The wife believed there would be important financial information pertaining to the marriage stored on the computer, so she took it from the family home to her attorney’s office.⁵³ The husband’s employer even entered the matter and asserted that since the company owned the computer, not the husband, it should not be turned over to the wife and her attorney.⁵⁴ The court ultimately concluded that the husband was in control of the laptop and thus the wife did not act improperly in removing the computer from the family home and turning it over to her attorney.⁵⁵

In its analysis, the court noted that the husband had allowed the couple’s children to use the computer to do their homework, and that his employer did not limit his access or use of the laptop. Accordingly, the laptop could properly be characterized as the

⁴⁷ 641 A.2d 348 (Vt. 1993).

⁴⁸ *Id.* at 349.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 650 N.Y.S.2d 499 (N.Y. Sup. 1996).

⁵³ *Id.* at 499.

⁵⁴ *Id.*

⁵⁵ *Id.* at 500.

“family computer.”⁵⁶ The court indicated that the issue was not who had access to the laptop, but who could access its memory. The court concluded that: “The computer memory is akin to a file cabinet. Clearly, plaintiff could have access to the contents of a file cabinet left in the marital residence. In the same fashion she should have access to the contents of the computer.”⁵⁷ Since the wife should have had access to the information, such information was subject to discovery.

Finally, family law attorneys must be aware of the possibility that the attorney-client privilege can be compromised if certain information is stored electronically. Unlike other areas of litigation where parties are presumably separated and have essentially no access to the other’s information outside the discovery process, family law litigants often remain in the same home, or at least have access to the other’s personal property, most notably, the family computer. In *Hazard v. Hazard* a husband appealed the court’s decision to allow the introduction of a letter he had written to his attorney.⁵⁸ The husband had stored the letter on the family computer in the marital home and the wife was able to easily access it.⁵⁹ The court reasoned that the attorney-client privilege does not exist if communication takes place in front of a third party, and since the husband had voluntarily placed communication with his attorney in a place where the wife could easily access it, he “effectively allowed the contents of the letter to be communicated to Wife the same as if Wife had overheard a conversation of Husband with his attorney.”⁶⁰ The appellate court did not hold that the husband had waived the attorney-client privilege by placing the letter on the family computer. It simply indicated that the letter was never privileged because it was stored on the family computer where the wife had easy access to the information.⁶¹

⁵⁶ *Id.* at 499-500.

⁵⁷ *Id.* at 500.

⁵⁸ 833 S.W.2d 911, 913-14 (Tenn. Ct. App. 1992).

⁵⁹ *Id.* at 914.

⁶⁰ *Id.*

⁶¹ *Id.*

III. Legal Responses to Inadvertent Disclosure in Electronic Discovery

With the high volume of information that is being created, stored, and sent electronically and the speed with which all this information is exchanged, it is inevitable that issues of inadvertent disclosure will arise. Traditionally, attorneys have made review of documents to avoid inadvertent disclosure a part of everyday practice, but the substantial increase in the amount of information exchanged during electronic discovery has made this process increasingly difficult.⁶² Conducting a privilege review "in today's e-world is time-consuming and burdensome, and the costs can be astronomical. Further, even when a diligent privilege review is conducted, large volumes of data and the complex variety of [electronically stored information] make it more probable that privileged documents will be missed."⁶³ In an effort to ameliorate the risks of untoward consequences resulting from inadvertent disclosure during the electronic discovery process, there have been substantial amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and many states have responded with similar necessary amendments.

A. Preemptive Planning for Inadvertent Disclosure:

Amendments to the Federal Rules of Civil Procedure

In 1999 the chair of the Advisory Committee on Civil Rules imparted the committee with the daunting task of devising rules that would address current issues in electronic discovery.⁶⁴ The committee noted that the current discovery rules fail to "take into account changes in information technology, provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases."⁶⁵ Amend-

⁶² See Laurie A. Weiss, *Protection of Attorney-Client Privilege and Work Product in the E-Discovery Era*, in *THE ATTORNEY CLIENT PRIVILEGE IN CIVIL LITIGATION* 163 (2008).

⁶³ *Id.* at 164.

⁶⁴ Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, 3 (Sept. 2005), available at http://www.uscourts.gov/rules/supct1105/Excerpt_STReport_CV.pdf (last visited Apr. 1, 2009).

⁶⁵ *Id.* at 4.

ments to Federal Rules of Civil Procedure 16 and 26 are designed to alert the court to pay early attention to electronic discovery issues.⁶⁶

To address issues of inadvertent disclosure before they actually arise, Rules 16(b) and 26(f) allow parties to reach agreements regarding inadvertent disclosure prior to discovery.⁶⁷ These agreements can include how the parties will assert attorney-client privilege claims if information is inadvertently disclosed and how they will protect such information upon disclosure.⁶⁸ Rule 26(f) allows parties to enter into “quick peek” and “claw back” agreements.⁶⁹ “Quick peek” agreements provide that a responding party will supply opposing parties with electronic data without waiving the attorney-client privilege.⁷⁰ The requesting party then reviews this information and formally requests the documents that the party thinks are important to the case, and the responding party is able to screen the documents actually requested and remove any information that may be privileged.⁷¹ “Clawback agreements” afford responding parties the opportunity to withdraw information that is mistakenly produced for the opposing party.⁷² “Clawback agreements” mirror the lenient approach to inadvertent disclosure discussed previously. These agreements indicate that “production without intent to waive privilege or protection should not be a waiver.”⁷³

“Quick peek” and “clawback” agreements reached according to Rule 26(f) are enforced through Rule 16(b). Rule 16(b) allows courts to issue scheduling orders that include any agreements the parties reach regarding the inadvertent disclosure of privileged information.⁷⁴ The committee noted that allowing the court to issue anticipatory protective orders aids in the discovery

⁶⁶ *Id.* at 7. See also FED. R. CIV. P. 16 advisory committee’s note.

⁶⁷ FED. R. CIV. P. 16(b); FED. R. CIV. P. 26(f).

⁶⁸ *Id.*

⁶⁹ FED. R. CIV. P. 26(f) advisory committee’s note.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ FED. R. CIV. P. 16(b)(6). The court cannot include these provisions in a scheduling order unless all parties expressly agree, and inclusion of these provisions do not limit the court’s authority to act on motion. FED. R. CIV. P. 16(b) advisory committee’s note.

process by minimizing the risk of waiver of the attorney-client privilege and avoiding the cost and confusion the courts face when dealing with issues of inadvertent disclosure.⁷⁵ Once a scheduling order containing an agreement regarding inadvertent disclosure is issued, it cannot be modified unless the party requesting modification demonstrates good cause.⁷⁶

Current case law suggests that parties should not be so quick to rely on the protection that scheduling orders purport to provide.⁷⁷ Rule 16(b)’s allowance of “quick peek” and “clawback” agreements fails to recognize that the substantive law of inadvertent disclosure and attorney client privilege may vary within different jurisdictions.⁷⁸ In *Hopson v. Baltimore* the federal district court noted that different jurisdictions’ approaches to inadvertent disclosure may not comport with the Rule 16(b)’s lenient approach to determining whether inadvertent disclosure constitutes waiver of privilege.⁷⁹ If a jurisdiction has adopted the strict approach, any inadvertent disclosure would constitute waiver of the attorney-client privilege, regardless of whether an agreement was reached under Rule 16(b).⁸⁰ In jurisdictions where courts follow a middle ground approach, if parties turn over vast amounts of information under Rule 26(f)’s “quick peek” provisions, courts may determine that the parties did not take the proper precautions to screen for privileged information and rule that the privilege is waived by the inadvertent disclosure.⁸¹

In *Hopson* the court indicated that even if Rule 16(b) scheduling orders are enforceable, “it is questionable whether they are effective against third-parties.”⁸² Several courts have held that agreements concerning inadvertent disclosure and waiver of the attorney-client privilege do not preserve the privilege against

⁷⁵ FED. R. CIV. P. 16(b) advisory committee’s note.

⁷⁶ FED. R. CIV. P. 16(b).

⁷⁷ See Julie Cohen, Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 649 (2008).

⁷⁸ See *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 244, n.39 (D. Mass. 2005).

⁷⁹ See *id.*

⁸⁰ See *id.* at 244.

⁸¹ See *id.*

⁸² *Id.* at 235.

third parties.⁸³ The multifaceted and ongoing nature of family law litigation suggests that this is an especially important consideration for parties who wish to enter similar agreements. Consider the following example.

Prior to a dissolution proceeding, the parties enter into a “quick peek” agreement because of the substantial amount of electronic information they have stored on the family computer, two work laptops, cell phones, and PDA’s. Included in this information are e-mails the wife has written to her attorney seeking advice. She has inquired whether it is advisable to move into a neighborhood with her children where she knows that several of her neighbors are registered sex offenders. The wife explains that because of the divorce she cannot afford to live anywhere else with her children. She says that even though she is very busy with work, she will only leave the children home alone for a few hours during the day and a new neighbor has agreed to watch out for them while she is away. She tells her attorney she does not plan to move until after the divorce is final. The opposing parties return the electronically saved letter according to the original agreement and it plays no role in the litigation of the dissolution.

Suppose that days after the divorce is final, the husband files an objection to his now ex-wife’s relocation. Can he use the information contained within the letter as part of his case? Assume that several months after the divorce the wife learns that one of her children has been molested by a sex offender neighbor so she reports this to the police. Upon receiving the report, the state decides to also prosecute the wife for failure to protect her children from the abuser. Can the state use the letter in the case against her despite the “quick peek” agreement in the original dissolution matter? Case law would suggest that the attorney-client privilege is waived in both instances.⁸⁴

⁸³ See, e.g., *Genetech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409 (Fed. Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *Bowne v. AmBase Corp.*, 150 F.R.D. 465 (S.D.N.Y. 1993).

⁸⁴ See, e.g., *Bowne*, 150 F.R.D. at 479 (stating that “waiver will be found even if the disclosure took place in a forum other than the lawsuit in which the waiver issue is raised, and even if the disclosure was made for a proper purpose to a person with an interest that is common to him and the privilege holder.”).

Despite the risks of the protective orders allowed by Rule 26(f) and 16(b), these rules can serve an important function in litigation if parties remain aware of the danger and appropriately balance it with the need to reduce the time and cost involved when large amounts of electronic discovery exist. Increasingly, states are recognizing the need to address the issues and concerns surrounding the discovery of electronic evidence and have enacted rules that mirror Rules 16(b) and 26(f). Arizona, Kansas, Ohio, and Virginia have adopted the amendments to the Rules that allow the parties to enter into agreements regarding the inadvertent disclosure of privileged information.⁸⁵ An additional twenty-two states have adopted rules relating to electronic discovery, but have not implemented rules that allow parties to reach agreements concerning inadvertent disclosure during the pre-trial process.⁸⁶ This small number of states suggests that states may be reluctant to enact laws that allow the judiciary to enter orders regarding “quick peek” or “clawback” agreements because of the risk and uncertainty they impose.

B. *Post Disclosure Solutions: Protection Under the Federal Rules of Civil Procedure and Resolutions Under the Federal Rules of Evidence*

Rules 16(b) and 26(f) require parties to discuss issues that may arise prior to the electronic discovery process, but the ability to reach agreements as to how to deal with inadvertent disclosures of information are options, not obligations.⁸⁷ A real possibility exists that parties will not agree to clawback or quick peek provisions prior to discovery, or if they do, that disagreements will arise regarding the scope or terms of those agreements when information is actually disclosed. It would undoubtedly be difficult for parties to return and never use information they felt was

⁸⁵ ARIZ. RULES OF CIV. P. 16(b)(1)(B)(iii) (2008); KAN. STAT. ANN. § 60-216(b)(6) (2008); OHIO STATE R. CIV. PRO. 16(9) (2008); VA. R. CIV. P. 4:13(10) (2008).

⁸⁶ See K&L Gates, *Current Listing of States that Have Enacted E-Discovery Law* (Oct. 10, 2008) available at <http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/> (last visited Apr. 4, 2009).

⁸⁷ FED. R. CIV. P. 16(b) (2008); FED. R. CIV. P. 24(f) (2008).

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crucial to their case simply because they had previously agreed to “quick peek” or “clawback” provisions.

The Federal Rules of Civil Procedure do not address whether a party has waived the attorney-client privilege, but they do provide a procedure for addressing questions of inadvertent disclosure.⁸⁸ Rule 26(b)(5)(B) provides that parties who have inadvertently produced privileged material may assert a protective claim to the information.⁸⁹ The claiming party must notify the receiving party of the claim and the basis for asserting the claim.⁹⁰ Once a receiving party is notified of the claim of privilege that party “must promptly return, sequester, or destroy the specified information and any copies it has [and may] not use or disclose the information until the claim is resolved.”⁹¹ Both the receiving and producing party must take reasonable steps to preserve the information while the court considers the claim of inadvertent disclosure.⁹²

Similar to the concerns about Rules 16(b) and 26(f), Rule 26(b)(5)(B) does not take into account the jurisdictional differences among the states’ approaches to resolving issues of inadvertent disclosure.⁹³ Rule 26(b)(5)(B) “works in tandem” with Rules 16(b) and 26(f) and allows the court to enforce clawback agreements that provide that inadvertently disclosed information must be returned by the receiving party.⁹⁴ Rule 26(b)(5)(B) ignores the possibility that if a jurisdiction practices a strict approach to determining whether inadvertently disclosed information waives the attorney-client privilege, no need exists for such a procedure. The privilege is already waived and the receiving party can do what it wishes with the inadvertently disclosed information.⁹⁵

While amendments to the Federal Rules of Civil Procedure implement procedures to reduce the cost, time, and risk involved

⁸⁸ FED. R. CIV. P. 26(b)(5) advisory committee’s note.

⁸⁹ FED. R. CIV. P. 26(b)(5)(B) (2008).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Cohen, *supra* note 77, at 648. See also *supra* notes 78-80 and accompanying text.

⁹⁴ FED. R. CIV. P. 26(b)(5) advisory committee’s note.

⁹⁵ See page 4 for a description of the strict approach to inadvertent disclosure of privileged information.

with electronic discovery and issues of inadvertent disclosure, they do not offer assistance in determining whether inadvertent disclosure of confidential information waives the attorney-client privilege. Traditionally, the Federal Rules of Evidence deferred to the states in determining whether inadvertent disclosure constituted waiver. Rule 501 explains: “[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”⁹⁶ Originally, the Federal Rules of Evidence contained thirteen rules relating to issues of privilege, but Article V was amended to eliminate all the specific rules on privilege, leaving the general provisions of Rule 501.⁹⁷ The committee members believed that “federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason.”⁹⁸ The absence of any uniform direction as to what constitutes waiver has left courts to decide which of the three approaches to inadvertent disclosure they will adopt and use.⁹⁹

The committee’s original intent to leave issues of privilege up to the states did not anticipate the problems that would arise as the use of electronic evidence has become common in litigation. “With the volume of documents that are exchanged during the discovery process . . . the chances are great that some document produced will inadvertently disclose privileged information.”¹⁰⁰ An illustration of how much paper would be generated in a typical divorce case if all electronic information was converted into paper form is useful in understanding the scope of the problem. Assume a typical married couple has two cell phones, a laptop, and a home computer. The average cell phone includes a flash memory that can store 200 megabytes of information, 400 for both cell phones. This would equal approximately 15 feet of shelved books.¹⁰¹ A low capacity desktop computer and laptop

⁹⁶ FED. R. EVID. 501 (1975).

⁹⁷ FED. R. EVID. 501 (1975) advisory committee’s notes.

⁹⁸ *Id.*

⁹⁹ See *supra* notes 19-35 and accompanying text.

¹⁰⁰ Heafey, *supra* note 19, at 615.

¹⁰¹ See Lyman & Varian, *supra* note 36. See also Kiker, *supra* note 23, at *4.

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may contain fifty gigabytes of storage space, 100 for the couples' two computers. If all this information were printed, it would total a library floor of academic journals.¹⁰²

The typical law office simply is not equipped with—and the average family law client cannot afford—the time and resources that would be necessary to screen all of this data for information that could potentially be privileged. Many attorneys may be forced to conduct a cost benefit analysis when deciding how to approach the screening of electronic evidence for privileged information. Attorneys practicing in jurisdictions that follow a lenient approach may feel little pressure to screen through the vast amounts of information since any privileged information will be protected and returned. States that follow this lenient approach include: Alabama,¹⁰³ Illinois,¹⁰⁴ Minnesota,¹⁰⁵ and Wisconsin.¹⁰⁶ Those practicing in jurisdictions that follow a strict approach must extensively screen all electronic information because any inadvertent disclosure will result in waiver. Jurisdictions that require this extensive screening include: Florida,¹⁰⁷ Texas,¹⁰⁸ and Virginia.¹⁰⁹ Practitioners in middle ground jurisdictions must be up to date on all case law in their jurisdiction so they can properly assess the potential analysis a court will go through if information is inadvertently disclosed. The majority of states fall within this category. Finally, those practicing in jurisdictions that have yet to adopt a single approach to inadvertent disclosure have no information on which to base their electronic discovery plan of action.

In an effort to address this uncertainty and provide a clear and “consistent standard for application of the attorney-client privilege” the Federal Rules of Evidence Advisory Committee

¹⁰² *Id.*

¹⁰³ *See e.g.*, *Bassett v. Newton*, 658 So.2d 398 (Ala. 1995).

¹⁰⁴ *See e.g.*, *Chavez v. Watts*, 515 N.E.2d 146 (Ill. App. Ct. 1987).

¹⁰⁵ *See e.g.*, *Levin v. C.O.M.B. Co.*, 469 N.W.2d 512 (Minn. Ct. App. 1991).

¹⁰⁶ *See e.g.*, *Bogwardt v. Redlin*, 538 N.W.2d 581 (Wis. Ct. App. 1995).

¹⁰⁷ *See e.g.*, *Hamilton v. Hamilton Steel Corp.*, 409 So.2d 1111 (Fla. Ct. App. 1982) (“once the privilege is waived, and the horse out of the barn, it cannot be reinvoled.”).

¹⁰⁸ *See e.g.*, *Methodist Home v. Marshall*, 830 S.W.2d 220 (Tex. App. Ct. 1992).

¹⁰⁹ *See e.g.*, *Clagett v. Commonwealth*, 472 S.E.2d 263 (Vir. 1996).

promulgated the now adopted Rule 502.¹¹⁰ The committee attempted to embody five basic principles in the new rule:

1. A subject matter waiver should be found only when privilege . . . has already been disclosed, and a further disclosure “ought in fairness” to be required in order to protect against a misrepresentation that might arise from the previous disclosure.
2. An inadvertent disclosure should not constitute a waiver if the holder of the privilege . . . took reasonable precautions to prevent disclosure and took reasonably prompt measures . . . to rectify the error.
3. A provision on select waiver should be included. . . .
4. Parties to litigation should be able to protect against the consequences of waiver by seeking a confidentiality order from the court. . . .
5. Parties should be able to contract around common-law waiver rules . . . but . . . these agreements cannot bind non-parties.¹¹¹

The committee was able to successfully incorporate these principles into and unanimously approve Rule 502, which was passed into law, absent the select waiver provisions, on September 19, 2008.¹¹²

Rule 502(b) explicitly addresses the issue of inadvertent disclosures.¹¹³ Under Rule 502, inadvertent disclosure does not constitute waiver of the attorney-client privilege when three elements are met: “(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”¹¹⁴ Rule 502(b) reflects a balanced method to determining whether there has been inadvertent waiver of attorney-client privilege and mirrors the middle ground approach that the majority of states follow.¹¹⁵

The rule does not adopt any of the multi-factor tests adopted by states that follow the middle ground approach to aid in deter-

¹¹⁰ 5 FED. EVID. REV. 1454, 1454 (Oct. 2008).

¹¹¹ Committee on Rules of Practice and Procedure, Report on the Advisory Committee on Evidence Rules, May 15, 2006, *available at* http://files.aliaba.org/thumbs/datastorage/skoobesruoc/pdf/TSLE01_chapter_02_thumb.pdf.

¹¹² *Id.*; Pub. L. No. 110-322, 122 Stat. 3537.

¹¹³ FED. R. EVID. 502(b) (2008).

¹¹⁴ *Id.* See *supra* notes 87-94 and accompanying text for a discussion of FED. R. CIV. P. 26(b)(5)(B) (2008).

¹¹⁵ *Sitterson v. Evergreen Sch. Dist.* No. 114, 196 P.3d 735, 741-42 (Wash. Ct. App. 2008); FED. R. EVID. 502(b) advisory committee note.

mining what constitute reasonable steps to avoid inadvertent disclosure.¹¹⁶ The advisory committee reasoned that these tests encompass a “set of non-determinative guidelines that vary from case to case,” and that as drafted the rule was flexible enough to accommodate any of the factors listed in the various states’ tests and any other factors pertinent to the question of reasonableness.¹¹⁷ In light of the specific difficulties in electronic discovery, the advisory committee did include different considerations bearing on the reasonableness of an inadvertent disclosure: first, the number of documents that must be reviewed, and second, the time constraints placed on the producing party.¹¹⁸

Rule 502(b) provides a uniform approach to the inadvertent disclosure of privileged information, but it does not offer certainty as to what practitioners must do to reasonably prevent disclosure thus protecting the attorney-client privilege. In addition to encouraging courts to consider the amount of information to be reviewed and the time constraints on discovery, the advisory committee included examples of what may be considered reasonable steps in preventing inadvertent disclosure.¹¹⁹ Attorneys who use advanced software applications to screen for privileged information may have taken reasonable steps to prevent disclosure.¹²⁰ A more practical option for attorneys dealing with smaller volumes of electronic information (such as family law attorneys or practitioners who do not have the resources to implement analytical software) would be the “implementation of an efficient system of records management before litigation.”¹²¹ These suggestions still leave many questions unanswered. It is unclear what types of software applications are appropriate, or what constitutes an efficient system of records management. It still “seems to be left completely up to each individual judge to adjudicate what were reasonable precautions.”¹²²

¹¹⁶ FED. R. EVID. 502(b)(2) (2008).

¹¹⁷ FED. R. EVID. 502(b) advisory committee note. *See Hydraflow*, 145 F.R.D. 626.

¹¹⁸ FED. R. EVID. 502(b) advisory committee note.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Hearing on Evidence: Hearing Before the Advisory Committee on Evidence Rules of the Judicial Conference of the United States 5 (Jan. 12, 2007)

Despite these uncertainties, Rule 502 attempts to provide a uniform approach for courts to follow when considering whether inadvertent disclosure constitutes waiver of the attorney-client privilege. A consistent approach allows attorneys to more effectively plan for the daunting electronic discovery process. Rule 502 seems to be a promising tool, but having been enacted for less than a year; the actual benefits are yet to be seen. The states have yet to adopt the new rule of evidence, but they would be well-served to implement a uniform approach to all proceedings within their jurisdiction.

IV. Conclusion

The confusion surrounding inadvertent disclosure of electronically stored information could be alleviated by the adoption of a uniform approach among jurisdictions. Amendments to the Federal Rules of Civil Procedure and the adoption of Federal Rule of Evidence 502(b) are important steps in the right direction. While there are undoubtedly risks involved, states that have yet to adopt the amended Federal Rules of Civil Procedure should consider the benefits of “quick peek” and “clawback” provisions in light of the overwhelming amount of electronically stored information in the typical case. States should consider adopting the new Federal Rule of Evidence 502(b) as it reflects a more uniform approach to inadvertent disclosure while allowing for states to determine what factors they consider most important when using the rule’s balancing approach. The use of electronically stored data is only set to increase with the further advancement of technology and states must be proactive in providing guidance to attorneys who must deal with the ever-growing amount of information.

Amanda Showalter

(statement of George L. Paul, Lewis & Roca, L.L.P), *available at* http://www.uscourts.gov/rules/EV_Hearing_Transcript_011207.pdf.

