

Protections For Inadvertently Produced Privileged Documents Under Rule 502

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In September of 2008, Congress enacted Federal Rule of Evidence 502(b), which governs the inadvertent disclosure of privileged or work product materials in federal proceedings. This Rule was prompted in part by divergent approaches to this issue by district courts, and was thus designed (1) to provide consistency to courts' treatment of inadvertently produced documents; and (2) to respond to litigants' concerns about the risks of inadvertent disclosure as part of increasingly large document productions, and the rising costs of managing and reviewing those large-scale productions. As such, "[t]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Fed. R. Evid. 502 advisory committee's notes (2011 Amendments).

In the five years since its enactment, many district courts have addressed disputes over what constitutes inadvertent disclosure under Rule 502 and whether such disclosure amounts to a waiver of privilege. The following discussion summarizes a representative sampling of recent district court cases, and attempts to distill the emerging trends from that caselaw into a set of best practices to avoid unintentionally waiving attorney-client privilege or work-product protections.

I. Federal Rule of Evidence 502(b)

Under Rule 502(b)¹, disclosure of an otherwise protected communication or information does not constitute a waiver of privilege or work-product protection if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).²

¹ Some district courts, such as those in the Third Circuit, have generally considered five additional factors in conjunction with the factors laid out by 502(b) when assessing whether inadvertent production operates as a waiver of privilege. These factors are (1) the reasonableness of precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosure; (3) the extent of the disclosure; (4) any delay and measures taken to rectify disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its errors. *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466,478 (D. Del. 2012).

² Fed. R. Civ. P. 26(b)(5)(B) states, "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

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In a dispute regarding the disclosure of allegedly privileged or work product materials, courts typically perform a multi-step analysis. First, the court must determine if the material in question is privileged or protected work product. Next, the court addresses the three prongs of Rule 502(b) to determine if the disclosure was “inadvertent” and if the holder of the privilege took “reasonable steps” both to prevent the disclosure and to rectify the disclosure once it was discovered. To determine what constitutes an “inadvertent” disclosure and “reasonable steps,” a court must undertake fact intensive analyses.

II. What Constitutes An Inadvertent Disclosure?

Federal Rule of Evidence 502(b) itself does not define the phrase “inadvertent disclosure.” Courts typically take one of two approaches when analyzing whether disclosure should be deemed “inadvertent.” First, and more commonly, courts look simply to whether the disclosure was intentional. See *Kmart Corp. v. Footstar, Inc.*, No. 09 C 3607, 2010 WL 4512337, at *3 (N.D. Ill. Nov. 2, 2010) (stating that the first element of Rule 502(b) merely asks “whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake”) (quoting *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. Apr. 7, 2009)); *Excel Golf Prods., Inc. v. MacNeill Eng’g Co.*, No. 11 C 1928, 2012 WL 1570772, at *2 (N.D. Ill. May 3, 2012) (“While Rule 502 does not define ‘inadvertent,’ this Court will follow the majority of courts in this District and conclude that, unlike under the old balancing test, the inadvertence inquiry asks merely whether the production was unintentional.”). If a party did not intend to disclose a document, then it will usually be deemed to have been inadvertently disclosed.

As for the second approach, some courts look to the reasonableness of the steps taken to prevent disclosure when assessing alleged inadvertency. In other words, these courts collapse the first two prongs of Rule 502(b) into a broader inquiry into the producing party’s pre-disclosure conduct. For example, in *MSP Real Estate, Inc. v. City of New Berlin*, Nos. 11-C-281, 11-C-608, 2011 WL 3047687, at *3-4 (E.D. Wis. July 22, 2011), the court looked to whether the “procedures [to prevent disclosure] used by New Berlin ‘were so deficient’ to conclude that the disclosure was voluntary,” writing that “[i]n determining whether the disclosure was inadvertent, the Court must look to the totality of the circumstances.” *Id.* at *3-4 (citation omitted). Ultimately, the *MSP* court found that the producing party’s disclosure was inadvertent (although that did not resolve the overarching question of whether that disclosure constituted a waiver of the applicable privileges). *Id.* at *5-6. Following similar reasoning, other courts have found that a disclosure was not inadvertent where the disclosing party failed to identify what precautions it took to prevent disclosures. See *In re Basler*, No. BK10-43471-TJM, 2011 WL 3236079, at *5 (Bankr. D. Neb. July 26, 2011) (finding a disclosure was “not inadvertent” where the producing party had not made a showing of reasonable steps taken to prevent the disclosure); *GATX Corp. v. Appalachian Fuels, LLC*, No. 09-41-DLB, 2010 WL 5067688, at *5 (E.D. Ky. Dec. 7, 2010) (“Because GATX failed to identify the steps it took to comply with Rule 502(b), the Court will assume the disclosure of these documents was not inadvertent.”). This second approach

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information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

underscores the importance of adopting and adhering to rigorous document review protocols, given that the mere intention to avoid disclosure may, at least for some courts, be inadequate to evidence inadvertency.

In cases where disclosure was intentional but the accompanying *waiver* was inadvertent, courts have reached differing conclusions. When a party intentionally discloses a privileged document, courts most often consider it an advertent disclosure that waives privilege (regardless of whether the producing party specifically intended to waive its privilege). In other words, as the court in *First Am. CoreLogic, Inc. v. Fiserv, Inc.*, No. 2:10-CV-132-TJW, 2010 WL 4975566, at *4 (E.D. Tex. Dec. 2, 2010), wrote, “the *disclosure* itself, not the *waiver* of the privilege, must have been inadvertent.” In *CoreLogic*, plaintiff’s counsel filed under seal a motion for a protective order that included multiple privileged documents as exhibits, but then argued the disclosure was inadvertent because they had meant to file the exhibits *in camera*. In finding that the disclosure was not inadvertent, the court noted that the filing did not anywhere contain the words “*in camera*” and that plaintiff’s counsel had served copies of the privileged exhibits on opposing counsel. *Id.* at *3-4. Similarly, in *Thompson v. Quorum Health Res., LLC*, No. 1:06-CV-168, 2010 WL 234801, at *4 (W.D. Ky. Jan. 13, 2010), the court found waiver where the disclosing party’s counsel had, himself, introduced a draft document as an exhibit at a deposition (rather than the final version of the document). The *Thompson* court analyzed this disclosure by assessing whether reasonable steps had been taken to prevent disclosure, but the conclusion regarding inadvertency was similar to that in *CoreLogic*.

In contrast, in *Oppliger v. United States*, Nos. 8:06CV750, 8:08CV530, 2010 WL 503042, at *5 (D. Neb. Feb. 8, 2010), the court found that privilege was not waived for an “intentional, yet inadvertent” disclosure where an unrepresented third party produced privileged materials in response to a subpoena because he was not aware that he had the right to withhold them. Thus, intentional production (but unintentional waiver) on the part of an attorney is much more likely to lead to a waiver than an intentional but mistaken production by an unrepresented party.

III. What Are “Reasonable Steps To Prevent Disclosure” Of Privileged Information?

Courts considering whether inadvertent disclosure should result in a waiver of applicable privilege often focus their analysis on the second prong of Rule 502(b): the reasonableness of the pre-disclosure steps taken by a party, its counsel, and any associated vendors. A review of the recent caselaw reveals four key factors that inform a court’s analysis of whether reasonable steps have been taken to prevent disclosure, regardless of what error actually led to the disclosure: (1) the nature of the attorney-review procedures; (2) the nature of the inadvertently produced documents; (3) the volume of documents reviewed; and (4) the timing of the review and production. After considering each of these factors in turn, the unique role and treatment of vendors in the discovery process will be examined, because vendor conduct is frequently implicated in the case of inadvertent production.

A. Nature of Attorney-Review Procedures

Unlike the question of inadvertency, the advisory committee notes to Rule 502 provide some guidance as to what constitutes “reasonable steps to prevent disclosure” as part of attorney-

review procedures. For instance, “[d]epending on the circumstances, 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 implementation of an efficient system of records management before litigation may also be relevant.” Fed. R. Evid. 502 advisory committee’s notes (2011).

As those advisory committee notes indicate, the standard for evaluating pre-disclosure conduct does not require perfection; instead the hallmark is reasonableness. See *Valentin v. Bank of N.Y. Mellon Corp.*, No. 09 Civ 9448(GBD)(JCF), 2011 WL 1466122, at *2 (S.D.N.Y. Apr. 14, 2011) (“[T]he steps taken to preserve privilege need not be perfect; they must only be reasonable.”), *objections overruled*, 2011 WL 2437644 (S.D.N.Y. May 31, 2011); *Gilday v. Kenra, Ltd.*, No. 1:09-cv-00229-TWP-TAB, 2010 WL 3928593, at *5 (S.D. Ind. Oct. 4, 2010) (“[H]ad Kenra’s counsel double- or triple-checked its privilege log against its production, this whole argument may have been avoided. However . . . ‘this type of expensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid.’”) (quoting *Alcon Mfg., Ltd. v. Apotex Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *6 (S.D. Ind. Nov. 26, 2008)).

Thus, courts frequently will credit attorneys for establishing a procedure for redacting or segregating privileged information and communications, even if mistakes are made in the implementation of that procedure. For example, in *King Pharm. Inc. v. Purdue Pharma L.P.*, No. 1:08CV00050, 2010 WL 2243872 (W.D. Va. June 2, 2010), the defendant produced four pages of a document in redacted form but argued that this was a mistake and that the document should have been withheld in its entirety. The court found that the defendant had satisfied the test under Rule 502(b), writing that “[t]he fact that the document had been reviewed and partially redacted does not by itself prevent the disclosure from being inadvertent.” *Id.* at *2. It further noted that “[t]he nature of the mistake in disclosing a document is not limited by the rules, and logically ought to include mistaken redaction, as well as other types of mistakes that result in disclosure.” *Id.*

Consistent with the general pronouncements in the foregoing caselaw, when counsel correctly designate documents as privileged but inadvertently include them in a production, courts typically accept that attorney-review procedures are sufficient to show reasonable care was taken to prevent disclosure. For instance, in *Jeanes-Kemp, LLC v. Johnson Controls, Inc.*, No. 1:09CV723-LG-RHW, 2010 WL 3522028 (S.D. Miss. Sept. 1, 2010), three attorneys conducted a privilege review on a production of 1271 documents, but two documents identified during that review as privileged “were inadvertently placed on the computer disk and sent to counsel for Defendant.” *Id.* at *1. The court found that because “[t]hree attorneys reviewed the documents and identified the document as privileged” the law firm had taken “reasonable steps” to prevent disclosure. *Id.* at *2. Thus, although cross-checking productions to ensure that all documents and portions of email chains are coded consistently for privilege may prevent errors, at least one court has found that such procedures went beyond the reasonable efforts required under Rule 502(b). See *Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at *4 (N.D. Cal. March 11, 2011) (rejecting the argument that the producing party failed to take reasonable steps because it had not cross-checked all iterations of email chains in its privilege review, stating that “perfection or anything close based on the clairvoyance of hindsight

cannot be the standard; otherwise the time and expense required to avoid mistakes to safeguard against waiver would be exorbitant, and complex cases could take years to ready for trial”).

That is not to say, however, that courts will accept the mere existence of attorney-review procedures as *per se* evidence of reasonableness. When relying on an attorney review as evidence of reasonable pre-disclosure steps under Rule 502(b), it is insufficient to simply state that a review was conducted. Information regarding the number of attorneys involved, the time spent reviewing, any review protocols or training sessions utilized, how many rounds of reviews were conducted, and any factors adding to the complexity of the review (for example, if the case is a patent matter involving highly technical documents), will bolster an argument that reasonable steps were taken. For example, in *Bd. of Trs., Sheet Metal Workers’ Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845 (E.D. Mich. 2010), the court cited to numerous details about the defendants’ document review in finding that they had taken sufficient steps to prevent disclosure. These details exemplify the type of information that should be provided when defending the reasonableness of review and production procedures:

According to the defendants, their law firm reviewed 63,025 documents totaling an estimated 4.7 million pages; produced 56,846 documents totaling some 4.3 million pages; and prepared privilege logs for 1,306 documents. The defendants used a team of sixteen associates (who were supervised by two senior associates) to conduct review, and the team spent about 2,500 hours reviewing 8,700 hard copy documents and more than 59,000 electronic documents, including emails. They say review was complicated by the fact that the documents contained correspondences with at least eleven law firms representing defendants and their affiliates on a broad range of matters.

Id. at 851; *see also Williams v. District of Columbia*, 806 F. Supp. 2d 44, 50 (D.D.C. 2011) (finding that a party failed to provide sufficient evidence of reasonable steps taken where no detail was provided beyond the bare assertion that documents were “reviewed by an experienced litigation paralegal under the supervision of an attorney”); *Conceptus, Inc. v. Hologic, Inc.*, No. C09-02280 (WHA), 2010 WL 3911943, at *2 (N.D. Cal. Oct. 5, 2010) (stating that “[m]erely asserting that prior counsel inadvertently disclosed the letter does not meet the burden of proof” and noting that plaintiff “did not provide information on the number of documents produced at the same time as the letter, the nature of review before the disclosure, or the time taken to conduct the review”); *Excel Golf Prods.*, 2012 WL 1570772, at *3 (“The producing party must offer specific facts and details to show that the procedures were reasonable.”).

In addition, at least one court requires that attorney review be linked to the document production process itself in order to be considered sufficiently reasonable. In *Pilot v. Focused Retail Prop. I, LLC*, 274 F.R.D. 212, 214 (N.D. Ill. 2011), plaintiff’s counsel initially reviewed a set of documents after receiving them and segregated the privileged materials. Two months later he instructed an assistant to produce the entire file, having forgotten by that time that the file contained two sets of the documents, one with the privileged material segregated and the other with the privileged material still included. *Id.* Despite the attorney’s initial review of the documents, the court found that he did not take reasonable steps because his “review of the documents he originally received did not make up for his total failure to review the production itself.” *Id.* at 217. The court pointed out that counsel’s having forgotten about having two sets

of documents did not excuse the lack of a production-focused review, but rather “illustrates that he should have either used an organized screening procedure or reviewed the actual production, lest such a mistake occur.” *Id.*

Indeed, any attorney review procedures should be systematic and rigorous. For instance, in *MSP*, 2011 WL 3047687, the reviewing attorney separated reviewed documents into piles with a Post-It note on the top of each pile designating that pile as privileged or not. The court found this was not a sufficiently reasonable precaution against production, writing that “[t]he failure to identify and mark individual documents and relying on Post-It notes to identify each pile supports a finding that the precautions taken to prevent disclosure were not reasonable.” *Id.* at *5-6.

B. Nature of the Inadvertently Produced Documents

One type of error that frequently leads to the inadvertent production of privileged documents is the initial failure to recognize a document as privileged. If a document is not clearly privileged on its face, this will weigh against waiver in the case of a mistaken privilege designation. For instance, in *King*, the document in question consisted of four pages from a larger document, and the privilege was not “apparent solely on the words used” but clear only from the larger context in which the document was created. 2010 WL 2243872 at *2. This, in part, led the court conclude that reasonable steps had been taken to prevent disclosure. *Id.* Similarly, the *Valentin* court found that no privilege waiver occurred when handwritten notes were knowingly produced, because those notes were clawed back later when it became clear they were the notes of an in-house attorney. 2011 WL 1466122, at *2-3. By contrast, if a document is clearly privileged on its face, this can weigh in favor of a waiver. *See Pilot*, 274 F.R.D. at 217 (finding that the “obviously privileged” nature of the disclosed documents, including several letters on law firm letterhead, weighed in favor of waiver).

C. Scope of Discovery and Volume of Inadvertently Produced Documents

The reasonableness of the steps taken to prevent disclosure of privileged material is nearly always contextualized by comparing the number of pages or documents that were inadvertently produced to the overall scope of discovery. *See* Fed. R. Evid. 502 advisory committee’s note (2011 Amendments) (“Other considerations bearing on the reasonableness of a producing party’s efforts include the number of documents to be reviewed”); *Pacific Coast Steel v. Leany*, No. 2:09-cv-02190-KJD-PAL, 2011 WL 4704217, at *5 (D. Nev. Oct. 4, 2011) (“[T]he scope of the discovery [2.3 million pages] and the extent of the disclosure [three documents] weighs in favor of finding non waiver.”). For example, in *Kilopass Tech. Inc. v. Sidense Corp.*, No. C10-02066 SI, 2012 WL 1534065 (N.D. Cal. May 1, 2012), the plaintiff produced 55,000 documents (totaling 400,000 pages), and claimed that 1,139 of those documents were inadvertently produced, privileged documents. *Id.* at *2. Rather than focusing on the overall page count, the *Kilopass* court highlighted that more than one out of every fifty documents produced was privileged. The court wrote that “[t]he high proportion of privileged documents evidences a failure on [the plaintiff’s] part to properly screen the documents.”³ *Id.* at

³ The errors that lead to the disclosure here were three-fold: (1) a vendor screened for privileged documents using key word searching but “mistakenly did not run the search across all production batches”; (2) the client provided an incomplete list of
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*3; *see also Sidney*, 274 F.R.D. at 217 (“The production here was only 588 pages, and this small size weighs in favor of waiver.”). In other words, the larger the overall production and the smaller the number of inadvertently produced materials, the less likely it is that a given unintentional disclosure will cause a privilege waiver.

In addition to page-counts or the number of documents in a production, courts will also look to the parties’ characterizations of the production to inform their view of the volume of inadvertently produced documents. For example, in *Kmart* 2010 WL 4512337, at *4, the defendant sought to claw back five privileged documents as inadvertently produced, four emails or letters and one 126 page claim file—totaling 130 pages. *Id.* The defendant had produced approximately 4,500 pages in total. *Id.* However, the court was swayed by the plaintiff’s argument that of the 4,500 page production, approximately 4,200 pages consisted of public documents from lawsuits, which as the court noted, left “only approximately 300 pages of potentially confidential documents for [the defendant] to review in detail,” ultimately finding that reasonable steps had not been taken to prevent disclosure. *Id.* at *4-5.

D. Timing of Review and Production

Time pressure is often an ameliorating factor in a Rule 502(b) analysis of reasonable steps to prevent disclosure. *See* Fed. R. Evid. 502 advisory committee’s notes (2011 amendments); *see also MSP*, 2011 WL 3047687, at *6 (“[T]he lack of any apparent time pressure weigh[s] in favor of a finding that the precautions taken to prevent disclosure were not reasonable.”). However, any alleged time pressure must not be self-imposed. *See Kmart*, 2010 WL 4512337, at *4 (finding that a one-week turn-around to produce documents prior to a deposition did not compel a finding that the review procedures were reasonable where opposing counsel had not “require[d]” the documents be produced prior to the deposition, the producing party had not attempted to reschedule the deposition, and the court had not ordered the production). Further, the time pressure must be the result of a deadline in the case at issue, and not a result of counsel’s other obligations. *See Sidney*, 274 F.R.D. at 217 (rejecting counsel’s argument that he had been busy with other cases around the time of the inadvertent disclosure because “relevant time constraints are those relating to this discovery, not an attorney’s schedule”).

E. Vendor and Other Third-Party Errors

Copy vendors, electronic discovery vendors, and teams of temporary attorneys are often employed to assist in connection with document productions, and any of these entities can make a mistake that results in the inadvertent production of privileged materials. In the context of a Rule 502 analysis, most courts deem it reasonable to assume that a vendor’s work product is reliable. Rather than examine the specific actions of the vendor, these courts typically look at whether counsel gave the vendor appropriate guidance. If counsel provided the vendor with

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prior attorneys and law firms for the key word searches; and (3) litigation counsel spot-checked the production, but not extensively enough to catch any of the privileged documents. *Kilopass*, 2012 WL 1534065 at *2. In addition to the high volume of disclosed documents, the court pointed to the failures at all three levels—client, vendor, and litigation counsel—that together led to its conclusion that reasonable steps to prevent disclosure were not taken. *Id.* at *2-3.

instructions that, if accurately carried out, would be likely to prevent mistaken disclosures, then courts appear willing to accept that reasonable care was taken, even if the vendor ultimately failed to accurately follow counsel's instructions. *See Olem Shoe Corp. v. Washington Shoe Corp.*, No. 09-23494-CIV, 2010 WL 3981694, at *3 (S.D. Fla. Oct. 8, 2010) (finding no waiver where a copy vendor mistakenly included documents categorized as privileged onto a production disk despite counsel's instructions to the contrary); *Kandel v. Brother Int'l Corp.*, 683 F. Supp. 2d 1076, 1085-86 (C.D. Cal. 2010) (finding no waiver where a third-party consultant and document review team had failed to run keyword searches for privilege as instructed by litigation counsel).

At least a few courts, however, have criticized producing parties for not performing quality control checks on work done by vendors. In *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 136 (S.D. W. Va. 2010), the court found that reasonable steps to prevent disclosure had not been taken, in part because the producing party had "failed to perform critical quality control sampling" of the results of keyword searches done by an e-discovery vendor. *Id.* The court cautioned that attorneys should perform their own quality control checks of vendors, stating that "the failure to test the reliability of keyword searches by appropriate sampling is imprudent." *Id.* Similarly, in *Thorncreek Apartments III, LLC v. Vill. of Park Forest*, Nos. 08-C-1225, 08-C-0869, 08-C-4303, 2011 WL 3489828 (N.D. Ill. Aug. 9, 2011), the court found that a party's failure to verify that an electronic discovery vendor was not including documents marked privileged in a production database was "strong evidence of the inadequacy of the [party's] precautions." *Id.* at *7.

IV. What Are "Reasonable Steps To Rectify The Disclosure"?

A. Timely Assertion Of Privilege And Request For Claw Back

Rule 502(b) requires that once an inadvertent disclosure is discovered, reasonable steps must be taken to rectify the error. Courts typically require these steps to include a timely request that the documents be clawed back. *See Ceglia v. Zuckerberg*, No. 10-CV-00569A(F), 2012 WL 1392965, at *9 (W.D.N.Y. Apr. 19, 2012) (rejecting a claw-back request that came more than two months after the discovery of the disclosure because "a request for the return or destruction of inadvertently produced privileged materials within days after learning of the disclosure is required"); *N. Am. Rescue Prods., Inc. v. Bound Tree Med., LLC*, No. 2:08-cv-101, 2010 WL 1873291, at *8 (S.D. Ohio May 10, 2010) (finding a claw-back request sent three months after discovery of the disclosure to be unreasonable).⁴ As with other aspects of Rule 502, a claw-back request need not generally be immediate, but instead must be promptly provided in due course.

There is, however, an exception to this general rule: when an inadvertent disclosure is discovered during a deposition, an immediate response is typically necessary to prevent waiver. Failing to object and to immediately inform opposing counsel that the document is privileged

⁴ Moreover, the mere sending of a claw-back letter does not absolve an attorney from ensuring that the receiving party has complied with the request. In at least one case, the court found fault with a party for failing to follow-up on an initial claw-back demand. *Williams v. District of Columbia*, 806 F. Supp. 2d 44, 52 (D.D.C. 2011) ("When Williams did not promptly return the communication or otherwise respond to the District's [claw back] letter, the District was on notice that further action was required.").

and was inadvertently produced often results in a waiver of privilege. See *Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP*, No. 06CV2804 (BTM) (WMc), 2010 WL 275083, at *5 (S.D. Cal. Jan. 13, 2010) (“[I]f a privileged document is used at a deposition, and the privilege holder fails to object immediately, the privilege is waived.” (citation omitted)); *Martin v. State Farm Mut. Auto. Ins. Co.*, No. 3:10-CV-0144, 2011 WL 1297819, at *5 (S.D.W. Va. Apr. 1, 2011) (finding waiver of privilege where the producing party “failed to immediately assert the privilege or request return of the letter” when it was introduced as an exhibit at a deposition); *Pilot*, 274 F.R.D. at 214 (finding waiver where the privileged documents were used as deposition exhibits with no objection of the counsel who authored the documents and who was defending the deposition); *Mycone Dental Supply Co. v. Creative Nail Design Inc.*, No. C-12-00747-RS, 2013 WL 4758053 (N.D. Cal. Sept. 4, 2013) (stating that the document used in deposition should have been immediately clawed back even if additional time was needed to conduct further investigations of additional documents); but see *Alers v. City of Philadelphia*, No. 08-4745, 2011 WL 6000602, at *2 (E.D. Pa. Nov. 29, 2011) (finding that a claw-back letter sent four days after a privileged document was used in a deposition was timely).

Courts do consider the nature of the inadvertently produced document, however, when determining if a failure to object when a privileged document is used in a deposition results in a waiver. If a document is not clearly privileged on its face, then courts are more willing to accept that the failure to object immediately at the deposition was reasonable—so long as the disclosing party follows up shortly after the deposition and seeks claw back of the document in question. As but one example, in *Zapmedia Servs, Inc. v. Apple, Inc.*, 2:08-CV-104-DF-CE, 2010 WL 5140672 (E.D. Tex. Sept. 24, 2010), plaintiff’s counsel allowed a witness to answer questions about two inadvertently disclosed documents. *Id.* at *2. However, two hours after the deposition, the plaintiff determined the documents were privileged and sent a claw back request. *Id.* The court found that the privilege had not been waived because “[c]onsidering that the privileged nature of these documents was not obvious from the face of the documents and that [plaintiff] sent its claw back request immediately after the deposition, the court finds that the plaintiff acted promptly and reasonably.”⁵ *Id.* In a similar analysis that led to a different result, the court in *Jacob v. Duane Reade, Inc.*, 11 Civ. 0160(JMO)(THK), 2012 WL 651536 (S.D.N.Y. Feb. 28, 2012), found that waiver occurred where the defendants’ counsel failed to object to the use of a privileged email in a deposition and did not seek claw back of the document until two months later. *Id.* at *5-6. Defense counsel argued that it had not immediately recognized the email as privileged because the attorney whose advice was contained in the email was only referenced as “Julie.” *Id.* at *5. The court found that the email should nonetheless have raised a red flag for counsel because the subject matter involved satisfying the requirements of a federal statute. *Id.* at *6. Furthermore, the court found that counsel had not been diligent in following up during breaks in the deposition or immediately after the deposition to ascertain if “Julie” was an attorney. *Id.*

B. Affirmative Duty To Re-Check Production For Further Errors

⁵ By contrast, the *Zapmedia* court also ruled that privilege had been waived with respect to other inadvertently produced documents used in a different deposition, where the plaintiff had not objected during the deposition and failed to seek claw back until over eight months had elapsed. 2010 WL 5140672 at *2.

As explained in the Fed. R. Evid. 502 advisory committee notes (2011 Amendments),

[Rule 502(b)] 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. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

Id. Consistent with this guidance, courts have generally required a party to promptly follow up any discovery of inadvertently produced documents with a search for other privileged materials within its production. *See Mformation Techs. v. Research in Motion Ltd.*, No. C08-04990, 2010 WL 3154441, at *1-2 (N.D. Cal. Aug. 9, 2010) (finding no waiver where a producing party recalled nine documents, then later recalled 55 further document found during a follow-up search roughly two months later, though noting that the follow-up search could have been more timely). Failing to do so in a timely manner risks waiving privilege for any later discovered, inadvertently disclosed documents. *See Luna Gaming-San Diego*, 2010 WL 275083, at *6 (finding waiver of additional privileged documents where the plaintiff had failed to re-check its production after two inadvertently produced privileged documents were used in depositions and filings, and determining that the discovery of these initial inadvertently produced documents had “put [plaintiff] on notice that its document production was defective” such that “[plaintiff] should have taken prompt and diligent steps to reassess its document production”).

Beyond the discovery of inadvertently produced documents, however, it appears that some courts may be inclined to extend this rule to require follow up regarding other types of errors that could give rise to concerns about the quality of a party’s production. For example, in *D’Onofrio v. Borough of Seaside Park*, No. 09-6220 (AET), 2012 WL 1949854 (D.N.J. May 30, 2012), the court found that privilege was waived where the defendants failed to conduct follow up searches for inadvertently disclosed documents in the face of an escalating number of technical and substantive problems with its production. *Id.* at *10-15. In *D’Onofrio*, defendants’ attorneys reviewed their documents for privilege; however, their support staff failed to remove approximately 1,000 pages of documents flagged as privileged from the production set. *Id.* at *2. Subsequently defendants noticed that certain privileged electronic attorney comments had been mistakenly included on the production disc (but did not notice not the privileged documents). *Id.* As a result, the defendants recalled the disc and produced a second one without the comments; however, they failed at that time to search the production for other privileged materials. *Id.* After a complaint that the disc was unreadable, the defendants created a third disc and conducted a quality control review of the files it contained. However, the defendants limited this review to ensuring that the same files were included on the third disc; they did not perform any searches for inadvertently produced documents. *Id.* at *3. The defendants then produced a privilege log for withheld documents, but failed to notice that it contained a significantly lower number of entries than it should have because of the large volume of undiscovered inadvertently produced documents. *Id.* Following a further technical error with their third production disc, the defendants created a fourth production disc, and in so doing discovered that the production contained some privileged documents. *Id.* at *4. The defendants withheld these documents from the fourth disc but did not undertake any searches for additional privileged documents. *Id.* The approximately 1,000 pages of privileged documents included in the initial production were

ultimately discovered by the defendants when the plaintiff attached a number of them as exhibits to a brief. *Id.* The defendants then sought their recall as inadvertently produced. *Id.*

The *D’Onofrio* court found that the defendants failed take reasonable steps to rectify their error because they did not conduct any follow up privilege reviews of their production despite the series of problems they encountered. *Id.* at *12 (noting that “[w]hile a number of the seemingly unending problems the [defendants] experienced with their document production did not involve the disclosure of protected information, several did”). The court found that “the problems experienced by the [defendants] with their production of the [documents] would have spurred a reasonable person to recheck the entire contents of the [final production] disc.” *Id.* at *15.

V. Scope of Waiver

When a party fails to meet the test established by Fed. R. Evid. 502(b), the result is a waiver of privilege for the disclosed document or documents. Typically, however, courts will limit the waiver to the documents themselves and decline to find a subject matter waiver. As the court noted in *Martin*, 2011 WL 1297819,

The intent of rule 502(a) [which addresses the scope of waiver associated with a disclosure made in a federal proceeding] was to curtail prior waiver doctrine significantly, limiting subject matter waiver to situations in which a litigant discloses protected information to obtain an advantage in the case, and then invokes the privilege to “deny its adversary access to additional materials that could provide an important understanding of the privileged materials.”

Id. at *6 (quoting *Chick-Fil-A v. ExxonMobil Corp.*, No. 08-61422-CIV, 2009 WL 3763032, at *5 (S.D. Fla. Nov. 10, 2009)). As such, the *Martin* court found no subject matter waiver where the inadvertent disclosure “d[id] not constitute the introduction of evidence in a selective, misleading or unfair manner, which would justify a broader subject matter waiver.” 2011 WL 1297819, at *6; *see also GATX Corp.*, 2010 WL 5067688, at *6 (finding a disclosure not inadvertent because the plaintiff failed to explain the steps it took to comply with Rule 502(b), but finding that subject matter waiver would be “inconsistent with the purposes of Rule 502(a)”). This caselaw is consistent with the explanatory notes from Rule 502 itself, which provide that “a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.” Fed. R. Evid. 502 advisory committee notes (2011 Amendments).

VI. Best Practices

As the foregoing discussion indicates, courts have not uniformly interpreted Rule 502, and it is inherent, in a highly fact-sensitive area like this one, that the question of whether inadvertent disclosure should result in a waiver of privilege will depend to a large extent on the unique facts of each case. However, some clear guidance regarding the best practices for preserving privilege in connection with document production has begun to emerge from the recent caselaw.

Most obviously, the first step is for counsel to review all documents that are harvested for potential production. If, given the size of the potential production, this is impractical or would be exorbitantly expensive, then attorneys should review at least those documents identified using keyword searches for attorney names and other words that may indicate the presence of privileged information. When relying on keyword searching, quality control checks should be run to ensure the searches are casting a sufficiently broad net. Further, whatever method is used to identify and review potentially privileged materials, attorneys should create a memorandum that memorializes the details of the review procedures. Such a memorandum could prove invaluable in the event that opposing counsel contests the claw back of an inadvertently produced document.

Once privileged documents have been identified and a production set of documents has been created, quality control checks should be performed. Spot checks of the production may identify any large or obvious problems with the production. Also, if the document production is in electronic form, additional keyword searches can ensure that none of the segregated privileged materials were inadvertently included. Again, memorializing these procedures could later prove invaluable.

While a solely technical problem with an electronic production, such as a corrupted disk, will not likely give rise to an obligation to perform a post-production review, any error indicating that materials were included or omitted from a production contrary to their review designation should be timely followed up with checks to determine if other errors were made. Further, if an inadvertent disclosure is discovered, an immediate request should be made for the return or destruction of the privileged document. If no response is received within a reasonable period of time, the request must be followed up on. One cannot assume that a lack of response from the receiving party indicates that it has no objection to the claw-back request. Documents used at depositions should be very carefully scrutinized. If a document used at a deposition appears to be an inadvertently produced, privileged document, an objection should be made immediately and no questions should be allowed regarding the document or the information it contains. Even if a document used in a deposition is not privileged on its face, if it gives rise to any question that it may contain privileged information, counsel should follow up during a break or immediately after the deposition to determine the context of the document and whether it is privileged.

As more cases are decided on this topic, greater insight (and hopefully, uniformity) regarding Rule 502 will likely emerge. With large electronic productions becoming increasingly common, inadvertent disclosures—even with careful attorney planning and review procedures—are virtually inevitable. Indeed, even if the foregoing best practices are stringently observed, an inadvertent disclosure may ultimately result in a privilege waiver. But common sense caution, attention to detail, and a thorough recording of review practices and procedures can help prevent an inadvertent disclosure from becoming a waiver of privilege.