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LATCHING ONTO LACHES: A RULES-BASED ALTERNATIVE FOR RESOLVING QUESTIONS OF WAIVER FOLLOWING THE INADVERTENT PRODUCTION OF PRIVILEGED DOCUMENTS IN FEDERAL COURT ACTIONS

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The Federal Rules of Civil Procedure were recently amended to establish a protocol for asserting privilege and work product claims with respect to documents that were inadvertently produced during discovery.¹ The amendment fails to address, however, the more substantial question of whether the production of such documents results in a waiver of the applicable privilege or immunity. As a result, the amendment will not materially affect existing federal practice: one of the parties will still be required to ask the court for a determination of whether the privilege or immunity has been waived and the court will still be required to answer the question under applicable federal or state law.²

The absence of a rules-based standard would be irrelevant, of course, if there were a uniform common law standard for answering this question. That is not the case, however. The district courts variously apply three standards for determining waiver in federal question cases³ and, because controlling precedent exists in only two circuits,⁴ they must frequently select the standard on an ad hoc basis. As a result, different standards are used by different district courts within a circuit and sometimes by different courts within a judicial district⁵—situations that cannot be reconciled with the Supreme Court’s admonition that “an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁶ The problem is compounded in diversity

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¹ Rule 26(b)(5) now includes the following additional text regarding after-the-fact assertions of privilege and work product protection:

If information is produced in discovery that is subject to a claim of privilege or 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

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

² The Civil Rules Advisory Committee Note makes clear that the rule “does not address whether the privilege or protection that is asserted after production was waived by the production.” Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure 58 (May 27, 2005), available at http://www.uscourts.gov/rules/Reports/CV5-2005.pdf. Instead, the rule provides “a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.” Id. For this reason, the Advisory Committee characterized the amendment as merely a “nod to the pressures of litigating with the amount and nature of...information available in the present age.” Id. at 54.

³ See infra text accompanying notes 37–96.

⁴ See Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

⁵ See infra notes 105–107.

cases where the district court must apply state privilege law but, because there are few authoritative state court decisions in this area, the district courts must frequently predict how the highest court of the pertinent state would resolve the issue with only general principles of privilege law to guide the analysis.

The absence of a uniform standard would be immaterial if the risk of mistake were small or the consequence insignificant. That is also not the case. "The inadvertent production of a privileged document is a specter that haunts every document intensive case"—a specter of increasing proportion due to the vast number of electronic documents that can be stored on computers and related devices. A Westlaw search for federal cases involving document discovery in excess of one million pages generated nearly 200 hits, thus underscoring the prevalence of document-intensive litigation today. In this environment, the possibility that a privileged document will be produced during discovery is more likely an inevitable consequence of that process. Moreover, the potential loss of the privilege with respect to all other communications on the same subject raises the

7. See Fed. R. Evid. 501 ("[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."). In contrast, federal common law of privilege applies in federal question cases. Id. ("Except as otherwise required...the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). And, when a case involves federal and supplemental state law claims, federal common law applies to both. See Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978) ("[I]n federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation."). Federal common law applies to all claims of work product protection without regard to whether the case involves federal claims, state claims or both. See Calabro v. Stone, 225 F.R.D. 96, 98-99 (E.D.N.Y. 2004) ("Although state law applies to questions of privilege in diversity actions, 'federal law governs the applicability of the work product doctrine in all actions in federal court.'" (quoting Weber v. Paduano, No. 02 Civ. 3392, 2003 WL 161340, at *3 (S.D.N.Y. Jan. 22, 2003))).

8. See infra notes 117-118.

9. See, e.g., Konradi v. United States, 919 F.2d 1207, 1213 (7th Cir. 1990) ("The decision of a federal court in a diversity case, or in any other case in which state law supplies the rule of decision, is an exercise in predicting how the highest court of the state would decide the case if it were presented [with it].")); McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 661 (3d Cir. 1980) (in the absence of an authoritative determination by a state's highest court, the disposition of an issue of state law "must be governed by a prediction of how the state's highest court would decide were it confronted with the problem."). In several diversity cases involving potential waiver due to the mistaken production of a privileged document, the district court failed to recognize that state law controls the issue and applied federal common law instead. See infra note 109. In fact, district courts in diversity actions mistakenly apply federal law more frequently than they correctly apply state law. See infra notes 109-110.


11. See MICHELE C.S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW 48 (2004) ("Electronic records present the problem of extreme volume that was previously unseen in the paper world. Any lawyer who has engaged in large scale document review understands that the task of reviewing every single piece of paper to determine whether it contains privilege is Herculean."); PAUL R. RICE, ELECTRONIC EVIDENCE LAW & PRACTICE 3 (2005) ("The last two decades have seen exponential growth in the amount of digital information involved in the normal business activity of most companies."); Richard L. Marcus, Confronting the Future: Coping with Discovery of Electronic Material, 64 L. & CONTEMP. PROBS. 253, 261 n.53 (2001) (citing a "very experienced litigator" who contends that the advent of electronic discovery has "increased discovery retrieval burdens fourfold"); Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 DUKE L.J. 561, 589-90 (2001) ("For a variety of reasons, it is not difficult to predict that in the majority of cases, discovery of electronically stored data will result in a geometric increase in the number of documents produced...For example, one eight-millimeter backup tape can hold as much information as 1500 boxes of paper.").

12. The search terms used in a terms and connectors search to generate this result in the (allfeds) database were ("document production" /s "million pages") (producl/s "million pages") (producl/s "million documents").
stakes dramatically—thus leading to expensive pre-production review to prevent disclosure and extensive post-production motion practice to determine the effects of a mistake.

This Article advocates a rules-based standard for determining whether the mistaken production of a document waives (or more accurately “forfeits”13) an applicable privilege or immunity that would apply in both federal question and diversity cases. In particular, this Article advocates a further amendment to the Federal Rules of Civil Procedure establishing that the mistaken production of a document does not waive an applicable privilege or immunity so long as the producing party asserts the privilege or immunity within ten days of learning of the mistake (with shorter periods applicable when the mistake is discovered in connection with a motion or at a deposition, hearing, or trial). By establishing a bright-line standard, most disputes regarding waiver in this context would be eliminated altogether or would require modest factual presentations from which the district court could make a prompt decision. In addition, such a rule would protect the producing party from the harsh consequences that can follow from the mistaken production of a privileged document, while simultaneously protecting the receiving party from the prejudice that can flow from the loss of evidence that has been worked into the fabric of a case. Finally, such a rule would harmonize the evidentiary rule of waiver with the ethical obligation imposed on attorneys in an increasing number of jurisdictions to inform the producing party of its mistake and then refrain from using the pertinent document until the waiver issue is resolved.

Part I briefly reviews the attorney-client privilege and the traditional rule of waiver by voluntary disclosure, contending that the traditional rule does not apply especially well to the mistaken production of a privileged document during discovery. Part II reviews the approaches developed by the federal courts for resolving the question of waiver in this context and identifies the deficiencies of each. Part III argues that these approaches should be replaced by a uniform rule for federal question and diversity cases that preserves protection and requires return of the pertinent document so long as the producing party acts promptly upon learning of the mistake. This part contends that a simple rule along these lines nearly always achieves the same outcome as the more elaborate facts and circumstances test

13. The term “waiver” can be misleading because it implies an intentional relinquishment of a known right. See United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001) (explaining the difference between waiver and forfeiture). A privilege can be lost without any intent to relinquish it or any awareness that it applies in the first instance. See id. For this reason, some prefer the term “forfeiture” to describe the loss of an evidentiary privilege. See Panel Discussion, Conference on Electronic Discovery: Panel Six: Rules 26 and/or 34: Protection Against Inadvertent Privilege Waiver, 73 FORDHAM L. REV. 101, 110 (2004) (statement of Daniel J. Capra). Although forfeiture may be more precise, waiver is so embedded in case law and legal text that the distinction is meaningless and the use of the more precise term may create more confusion than illumination.

14. Although courts recognize other privileges, this Article focuses on the attorney-client privilege because of the significantly greater frequency with which documents covered by this privilege are found within the universe of documents potentially responsive to a discovery request and are therefore at risk of inadvertent production. In contrast, documents covered by other privileges ordinarily find their way into the universe of responsive documents because the producing party waived the privilege by placing the communications at issue (such as waiver of the doctor-patient privilege by asserting a personal injury claim). Indeed, there do not appear to be any federal cases involving the mistaken production of a document covered by one of the other privileges.
preferred by many courts, thus saving substantial time and resources without sacrificing accuracy in decision making.

I. THE ATTORNEY-CLIENT PRIVILEGE AND WAIVER BY VOLUNTARY DISCLOSURE

"The attorney-client privilege is the oldest of the privileges...known to the common law."15 It rests on the assumption that "encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously...."16 Because a client may be reluctant to share adverse information with her attorney if there were a chance it could come back to haunt her, the privilege insulates her comments from forced disclosure in subsequent proceedings and thus allows her to speak freely.17 Consistent with this "instrumental" rationale,18 courts view confidentiality as the essence of the privilege and find waiver whenever the client voluntarily abandons the secrecy to which she is entitled.19 This makes sense: a client who is willing to reveal publicly the matters

15. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Wigmore dates the privilege to "the reign of Elizabeth I, where [it] already appears as unquestioned." 8 WIGMORE ON EVIDENCE § 2290, at 542 & n.1 (McNaughton rev. 1961). Others trace the privilege to Roman origins. See 1 KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 87, at 343 (John W. Strong ed., 5th ed. 1999) ("The notion that the loyalty owed by the lawyer to his client disables him from being a witness in his client's case is deep-rooted in Roman law."); JOHN WILLIAM GREGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.04, at 1-4 (3d ed. 2000) ("By imperial decree, Roman advocates were declared incompetent as witnesses in cases in which they had a part.").

16. 2 JACK B. WEINSTEIN, MARGARET A. BERGER & JOSEPH M. MCLAUGHLIN, WEINSTEIN'S EVIDENCE § 503[02], at 503-16 (1996). The attorney-client privilege attaches when four conditions exist: (1) a communication, (2) between privileged persons, (3) in confidence and (4) for the purpose of obtaining or providing legal assistance to the client. See RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS § 68 (2000). Wigmore provides a more detailed, alternate formulation:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) except the protection be waived.

WIGMORE, supra note 15, § 2292, at 554.

17. The belief that clients would withhold information from their attorneys in the absence of the privilege is frequently debated. Wigmore characterized this belief as entirely "speculative," WIGMORE, supra note 15, § 2291, at 554, and subsequent commentators have reiterated the point. See, e.g., STEPHEN A. SALTZBURG, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited, 12 HOFSTRA L. REV. 817, 822 (1984) ("The adoption of the privilege represents an educated guess about behavior."); Note, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1236 (1962) ("The mythical average American is, as likely as not, either misinformed or uninformed about the attorney-client privilege."). Others are more optimistic, however. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODGES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:101, at 128 (2d ed. Supp. 1993) ("Although there is little empirical evidence of the precise degree to which clients rely on...confidentiality, it is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have some greater ability to gain the trust of at least some clients, and hence to serve them competently.").

18. A noted commentator describes the instrumental justification for privileges as follows: the instrumental rationale "assumes that a refusal to disclose information to a tribunal is bad and must therefore be justified as furthering some other social policy. In other words, the evil of nondisclosure is tolerated as an instrument by which some other good result can be accomplished." 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5422, at 671 (1980). "By an instrumental argument we mean one that takes the form 'X is good because it will bring about Y'; for example, the argument that the attorney-client privilege is good because it will encourage clients to be more candid with their lawyers." Id. § 5422.1, at 476 (Supp. 2005).

19. See In re Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996) ("By voluntarily disclosing her attorney's advice to a third party, for example, a client is held to have waived the privilege because
about which she spoke privately with her attorney presumably did not require the protection of the privilege as a condition on disclosure.\textsuperscript{20} The basic waiver rule conforms to this policy and provides for loss of the privilege whenever the client\textsuperscript{21} voluntarily discloses\textsuperscript{22} a significant part\textsuperscript{23} of a privileged communication\textsuperscript{24} to a third person.\textsuperscript{25}

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\textsuperscript{20} Wigmore, supra note 15, § 2311, at 599 (justification for privilege "ceases when the client does not appear to have been desirous of secrecy").

\textsuperscript{21} The disclosure must ordinarily be made by the client. See In re Grand Jury Subpoena, 341 F.3d 331, 336 (4th Cir. 2003) ("The client is the holder of the attorney-client privilege and can waive it either expressly, or through conduct."); supra note 15, § 2311, at 599 (justification for privilege "ceases when the client does not appear to have been desirous of secrecy").

\textsuperscript{22} The disclosure must be voluntary. As such, a court-ordered disclosure, or one that occurs through deception, does not result in waiver. See In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979) ("To the extent the documents can be viewed as stolen, following the modern trend mentioned above, they should not lose the protection of the privilege."); supra note 15, § 2311, at 599 (justification for privilege "ceases when the client does not appear to have been desirous of secrecy").

\textsuperscript{23} The disclosure must involve a significant part of the communication. As such, a client can be required to testify regarding the facts necessary to prove the existence of the privilege, her retention of an attorney, and the particular subjects about which she spoke with her attorney. She cannot be required, in contrast, to disclose the communication itself. See 26A WRIGHT & GRAHAM, supra note 18, § 5729, at 561–62 (1992).

\textsuperscript{24} The client must intend for the communication to remain confidential. As such, a communication between attorney and client for which there was never any expectation of secrecy (because, for example, the client intended that the communication would ultimately be disclosed to some third party) is not privileged. See United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984) ("If a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as the details underlying the data which was to be published will not enjoy the privilege."); supra note 15, § 2311, at 599 (justification for privilege "ceases when the client does not appear to have been desirous of secrecy").

\textsuperscript{25} See Centuori v. Expertian Info. Solutions, Inc., 347 F. Supp. 2d 727, 729 (D. Ariz. 2004) ("Waiver by voluntary disclosure 'need not be effectuated by words or accompanied by the litigant's subjective intent.'" (quoting Bittaker v. Woodford, 331 F.3d 715, 719 n.4 (9th Cir. 2004))); Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 (D. Utah 2002) ("This court has also drawn a distinction between inadvertent disclosure and disclosure which was inadvertent and intended where the person making discovery was merely unaware of the legal consequences or nature of the document produced. In the latter situation the party making production has fully
The emphasis on voluntary disclosure explains several forms of implied waiver. The voluntary disclosure of a portion of a privileged communication results in waiver as to the remainder of the communication; the voluntary disclosure of a privileged communication to one adversary results in waiver as to all other adversaries, and the assertion of a claim or defense that relies on a privileged communication for its success results in waiver as to the communication thus placed "at issue." In these situations, waiver is implied from voluntary action that reflects indifference to confidentiality and purposeful use of the communication for tactical gain. But more importantly, the waiver-triggering event is typically preceded by an attorney's analysis of the consequences of disclosure and ultimate recommendation that doing so will better protect the client's interests. This is the case, for example, when a corporation voluntarily discloses the results of an internal

waived the...privilege."). As such, the threshold for waiving an evidentiary privilege is lower than that for waiving a constitutional right. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver [of the right to counsel] is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

26. The term "implied waiver" is used to describe situations in which a client does not expressly waive the privilege but rather engages in conduct that "places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege." WIGMORE, supra note 15, § 2388, at 855. The sword-shield metaphor is frequently used to explain implied waiver: a litigant cannot disclose a portion of a privileged communication as a "sword" to advance a claim or defense and then invoke the privilege as a "shield" to prevent inquiry into the communication and others on the same subject. See Willy v. Admin. Review Bd., 423 F.3d 483, 497 (5th Cir. 2005) ("When a party entitled to claim the attorney-client privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege."). Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.

In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 24 (1st Cir. 2003).

27. See United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998) (defendant "cannot selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with [his attorney] for his own benefit"); United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) ("A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes."); Int'l Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 92 (D. Del. 1974) (disclosure of a portion of a communication resulted in waiver of entire communication: "It would be manifestly unfair to allow Fibreboard to make factual assertions and then deny International an opportunity to uncover the foundation for those assertions in order to contradict them.").

28. See Persian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others.... The attorney-client privilege is not designed for such tactical employment."); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993) ("We agree that selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.").

29. See Weizmann Inst. of Sci. v. Neschis, No. 00 Civ. 7850, 2004 WL 540480, at *3 (S.D.N.Y. Mar. 17, 2004) ("Attorney-client privilege may also be impliedly waived or forfeited where a party makes assertions in the litigation or asserts a claim that in fairness requires examination of protected communications." (internal quotations omitted)); Mordesovitch v. Westfield Ins. Co., 244 F. Supp. 2d 636, 641 (S.D. W. Va. 2003) ("A party waives the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue. The classical example is where an attorney is sued by a client for legal malpractice."); Central Soya Co. v. Geo. A. Hormel & Co., 581 F. Supp. 51, 53–54 (W.D. Okla. 1982) (defendant waived attorney-client privilege as to all opinions provided by attorney when it raised reliance on certain of them as a defense to claim for willful patent infringement).

30. In these situations, waiver includes the communication actually disclosed as well as all other communications on the same subject. See In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) (voluntary disclosure of privileged documents to third party waives the privilege not only for the disclosed documents but "all other communications relating to the same subject matter"); Weizmann, 2004 WL 540480, at *3 ("Where there has been a prejudicial disclosure of some attorney-client communications, there may be a waiver of all communications on the same subject.").
investigation regarding perceived corporate misconduct to the SEC that is based, at least in part, on privileged information even though doing so will likely require disclosure in the inevitable securities fraud class action. The corporation’s attorney will recognize the risk, but nevertheless recommend disclosure because the benefit of currying favor with a regulator (and reducing the risk of crippling civil or criminal penalties) outweighs the cost of an enhanced fraud claim. It is also the case when a client sues her former attorney for malpractice even though doing so will allow the former attorney to disclose potentially embarrassing information about the client to defend the claim. The successor attorney will identify the risk, but still recommend proceeding when necessary to ensure that the client is made whole. While evidentiary privileges can be waived without any intent to do so, most implied waiver results from a conscious decision in this regard.

The waiver analysis is more complicated in connection with the mistaken production of a privileged document. The disclosure is voluntary, but only in the sense that it is volitional. The client (or more accurately her attorney) plainly produced the document but would not have done so if she recognized its privileged status. Nor does the client have any intention to use the document for tactical gain—indeed, she would prefer to retain confidentiality and prevent her adversary from using the document to its advantage. And the instrumental rationale for the privilege is not undermined by disclosure: the client may have been unwilling to share her story in the absence of the privilege and may have relied on the assurance of confidentiality as a condition on disclosure, but nevertheless loses its protection even though she has done nothing indicating indifference to confidentiality or a willingness to abandon it. The common law of agency may supply an answer, but it is entirely unsatisfactory when considered in relation to the purpose behind the privilege. This situation is thus qualitatively different from that which obtains when a client flippantly shares a privileged communication with a friend or purposefully injects a communication into a case for tactical gain.

31. See supra note 25.
32. The client is, of course, the principal and the attorney is, of course, the agent in connection with an attorney-client relationship. See, e.g., Rogers v. The Marshal, 68 U.S. 644, 651 (1863) (“The attorney is the agent of his client to conduct his suit to judgment....”). One consequence of this agency relationship is that the attorney-agent’s mistaken production of a privileged document binds the client-principal without regard to the client’s awareness of the mistake or interest in waiving the privilege. See Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 636 (W.D.N.Y. 1993) (“While it is a general rule that the privilege is personal to the client and may be voluntarily waived only by action of the client, it is also clear that the client’s attorney can be held to possess implied authority as an agent to effect a waiver whether voluntary or inadvertent.”); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 460 (N.D. Cal. 1978) (“The nature of the trial process is such that an attorney, and not the client, must have the immediate and ultimate responsibility of deciding if and when to raise objections.”).
33. Nor is mistaken production analogous to the failure to object to a question at deposition or trial, a failure that traditionally results in waiver. See, e.g., United States v. Gurtner, 474 F.2d 297, 299 (9th Cir. 1973) (“Gurtner’s failure to make a timely objection to Foulk’s testimony constituted a waiver of the privilege.”); Perrignon, 77 F.R.D., at 459 (privilege waived at deposition when attorney failed to object before plaintiff described her conversations with former in-house counsel). The decision to produce a document is typically made by a junior attorney or paralegal that bills at a lower rate (thereby providing substantial cost-savings to clients in connection with this labor-intensive activity) but who possesses a limited understanding of the facts of the case, the privilege, or its application in the context of those facts. In contrast, the decision to object to a question at a deposition is typically made by a more seasoned attorney who is fully familiar with the scope of the privilege and the nature of the case. Moreover, the decision to produce is made in a time-sensitive environment in which thousands of decisions must be made each day and in which fatigue (if not outright boredom) is a likely
Because of these differences, the federal courts have struggled to establish a single standard for answering the question of when mistaken production results in waiver.\textsuperscript{34} The three approaches developed thus far (typically referred to as the strict, middle, and lenient approaches, respectively) emphasize some aspect of privilege doctrine, or some aspect of the discovery process, to promote a preferred outcome.\textsuperscript{35} Unfortunately, they do not provide an ideal solution and each is subject to criticism in one way or another. Perhaps the confluence of conflicting considerations regarding the importance of confidentiality, the magnitude of contemporary document discovery, and the ever present potential for mistake by the most careful party—each of which will likely be evaluated differently by individual judges based upon their own experiences before appointment to the bench—ultimately prevents universal agreement on any particular standard. In this environment, a rules-based solution may be the only means to a uniform rule that establishes a consistent standard upon which all litigants, in all judicial districts, can rely.\textsuperscript{36}

II. THE THREE APPROACHES USED BY THE FEDERAL COURTS TO RESOLVE THE QUESTION OF WAIVER FOLLOWING THE MISTAKEN PRODUCTION OF A PRIVILEGED DOCUMENT

A. The Strict Approach

Under the strict approach, any disclosure of privileged information waives the attorney-client privilege—meaning that the mistaken production of a single

\textsuperscript{34}See infra text accompanying notes 37–96.

\textsuperscript{35}See, e.g., Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996) ("Courts have generally followed one of three distinct approaches to attorney-client privilege waiver based on inadvertent disclosures: (1) the lenient approach, (2) the 'middle of the road' approach,...and (3) the strict approach."); Judson Atkinson Candies, Inc. v. Dhimantek, 476 F. Supp. 2d 913, 944 (N.D. Ill. 2007) ("In determining whether there was a waiver, courts apply one of three approaches: (1) a subjective approach; (2) an objective approach; and (3) a balancing test."); Evenflo Co. v. Hantee Agents Ltd., No. 3-05-CV-346, 2006 WL 2945440, at *5 (S.D. Ohio Oct. 13, 2006) ("Three approaches to inadvertent disclosure have been taken by federal courts.").

document, in a production comprised of thousands of documents, results in waiver\textsuperscript{37} without regard to the efforts taken to avoid disclosure.\textsuperscript{38} This approach is especially harsh because waiver typically extends beyond the pertinent document to all other communications on the same subject.\textsuperscript{39} This approach is justified on the ground that

37. See In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("We...agree with those courts that the privilege is lost even if the disclosure is inadvertent." (internal quotations omitted)); Gen. Elec. Co. v. Johnson, No. Civ. A.00-02855, 2006 WL 2616187, at *18 (D.D.C. Sept. 12, 2006) ("[A]l privilege holder's inadvertent disclosure of privileged materials will effect a waiver..."); United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., No. Civ. 99-3298, 2004 WL 2009417, at *1 (D.D.C. May 17, 2004) ("Despite the importance of the attorney-client privilege, it is not absolute and may be waived through inadvertent disclosure.")); New York v. Microsoft Corp., No. Civ. A.98-1233, 2002 WL 649492, at *2 (D.D.C. Apr. 8, 2002) ("Disclosure of otherwise-privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege."); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) ("When a document is disclosed, even inadvertently, it is no longer held in confidence despite the intentions of the party and thus, the privilege is lost even if the disclosure is inadvertent." (internal quotations omitted)); Western Trials, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8 (D.D.C. 1991) ("Even inadvertent disclosure, 'short of court-compelled disclosure...' waives the privilege." (quoting In re Sealed Case, 877 F.2d at 980)); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc., 132 F.R.D. 204, 209 (N.D. Ind. 1990) ("When 'inadvertent' disclosure occurs the court should not be consumed in searching for the true intention of the disclosing party nor should it utilize its crystal clear hindsight to determine the adequacy of the precautions taken."); ICI Ams. Inc. v. Wanamaker, Civ. A No. 88-1346, 1989 WL 38647, at *3 (E.D. Pa. Apr. 18, 1989) ("Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege."); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) ("When confidentiality is lost through 'inadvertent' disclosure, the Court should not look at the intention of the disclosing party. It follows that the Court should not examine the adequacy of the precautions taken to avoid 'inadvertent' disclosure either." (citation omitted)); Thomas v. Pansy Ellen Prods., Inc., 672 F. Supp. 237, 243 (W.D.N.C. 1987) ("Voluntary production, even where inadvertent, effects a waiver of the privilege."); Underwater Storage, Inc. v. U.S. Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) ("The Court will not look behind this objective fact [of production] to determine whether the plaintiff really intended to have the letter examined.").

38. These courts contend that disclosure demonstrates that the precautions were inadequate: "It seems somehow fictional to confirm the adequacy of the discovery precautions taken when obviously (as manifested by the disclosure) the precautions, almost by definition, were inadequate." Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc., 132 F.R.D. 204, 209 n.9 (N.D. Ind. 1990); see also Harmony Gold U.S.A., Inc., v. FASA Corp., 169 F.R.D. 113, 117 n.6 (N.D. Ill. 1996).

it disciplines parties, inducing them to protect the privilege zealously (with one appellate court suggesting that privileged documents should be treated "like jewels—if not crown jewels") and comports with the practical reality that confidentiality can never be fully restored following disclosure. These justifications are not persuasive, however.

First, the strict approach is unrealistic and can lead to waiver even when a litigant treats its documents like "crown jewels." IBM's antitrust battles during the 1970s demonstrate this point. IBM established an elaborate review process, with multiple layers of attorney review, in an attempt to prevent the production of privileged documents in the context of accelerated discovery. Even this process—recounted with awe in judicial opinions and legal texts—was not foolproof. IBM mistakenly produced 1,200 pages of privileged material in a production totaling seventeen million pages (or .007 percent of the total production) yet one district court still found that the privilege had been waived and that this waiver extended to all other communications on the same subject. IBM treated its documents like "crown jewels" but still came up short. There is no reason to think other litigants would

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42. For a colorful description of the magnitude of IBM’s effort in these cases, see JAMES B. STEWART, THE PARTNERS: INSIDE AMERICA’S MOST POWERFUL LAW FIRMS 53–113 (1983).

43. See Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 648 (9th Cir. 1978) (describing the procedures taken by IBM to avoid production and characterizing the task as “monumental”). The Ninth Circuit ultimately concluded that production of seventeen million pages of documents during a three-month period pursuant to a court-imposed accelerated discovery program constituted “compelled” disclosure from which there could not be any waiver. Id. at 651. As such, the Ninth Circuit did not address “whether...’inadvertent’ disclosure constitutes a waiver of the attorney-client privilege.” Id. at 650.

44. Id. at 648 (“IBM mounted a herculean effort to review and produce the material which had been requested.”); IBM Corp. v. United States, 471 F.2d 507, 523 (2d Cir. 1972) (Mulligan, J., dissenting) (“It is indeed mind-boggling to contemplate 17 million document pages which in bulk weigh 87 tons and would stretch from coast to coast. Even with the sophistication and expertise which this appellant brings to the task of document production, to say nothing of the legal forces it commands, error is inevitable.... Monopolist or not, IBM is hardly infallible.”); George A. Davidson & William H. Voth, supra note 36, at 642–43; Richard L. Marcus, supra note 36, at 1609–10.


46. The cost associated with document discovery is significant. One forensic consultant estimates that review for privilege costs two dollars per page. KPMG FORENSIC, A REVOLUTION IN E-DISCOVERY: THE PERSUASIVE ECONOMICS OF THE DOCUMENT ANALYTIC APPROACH 8, available at http://www.reedsmith.com/_dbi/Documents/050117_eDisc_WPv10_POST.pdf. This consultant assumes the reviewing attorney bills at $200 per hour and can review one hundred pages per hour. Id. Although the assumed rate seems reasonable, the pace seems slow. A more realistic pace of 200 pages per hour (or approximately one box per day) still results in a cost of one dollar per page for pre-production review. A client who would therefore pay the same amount to have an attorney review a modest-sized production of 32,000 pages ($200 per hour times ten hours per day times sixteen days equals $32,000) as she would to have her attorney conduct a ten-day jury trial while working an additional nine hours each evening for the next day’s proceeding ($200 per hour times sixteen hours per day times ten days equals $32,000). A client who is willing to pay this sort of money for document review plainly treats her materials like “crown jewels” and should receive greater protection in the event a privileged document slips through the cracks. Although readers can make different assumptions about the
fare any better. 47

Second, the strict approach incorrectly assumes that there is not a meaningful corrective for lost confidentiality. 48 While one cannot "unring a bell," the simple remedy of returning the pertinent document is frequently adequate and entirely consistent with other instances in which information is shared during discovery that cannot ultimately be used at trial (such as evidence regarding subsequent remedial measures, the existence and amount of insurance, and most hearsay statements). 49

Moreover, litigants increasingly stipulate to this corrective in complex, document-intensive cases, 50 thereby tacitly acknowledging that reclaiming a mistakenly

applicable speed and hourly rate, the point remains the same: the cost associated with pre-production document review is tremendous in an absolute sense and also in relation to more important pretrial and trial activities. Cf. Deborah H. Juhnke, Where Litigation Support Ends and Electronic Discovery Begins 8 (estimating by-hand review costs of $66 per page, assuming review performed by contract attorney at $100 per hour and at a rate of 150 pages per hour) (on file with the New Mexico Law Review). Not surprisingly, two commentators emphasize the cost associated with preserving the privilege in connection with their calls for change. Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished, 47 DUKE L.J. 853, 861 (1998) (A requirement of confidentiality "should be abandoned as a requirement for the attorney-client privilege because compliance with it generates significant unnecessary costs in the preservation of secrecy, the proof of that preservation, and the resolution of disputes surrounding it."); Alan J. Meese, supra note 36 (advocating a lenient approach to avoid the "wasteful" costs associated with pre-production review). And, of course, litigants themselves frequently raise the cost of review to justify limitations on the scope of document discovery or to shift the cost of that discovery to the requesting party. See, e.g., Zubulake v. UBS Warburg L.L.C., 216 F.R.D. 280, 283 (S.D.N.Y. 2003) (defendant requested that court require plaintiff to pay for restoring and producing e-mails stored on back-up tapes and estimated that the work would cost $165,954.67 to restore and search the tapes and an additional $107,694.72 for attorney and paralegal review); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 425 (S.D.N.Y. 2002) ("By using paralegals to review the production at the rate of two e-mails per minute at fees of $150 per hour, it is estimated that the privilege analysis would cost approximately $247,000.").


48. Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 117 (N.D. Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); F.D.I.C. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) ("Once persons not within the ambit of the confidential relationship have knowledge of the communication, that knowledge cannot be undone. One cannot 'unring a bell.'"); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988) ("[R]egardless of how painstaking the precautions, there is no order I can enter which erases from defendant's counsel's knowledge what has been disclosed. . . . Plaintiff suggests that a protective order be issued prohibiting the defendant from 'using' the documents, a sort of 'use immunity.' I reject the suggestion because I do not see what purpose would be served. Such an order would not restore the confidential nature of the document.").

49. See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."); Fed. R. Evid. 407 (evidence of subsequent remedial measures); id. 411 (evidence of liability insurance); id. 801 (hearsay statements).

50. For a form of protective order regarding the inadvertent production of privileged documents and the return of such documents, see Hewlett v. Hewlett-Packard Co., No. 19513-NC, 2002 WL 32151538 (Del. Ch. Ct. Apr. 16, 2002). Two commentators argue that "[t]he single reform of giving effect, in subsequent litigation, to a stipulation or order providing that inadvertent production will not constitute a waiver, would greatly simplify the task of resolving privilege claims." Davidson & Voth, supra note 36, at 655. Such reform, however, would likely be effective in two-way discovery cases in which both sides possess sizable quantities of discoverable documents, are equally at risk of making a mistake and losing the protection, and are thus equally motivated to enter into such an agreement. The same is not true, however, in one-sided discovery cases where one party possesses all or the vast
produced document is adequate to protect their interests. The courts should not ignore this real world prophylactic and assume that complete relief is a necessary condition for any relief.  

Third, the strict approach may cause litigants who possess substantial quantities of discoverable documents (but who do not possess corresponding resources) to forego the protection of the privilege simply to avoid the cost of document review when the governing standard requires, but their attorneys cannot assure, that all privileged documents will be isolated and withheld for purposes of preserving the privilege. While IBM may have been willing to devote unlimited resources to avoid disclosure in litigation threatening the continued existence of the corporation in its then-current form, the same cannot be said of smaller corporate litigants in garden-variety employment disputes involving pattern and practice allegations that purport to justify discovery of documents from personnel files and e-mail accounts of other employees and other employment decisions. The cost associated with document review, when coupled with the absence of assurance that the privilege will be preserved, may cause these litigants to forego document review altogether. A litigant's ability to retain the benefits of the privilege should not, however, ebb and flow with its financial capacity and ability—but that is an unfortunate consequence of the decision-making process for litigants in jurisdictions that follow the strict approach.

Finally, the strict approach does not promote the policy underlying the privilege. A client's reliance on the privilege as a condition on disclosure should not be lost because her attorney makes a mistake months (if not years) later during discovery in a civil case that may not have been foreseeable at the time the communication occurred. The client has done nothing suggesting indifference to confidentiality,

51. Such agreements are enforceable against parties only. See 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2016.2, at 240 (2d ed. 1994) ("But such orders or agreements are not sufficient to withstand customary waiver analysis; whatever their estoppel effect as to the parties involved they could not bind nonparties."); see also Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991) (DOJ's agreement that it would not disclose privileged communications shared by Westinghouse could not bind nonparties); Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 235 (D. Md. 2005) ("Some commentators appear to be openly skeptical of their ability to insulate the parties from waiver, and even if they are enforceable as between the parties that enter into them, it is questionable whether they are effective against third-parties."); Hartford Fire Ins. Co. v. Guide Corp., 206 F.R.D. 249, 250 (S.D. Ind. 2001) ("While the parties might bind themselves by agreeing to limit waivers of privileges and protections, their agreement cannot bind third parties."); Sometimes these agreements are not even enforceable as between the parties themselves. See IBM Corp. v. United States, 471 F.2d 507, 517 (2d Cir. 1972) (court refused to enforce agreement between parties), appeal dismissed, 480 F.2d 293 (2d Cir. 1973); Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 118 (D.N.J. 2002) (trial court refused to enforce agreement between parties prohibiting claims of waiver with respect to mistakenly produced documents because such an agreement "could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases"); In re Columbia/HCA Healthcare Corp., 192 F.R.D. 575, 577-79 (M.D. Tenn. 2000) (trial court refused to enforce agreement that production of documents did not constitute waiver of privilege).

52. As noted previously, the attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). As such, clients will frequently consult with their attorneys before taking action to verify that the contemplated action is consistent with the law. A manufacturer of popular computer hardware may, for example, consult with an attorney before making changes to its products that could affect the compatibility of other vendors' existing products. This discussion will likely
and a potential malpractice claim is hardly an adequate remedy—a second round of litigation, solely for the purpose of trying the hypothetical case-within-a-case in which the privileged information is excluded, seems entirely wasteful when a far simpler corrective exists.\textsuperscript{53}

\textbf{B. The Middle Approach}

Under the middle approach, the mistaken production of a privileged document may or may not result in waiver depending upon the facts and circumstances of the case.\textsuperscript{54} This approach acknowledges the potential for mistake in document-intensive litigation and attempts to protect those litigants who make a good faith effort to preserve confidentiality while punishing those litigants who handle their documents with "such extreme carelessness as to suggest that [they are] not concerned with the protection of the asserted privilege."\textsuperscript{55} To distinguish between these two categories

\textsuperscript{53} The D.C. Circuit justifies the strict approach on the additional ground that it limits the ability of organizations to insulate documents from discovery. \textit{See In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).} This court reasons that increases in the frequency with which organizations label documents "privileged" necessarily increases the likelihood that a privileged document will be produced during discovery. \textit{Id.} From this, the court concludes that the strict approach will cause these organizations to limit the number of documents labeled "privileged" to eliminate the mistakes it might otherwise make during discovery to protect the privilege. \textit{Id.} This justification makes no sense. A document's privileged status does not depend upon the label attached by an author, and waiver does not occur merely because a document so labeled is produced in discovery if it does not meet the requirements of the privilege. \textit{See Baptiste v. Cushman & Wakefield, Inc., No. 03 Civ. 2102, 2004 WL 330235, at *2 (S.D.N.Y. Feb. 20, 2004) ("[T]he determination of whether a document is privileged does not depend upon the technical requirement of a privilege legend.") (quoting \textit{In re Grand Jury Proceedings, No. M-11-189, 2001 WL 1167497, at *10 (S.D.N.Y. Oct. 3, 2001)); LifeMaster Funding v. Telebank, 206 F.R.D. 298, 301 (D. Utah 2002) ("It is not necessary that a document be labeled as privileged in order for it to be subject to an Attorney/Client or work product privilege if the document otherwise fits within such privilege. On the other hand, labeling a document as privileged does not meet the privilege claimants' burden of establishing the privilege claim."). Perhaps because of this defect, the artificial expansion justification has only been invoked two other times to justify the strict approach. \textit{See Bellsouth Adver. & Publ'g Corp. v. Am. Bus. Lists, Inc., Civ. No. 1:90-CV-149-JEC, 1992 WL 338392, at *8 (N.D. Ga. Sept. 8, 1992); Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8-9 (D.D.C. 1991).}

\textsuperscript{54} \textit{See, e.g., Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) ("[I]n our view, an analysis which permits the court to consider the circumstances surrounding a disclosure on a case-by-case basis is preferable to a \textit{per se} rule of waiver."); United States v. Nat'l Ass'n of Realtors, 242 F.R.D. 491, 494 (N.D. Ill. 2007) ("[T]he Court will apply a balancing test, which provides maximum flexibility based on the individual facts of any case."); Judson Atkinson Candies, Inc. v. Latini-Hoberger Dhimantec, 476 F. Supp. 2d 913, 944-45 (N.D. Ill. 2007) ("Because of the unique circumstances of the current case and in recognition of the fact that circumstances may not always warrant disregarding privilege, even in cases of inadvertent disclosure, this Court opts to follow the balancing approach."); Urban Outfitters, Inc. v. DPIC Cos., 203 F.R.D. 376, 380 (N.D. Ill. 2001) ("The Court finds that the balancing test is the most appropriate method for assessing whether waiver occurred."); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000) ("[T]his court adopts the balancing approach."); Snap-On Inc. v. Hunter Eng'g Co., 29 F. Supp. 2d 965, 971 (E.D. Wis. 1998) ("Although district courts within the seventh circuit have used all three approaches, the 'emerging trend' is to use the balancing test."); Briggs & Stratton Corp. v. Concrete Sales & Servs., 176 F.R.D. 695, 699 (M.D. Ga. 1997) ("The case-by-case approach is the better approach and will be adopted in this court."); Edwards v. Whitaker, 868 F. Supp. 226, 229 (M.D. Tenn. 1994) ("This Court believes that the [middle] approach is most fair and appropriate.").

\textsuperscript{55} \textit{See also Trudeau v. N.Y. State Consumer Prot. Bd., 237 F.R.D. 325, 339 (N.D. N.Y. 2006) ("[I]nadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the privilege."); Hawkins v. Anheuser-Busch, Inc., No. 2:05-cv-688, 2006 WL 3230756, at *2 (S.D. Ohio June 19, 2006) ([G]iven the number of documents which are typically produced in litigation, even the most diligent of parties will occasionally produce
of litigants (and ultimately to determine whether there has been a waiver), courts typically consider five factors: the reasonableness of the precautions taken to prevent disclosure, the number of mistakenly produced documents, the extent of the disclosure, the time taken to correct the mistake once it comes to light, and whether justice and fairness would be served by relieving a party from its mistake. This approach seeks fair and equitable results, but in so doing exacts a high price because of the detailed factual inquiry into the document-handling practices of the producing party. And, while the "extreme carelessness" language implies a relatively modest threshold for preserving the privilege, the courts are frequently more exacting in their assessment of what should be expected from the producing party—thus leading to additional uncertainty in the application of an already uncertain facts and circumstances test.

1. Reasonableness of Efforts to Avoid Disclosure

The courts consider the efforts taken by the producing party to avoid disclosure and ordinarily find them sufficient so long as there is evidence establishing that the documents were reviewed on a page-by-page basis by an attorney or paralegal prior to production. Because there is usually some form of pre-production review in a privileged document inadvertently, and it ignores the realities of a discovery process to conclude that such a production is always a waiver of the attorney-client privilege...."


57. See Gray v. Bicknell, 86 F.3d 1472, 1484 (8th Cir. 1996). These costs are not insignificant: a producing party who learns of a mistake must prepare a motion for a protective order, together with a supporting memorandum and affidavits, and can easily incur $25,000 in legal fees and costs in so doing. A party opposing such a motion can incur the same fees and costs (and sometimes more if it conducts follow-up discovery in an attempt to challenge the content of the producing party’s affidavits). These fees and costs are largely unavoidable because nearly any position regarding waiver is supportable given the facts and circumstances standard that will resolve the issue, thereby increasing the potential for expensive post-production motion practice.

58. See infra notes 63, 65.

59. See, e.g., Expert Choice, Inc. v. Gartner, Inc., No. 3:03 CV 022234, 2007 WL 951662, at *3 (D. Conn. Mar. 27, 2007) (same attorney reviewed each page of each document prior to production); Pucket v. Hot Springs Sch. Dist. No. 23-2, 239 F.R.D. 572, 586 (D.S.D. 2006) (“The court finds that this review of the file by both an attorney and paralegal to remove privileged material is a reasonable precaution.”); United States v. Mallinckrodt, Inc., 227 F.R.D. 295, 298 (E.D. Mo. 2005) (“USA did engage in a privilege review, which this Court finds to be a reasonable manner of protecting privileged documents from disclosure.”); Stoner v. N.Y. City Ballet Co., No. 99 Civ. 0196, 2002 WL 31875404, at *2–3 (S.D.N.Y. Dec. 24, 2002) (attorney reviewed documents and tagged those that were privileged; copy service removed tags and copied all documents; “while flawed in hindsight,” the precautions “were not self-evidently unreasonable at the time”); Fleet Bus. Credit Corp. v. Hill City Oil Co., No. 01-02417 MAV, 2002 WL 31741282, at *3 (W.D. Tenn. Dec. 5, 2002) (team of three attorneys and paralegal reviewed each document, isolated privileged documents and tagged remainder with tabs indicating they were to be copied); Purizer Corp. v. Battelle Mem'l Inst., No. 01 C 6360, 2002 WL 1400263, at *2 (N.D. Ill. June 27, 2002) (precautions were adequate where experienced attorneys and legal assistants performed review after receiving instructions from lead counsel regarding how to search for privileged documents); Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 (D. Utah 2002) (initial disclosure ‘preceeded by careful segregation of documents’); United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 179 (C.D. Cal. 2001) (documents were initially reviewed by paralegals and secretaries; those that appeared privileged were then reviewed by in-house attorneys; “[p]unishing defendant for adopting this common, reasonable, and cost-effective strategy would not make sense”); Starway v. Indep. Sch. Dist. No. 625, 187 F.R.D. 595, 597 (D. Minn. 1999) (review “was not casually placed in the hands of not-lawyer staff, and the precautions taken in this case were reasonable”); Laquila Constr., Inc. v. Travelers Indem. Co., No. 98 CIV. 5920 HB, 1999 WL 232901, at *1 (S.D.N.Y. Apr. 21, 1999) (single attorney reviewed file and removed pages that appeared to be privileged; court characterized this as "reasonable procedure—but not a particularly sophisticated one"); Baker's Aid, a Div. of M. Raubvogel Co. v. Hussman
civil cases, this factor usually tips in favor of preserving the privilege. Indeed, there are few cases in which a court found the producing party’s efforts inadequate in the face of testimony that such review occurred. In contrast, this factor tips in favor of waiver when the producing party fails to perform any review prior to production (or at least fails to submit evidence from which the court can make a finding in this regard).

Foodservice Co., No. CV 87-0937, 1988 WL 138254, at *4 (E.D.N.Y. Dec. 19, 1988) (review by attorney followed by instruction to defendant’s employee not to produce privileged document); Wallace v. Beech Aircraft Corp., 179 F.R.D. 313, 314 (D. Kan. 1998) (review by attorney and experienced legal assistant was adequate even though they missed privileged document marked as such); Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., No. 96 Civ. 7590, 1997 WL 736726, at *5 (S.D.N.Y. Nov. 26, 1997) (attorney reviewed documents and identified those that were privileged, delegating responsibility to paralegal to remove designated documents and conform copies); Aramony v. United Way of Am., 969 F. Supp. 226, 236-37 (S.D.N.Y. 1997) (initial review for privilege by paralegals and junior associate, followed by review of documents identified as potentially privileged by senior associate, deemed adequate); Lloyds Bank PLC v. Republic of Ecuador, No. 96 Civ. 1789 DC, 1997 WL 96951, at *4 (S.D.N.Y. Mar. 5, 1997) (review for privilege by two associates was adequate); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 445 (S.D.N.Y. 1995) (review by attorneys with paralegals then physically pulling privileged documents from the population); In re Grand Jury Investigation, 142 F.R.D. 276, 279-80 (M.D.N.C. 1992) (initial review for privilege by junior attorney and paralegal, followed by review of those identified as potentially privileged by a more senior attorney, followed by review of sample of documents designated for production deemed adequate); F.D.I.C. v. Ernst & Whinney, 137 F.R.D. 14, 17 (E.D. Tenn. 1991) (producing party “followed quite extensive precautions to avoid disclosure of privileged materials”); Monarch Cement Co. v. Lone Star Indus., Inc., 132 F.R.D. 558, 560 (D. Kan. 1990) (producing party’s representation that counsel was diligent in efforts to review each document was sufficient to support finding of adequate precautions); Kansas City Power & Light Co. v. Pittsburgh & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989) (producing party’s representation that counsel diligently attempted to review each document and segregate those that were privileged was sufficient to support finding of adequate precautions).

60. United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 179 (C.D. Cal. 2001) (“The reasonableness of the precautions adopted by the producing party must be viewed principally from the standpoint of customary practice in the legal profession at the time and in the location of the production, not with the 20-20 vision of hindsight.”).

61. See Trudeau v. N.Y. State Consumer Prot. Bd., 237 F.R.D. 325, 343-44 (N.D.N.Y. 2006) (court drew inference that producing party’s efforts to avoid disclosure were inadequate due to production of four copies of an obviously privileged document); Atronic Int’l, GMBH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 164 (E.D.N.Y. 2005) (producing party’s efforts to avoid disclosure of privileged documents were inadequate because “the attorney assigned to review these documents did not know the identity of plaintiff’s legal counsel in this matter”); Koehler v. Bank of Bermuda, Ltd., No. M18-302, 931745, 2003 WL 289640, at *14 (S.D.N.Y. Feb. 11, 2003) (producing party’s efforts to avoid disclosure were inadequate because “the Bank’s handling of privilege claims [was] plagued by continuing confusion and a lack of clarity”); Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 119 (D.N.J. 2002) (producing party’s efforts to avoid disclosure were inadequate, even though all documents were reviewed twice before production, because plaintiff failed to determine the author of what turned out to be privileged handwritten marginalia on several of them); Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 412-13 (D.N.J. 1995) (purported reliance on prior counsel’s representation that documents had been reviewed was not adequate); In re Sause Bros. Ocean Towing, 144 F.R.D. 111, 115 (D. Or. 1991) (employment of paralegal services firm to conduct privilege review was “only marginally reasonable”); F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991) (review by two attorneys for one day of approximately 15,000 to 50,000 pages was “manifestly inadequate” because it “created an unnecessarily high potential for an inadvertent disclosure”).

62. See Herndon v. U.S. Bancorp Asset Mgmt., Inc., No. 4:05CV 01446 ERW, 2007 WL 781788, at *3-4 (E.D. Mo. Mar. 13, 2007) (defendant acknowledged that it did not review document prior to delivery to plaintiff); Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., No. IP96-1718-C-HJG, 2001 WL 699850, at *1-2 (S. Ind. May 29, 2001) (plaintiff incorrectly assumed that documents had been reviewed for privilege by attorney who left firm and therefore did not perform any review; in the absence of an agreed-upon protective order, court would have found waiver due to insufficient safeguards); Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 412 (D.N.J. 1995) (defendants admitted that they did not conduct any review prior to production of documents, claiming it assumed the review had been done by prior counsel; defendants’ pre-production efforts were thus inadequate); Graco Children’s Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95 C 1303, 1995 WL 360590,
Several district courts depart from this pattern when the producing party reviews the documents prior to inspection by an adverse party but then fails to review them a second time prior to delivery of those selected for production. These courts justify a finding of waiver on the ground that a second review may have prevented the disclosure. Other district courts, however, reject the need for additional review prior to formal production. (One district court ironically concluded that the producing party’s second review [during which it caught all of its earlier mistakes] was too little, too late.)

at *8 (N.D. Ill. June 14, 1995) (no precautionary measures prior to production); Cunningham v. Conn. Mut. Life Ins., 845 F. Supp. 1403, 1409 (S.D. Cal. 1994) (plaintiff failed to review documents produced by former attorney from other litigation and therefore did not take adequate precautions to avoid disclosure); Allen-Bradley Co. v. Autotech Corp., No. 86 C 8514, 1989 WL 134500, at *2 (N.D. Ill. Oct. 11, 1989) (plaintiff did not review documents prior to making them available for inspection); see also Matteson v. Baxter Healthcare Corp., No. 02 C 3283, 2003 WL 22839808, at *3 (N.D. Ill. Nov. 26, 2003) (defendant failed to provide any evidence regarding precautions that were taken to prevent disclosure). A party that does not provide any evidence regarding pre-production review can occasionally avoid a finding of waiver so long as it acted promptly upon learning that it made a mistake. See Myers v. City of Highland Village, 212 F.R.D. 324, 327 (E.D. Tex. 2003) (defendant did not waive privilege even though it failed to “establish[,] that it took any precautions to prevent the disclosure of the document”); In re Atl. Fin. Fed. Sec. Litig., No. 89-645, 1992 WL 50074, at *6 (E.D. Pa. Mar. 3, 1992) (court did not find waiver notwithstanding the fact that defendant “offered no evidence upon which the court can assess the reasonableness of the precautions taken to prevent inadvertent disclosure.”).

63. See Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass. 2000) (producing party’s efforts were inadequate because, although its attorneys reviewed all documents prior to production and segregated the privileged ones from the others, the attorneys failed to review the documents a second time after they were returned from the copy service hired to photocopy the responsive documents and thus did not discover that the copy service copied both categories of documents); F.C. Cycles Int’l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 77–78 (D. Md. 1998) (producing party did not take adequate steps to avoid disclosure because, while its attorneys reviewed the documents prior to making them available for inspection, it did not again review the documents after they were designated for production to verify that they did not contain privileged information); In re Rause Bros. Ocean Towing, 144 F.R.D. 111, 115 (D. Or. 1991) (producing party failed to review documents a second time following inspection to determine whether any designated documents were privileged); Bud Antle, Inc. v. Grow-Tech, Inc., 131 F.R.D. 179, 183 (N.D. Cal. 1990) (producing party’s efforts were inadequate because it missed privileged document prior to inspection and then failed to review the documents thereafter designated for production); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 116 F.R.D. 46, 51 (M.D.N.C. 1987) (although the court found the producing party’s pre-inspection review “commendable,” it nevertheless concluded that it was inadequate because the producing party did not perform a second review of the documents designated for production following inspection); Liggett Group Inc. v. Brown & Williamson Tobacco Corp., 116 F.R.D. 205, 207–08 (M.D.N.C. 1986) (attorney reviewed box of documents prior to production, separating them into stacks for production and not for production; “counsel have not satisfied the Court that reasonable protective measures were employed in order to safeguard claims of privilege” and “there is no indication that counsel reviewed the relatively small number of documents selected for production after copying...had been completed.”); see also Hernandez v. Esso Standard Oil Co., Civil No. 03-1485, 2006 WL 1967364, at *4 (D.P.R. July 11, 2006) (producing party’s efforts were inadequate because, although it reviewed all documents prior to their placement on a disk, it failed to review the disk prior to production and thus failed to learn that privileged documents that were previously segregated were mistakenly included on the disk).

64. See United States v. Mallinckrodt, Inc., 227 F.R.D. 295, 298 n.5 (E.D. Mo. 2005) (rejecting argument that plaintiff should have reviewed documents a second time after they were scanned onto CD-ROMs); Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., No. 96 Civ. 7590, 1997 WL 736726, at *5 (S.D.N.Y. Nov. 26, 1997) (rejecting argument that documents should have been reviewed a second time because it would “needlessly increase the costs of litigation”); Aramony v. United Way of Am., 969 F. Supp. 226, 237 (S.D.N.Y. 1997) (procedures were adequate even though attorneys did not review documents second time following inspection and identification of those designated for production); Kansas City Power & Light Co. v. Pittsburgh & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989) (court rejected receiving party’s contention that second screening would have prevented disclosure; “[t]hrough hindsight one may conceive of further precautions that might have prevented an inadvertent disclosure” but precautions taken were nevertheless adequate).

65. See Prebilt Corp. v. Preway, Inc., Civ. A No. 87-7132, 1988 WL 99713, at *2–3 (E.D. Pa. Sep. 23, 1988) (although plaintiff reviewed documents before inspection and pulled privileged documents and reviewed them again after inspection and pulled privileged documents missed the first time, this was “not sufficient”).
These latter cases highlight the primary defect of the middle approach—the potential for inconsistent results due to the inconsistent application of the various factors. The outcome of a waiver dispute should not depend on the particular manner in which documents are produced, yet the case law suggests that it sometimes can. A party making documents available for inspection, for example, risks waiver if it does not review the documents a second time prior to delivery of those selected for production, even when there is no evidence suggesting any inadequacy in the initial review. Put simply, a party that reviewed its documents for privilege prior to inspection would not have any reason to believe further review would be necessary prior to delivery of those designated for production—yet some courts conclude that such additional review is necessary to preserve the privilege.

Another defect is logistical: courts are ill-equipped to evaluate the thoroughness of review based solely on self-serving testimony provided by the producing party. A court obviously cannot know whether the individuals performing the review (whether senior partners, junior associates, paralegals, or others) thoroughly reviewed the documents or merely skimmed them when not attending to other matters. Nor is there any way for the receiving party meaningfully to challenge the producing party’s testimony in this regard, and follow-up deposition discovery does not provide a panacea given the cost associated with such an effort. Although this factor goes to the heart of the middle approach, it is not very useful—as a practical matter—in determining whether the privilege should be preserved or lost in a given case.

2. Number of Inadvertent Disclosures

The courts also consider the number of documents mistakenly produced, usually in relation to the total number of documents produced. This factor tips in favor of preserving the privilege when the document production exceeds 1,000 pages.

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66. See supra notes 63, 65.
(although sometimes smaller quantities qualify as sufficiently sizable to warrant an assumption that mistakes will likely occur\textsuperscript{68}) and the number of pages of privileged documents mistakenly produced is less than five percent of this total.\textsuperscript{69}
Nevertheless, a modest number of mistakes will not protect a litigant who does not perform any review or who fails promptly to alert other parties of the mistake once she becomes aware of it.70

The number of mistakes provides a reality check on the representations made by the producing party regarding the measures taken to avoid disclosure: if the number of mistakes is small, testimony regarding the effort made to prevent disclosure would seem to be corroborated. The usefulness of this factor is lessened, however, because a simple arithmetic calculation regarding the percentage of documents mistakenly produced says nothing about the cause of the mistake. A paralegal who mistakenly releases a box of previously segregated, privileged documents commits a single mistake but one that totals approximately 2,000 pages for counting purposes.71 The cases do not show any consistent consideration of the cause of the mistake and instead focus on the number of documents mistakenly produced. This does not provide any insight into the equities of the situation or whether the producing party should or should not be relieved from its mistake.

3. Extent of Disclosure

The courts also consider the extent of disclosure (the extent to which the other parties have reviewed and analyzed the privileged document),72 which involves a subjective determination regarding whether confidentiality can be restored in any meaningful sense.73 As one court explained:

A limited disclosure resulting from glancing at an open file drawer or designating documents for copying may not justify a finding of waiver when the party does not know the essence of the document’s contents. However, when
disclosure is complete, a court order cannot restore confidentiality and, at best, can only attempt to restrain further erosion.74

Because disclosure is frequently “complete” in this sense by the time the issue reaches the court’s attention, this factor can (and sometimes does) trump the other factors.75 The district courts are seriously divided on this point, with some explaining that this factor tips in favor of waiver only when the document has “worked its way into the fabric of the case”76 (such as by being used in support of a motion or to elicit testimony at a deposition), with others concluding that it tips in favor of waiver merely from review by an adversary.77

The difficulty in application of this factor should become less pronounced as increasing numbers of state bar associations impose specific obligations on attorneys who inadvertently receive privileged materials (whether inside or outside


75. See Herndon v. U.S. Bancorp Asset Mgmt. Inc., No. 4:05 CV 01446, 2007 WL 781788, at *5 (E.D. Mo. Mar. 13, 2007) (plaintiff quoted document in its complaint and amended complaint and used it during the depositions of defendant’s representatives); Hernandez v. Esso Standard Oil Co., Civil No. 03-1485, 2006 WL 1967364, at *4 (D.P.R. July 11, 2006) ("Plaintiff had access to the information during a four month period" before defendant determined that a mistake had been made.); Crossroads Sys., Inc. v. Dot Hill Sys. Corp., No. A-03-CA-754, 2006 WL 1544621, at *3 (W.D. Tex. May 31, 2006) (plaintiff substantively questioned defendant’s witness about privileged document at deposition); Matteson v. Baxter Healthcare Corp., No. 02 C 3283, 2003 WL 22839808, at *3 (N.D. Ill. Nov. 26, 2003) (defendant did not assert privilege until plaintiff attempted to use document to impeach witness at trial); MG Capital L.L.C. v. Sullivan, No. 01 C 5815, 2002 WL 1424560, at *4 (N.D. Ill. July 1, 2002) (full content of document disclosed at deposition); United States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 173 (C.D. Cal. 2001) (recipient studied privileged document for two weeks before alerting producing party of mistake); Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 293 (D. Mass. 2000) (number of people saw privileged document; “the scope of the disclosure in this case is dramatic”); F.C. Cycles Int’l, Inc. v. Fila Sport, S.p.A., 184 F.R.D. 64, 78 (D. Md. 1998) (document “worked its way into the fabric of the case” through use at two depositions; “[i]t thus, this factor compels a finding of waiver”); Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 414 (D.N.J. 1995) (disclosure was complete based on substantive arguments made by recipient in support of its position on motion to dismiss); Central Die Casting & Mfg. Co. v. Tokheim Corp., No. 93 C 7692, 1994 WL 444796, at *5 (N.D. Ill. Aug. 15, 1994) (document incorporated in motion for summary judgment); In re Recombinant DNA Tech. Patent & Contract Litig., 30 U.S.P.Q.2d 1881, 1908 (S.D. Ind. 1993) (waiver was appropriate because several privileged documents were marked as deposition exhibits and used extensively during the testimony of at least one witness); F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991) (recipient was given three opportunities to learn contents of letter; “any order issued by the Court would have only limited effect; it could not force NBNE to forget what has already been learned”); Bud Antle, Inc. v. Grow-Tech Inc., 131 F.R.D. 179, 183 (N.D. Cal. 1990) (document was fully disclosed both during and after document inspection; during inspection, attorney made notes regarding content of document and then incorporated them into letter to client describing content and legal implications of it); Baxter Travelon Labs., Inc. v. Abbott Labs., 117 F.R.D. 119, 120 (N.D. Ill. 1987) (defendant quoted and attached copies of disputed document to court files on three occasions over three-month period without objection); see also Kansas City Power & Light Co. v. Pittsburgh & Midway Coal Mining Co., 133 F.R.D. 171, 172–73 (D. Kan. 1989) (despite defendant’s contention that it relied extensively on privileged document in preparing amended complaint and at depositions, the record did not reflect that the document was crucial to either of these activities).

76. In re Grand Jury Investigation, 142 F.R.D. 276, 281 (M.D.N.C. 1992) (documents had not been shown to witnesses, experts, or the grand jury itself); see also Monarch Cement Co. v. Lone Star Indus., Inc., 132 F.R.D. 558, 560 (D. Kan. 1990) (disclosure limited to defendant’s attorneys).

77. See In re Grand Jury Investigation, 142 F.R.D. 276, 281 (M.D.N.C. 1992) (disclosure deemed “complete” solely because privileged document was produced to government investigator); Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc., 116 F.R.D. 46, 51–52 (M.D.N.C. 1987) (disclosure deemed “complete” solely by virtue of document’s production and without any showing that document had been used or relied upon by producing party); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 330 (N.D. Cal. 1985) (disclosure deemed “complete” because receiving party “must have” learned of the content of privileged documents after they were produced).
the discovery context) to alert their opponent of the mistake and then refrain from reviewing the document until the waiver issue is resolved. The ABA’s Model Rules of Professional Conduct currently require attorneys who receive privileged documents in circumstances in which they “know or reasonably should know” of a mistake to notify the sender. By requiring prompt notice of a perceived mistake, the model rule permits the producing party to seek relief before the recipient can justifiably rely upon the document’s availability in any meaningful sense (and certainly before it becomes woven into the fabric of the case). Several state bar associations, through rules and formal ethics opinions, impose additional obligations in these circumstances such as requiring the recipient to refrain from reviewing the document and to return it upon request. These additional

78. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2002). The comment notes that the recipient may return the document unread, but that this is a matter of personal choice in the absence of applicable law requiring her to do so. Id. cmt.3. This rule has been adopted by Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Montana, Oregon, Washington, and Wyoming (Links to the various states’ rules of professional conduct are available on the American Bar Association’s website at http://www.abanet.org/cpr/links.html.).

79. New Jersey’s rules of professional conduct provide that a “lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.” N.J. RULES OF PROF’L CONDUCT R. 4.4(b) (2004). The same or similar outcomes are reached in other states through ethics opinions. See Ethics Comm. of the Colo. Bar Ass’n, Formal Op. 108 (2000), available at http://www.cobar.org/group/display.cfm?genid=1830 (attorney who receives documents that are facially privileged must notify sender upon discovering the error unless she knows the sender has intentionally waived privilege; attorney who knows of inadvertence before reviewing the documents must, in addition to giving notice, refrain from examining it and “abide by the sending lawyer’s instructions as to their disposition”); Ky. Bar Ass’n, Formal Op. KBA E-374 (1995), available at http://www.kybar.org/Default.aspx?tabid=30 (attorney who receives materials under circumstances in which it is clear that they were not intended for her should “refrain from examining the materials, notify the sender, and abide by the instructions of the sender regarding the disposition of the materials”); Ethics Comm. of the N.H. Bar Ass’n, Practical Ethics Articles (June 23, 1994), available at http://www.nhbar.org/pdfs/PEA6-94.pdf (attorney who receives materials that are facially privileged should not examine them, should notify the sender, and should abide by her instructions as to disposition; attorney who reads materials before discovering mistake may use the information contained therein in most circumstances but should notify the sender under most circumstances that the information has been received and read); Ethics Comm. of the N.C. Bar Ass’n, Op. RPC 252 (1997), available at http://www.ncbar.com/ethics/ethics.asp?id=252 (attorney in receipt of materials that appear on their face to be the subject of the attorney-client privilege that were inadvertently sent to her should refrain from examining them and return them to the sender); Or. State Bar Ass’n, Formal Op. 2005-150 (2005), available at http://www.osbar.org/docs/ethics/2005-150.pdf (attorney who receives document that she should know from the context is privileged and inadvertently produced should notify producing party and follow any instructions regarding disposition); Ethics Advisory Comm. of the Utah State Bar Ass’n, Op. 99-01 (1999), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_99_01.html (attorney who receives privileged communication should refrain from reading the document beyond that which is necessary to determine privileged status, notify sender, and then follow instructions regarding disposition or refrain from using them until a ruling can be obtained regarding the consequence of disclosure); see also Legal Ethics Comm. of the D.C. Bar, Formal Op. 256 (1995), available at http://www.dcbars.org/for_lawyers/ethical/legal_ethics/opinions/opinion_256.cfm (An attorney who receives documents with no indication that disclosure was inadvertent may retain and use the disclosed information; attorney who receives documents and who has not reviewed them before learning of inadvertence should “seek guidance from the sending lawyer and, if [she] confirms…inadvertence…and requests return of the material, unread, the receiving lawyer should do so.”); Ill. State Bar Ass’n Advisory Op. No. 98-04 (1999), available at http://www.isba.org/ethicsopinions/98-04.asp (attorney may use information contained in inadvertently disclosed document so long as she does not have notice of mistake before doing so; attorney who knows of an inadvertent transmission before reviewing any such document should return it to the sender without any examination); Supreme Court of Ohio Bd. of Comm’rs on Grievances & Discipline, Op. No. 93-11 (1993), available at http://www.sconet.state.oh.us/BOC/Advisory_Opinions/display.asp (attorney who conducts public records search and discovers privileged memorandum may read but has an ethical duty to notify opposing counsel). Notably, the Maine Bar Association withdrew an earlier formal opinion finding that an attorney could use inadvertently disclosed documents to the extent permitted by substantive law but that she must notify the producing
obligations, although of relatively recent origin, reflect increased interest within state and local bar associations to promote professionalism and trust among attorneys. The one-two punch of these ethical obligations should lead to fewer instances in which the receiving party will be able to review an inadvertently produced document in any meaningful sense before alerting the producing party of the mistake—thus reducing the number of situations in which waiver is found because the disclosure is "complete."

4. Time to Correct Mistake

The courts also consider the time taken by the producing party to seek corrective measures once it learns of a mistake. For purposes of determining whether the producing party unnecessarily delayed efforts to correct the mistake, the critical point in time is the date on which it learns of the mistake rather than the date on which it produced the document (although some courts incorrectly use this latter point in time for purposes of performing the waiver analysis). This factor tips in favor of preserving the privilege so long as the producing party acts within one month of learning of its mistake—usually by demanding return of the document or filing a motion for a protective order (although most cases involve efforts to correct the problem almost immediately).


when the producing party delays beyond this period or otherwise equivocates regarding the privilege.\textsuperscript{82} These outcomes are not surprising: prompt action demonstrates an interest in preserving the privilege and also reinforces the argument that a simple mistake has been made; delay in seeking a remedy, on the other hand, implies indifference to confidentiality.

5. Fairness

The courts also consider an overarching principle of fairness in determining whether there has been a waiver, taking into consideration the importance of the privilege (both to the producing party and to society in general) and the impact on the receiving party from loss of evidence if the privilege is upheld.\textsuperscript{83} This factor tips

in relation to the court’s evaluation of the other factors (with the court frequently using this factor to summarize its findings with respect to the other four). This factor does not tip the balance in favor of waiver simply because the pertinent document can be characterized as a “hot” document, as “relevance” would nearly always tip in favor of waiver. The absence of any real content to this factor (and the absence of any meaningful impact on the waiver analysis) suggests that it is an irrelevancy.

C. The Lenient Approach

Under the lenient approach, the inadvertent disclosure of a privileged document does not result in waiver so long as the client did not intend this result. The
client's subjective intention to preserve confidentiality trumps the objective fact of disclosure. As one court explained:

We are taught from the first year in law school that waiver imports the "intentional relinquishment or abandonment of a known right." Inadvertent production is the antithesis of that concept...[The producing party's] lawyer...might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege.88

The lenient approach is justified on the ground that only the client can waive the privilege and that a mistake by her attorney is insufficient in this regard,99 that client apprehension about disclosure to an attorney will be lessened because of the

88. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982) (quoting United States ex rel. Ross v. Franzen, 668 F.2d 933, 941 (7th Cir. 1982)). Although this passage is frequently quoted by courts embracing the lenient approach, it is frequently criticized because it equates the loss of an evidentiary privilege (which can occur without knowledge of the privilege or any intent to relinquish it) with waiver of a constitutional right (which requires a knowing and intentional relinquishment). See supra notes 13, 25. This criticism misses the mark, however, because most implied waiver is preceded by sufficient consideration by the client and her attorney to satisfy the requirements for knowing and intentional waiver.

reduced risk that her statements could come back to haunt her;\textsuperscript{90} and that it is predictable and leads to certain results.\textsuperscript{91} The courts adopting this approach acknowledge that confidentiality cannot be restored following disclosure, but nevertheless reason that the damage can be minimized by prohibiting future use of the document.\textsuperscript{92} These courts also appear concerned about the ethical ramifications of exploiting this type of mistake by an adversary.\textsuperscript{93}

The lenient approach is criticized because of the perceived concern that it will promote laxity (if not outright sloppiness) among attorneys in handling documents and protecting the privilege during discovery.\textsuperscript{94} This concern is overstated, however, because an attorney is motivated to protect the privilege for reasons unrelated to evidentiary principles. First, an attorney is ethically obligated to preserve confidentiality even when she knows that a mistakenly produced document will be returned (an ethical obligation, the violation of which can result in discipline in the absence of harm to the client, that attaches without regard to any evidentiary rule).\textsuperscript{92} Second, an attorney is motivated by the specter of malpractice claims to avoid any mistake that might cause the client to question her competence, particularly when—notwithstanding the return of a document—her adversary gains some insight into the case that may not have otherwise occurred to her in the absence of mistaken production. Although these two problems are contingent on the case going badly, the potential that they could mature into actual problems is always present in the attorney’s mind. Third, apart from these less immediate concerns, an attorney is motivated by sheer competitiveness to review her client’s documents in some


\textsuperscript{91} Berg Elecs., 875 F. Supp. at 263.


\textsuperscript{93} See Lazar v. Mauney, 192 F.R.D. 324, 330 (N.D. Ga. 2000) (characterizing attorneys as unprofessional and dishonest for secretly retaining copy of privileged document inadvertently produced during discovery); Transp. Equip. Sales Corp. v. BMY Wheeled Vehicles, 930 F. Supp. 1187, 1187–88 (N.D. Ohio 1996) (noting that strict approach can lead to sharp practices; attorneys failed to take the “better, and more ethical approach” when they did not contact producing party and inform it of the mistake and then follow the producing party’s instructions regarding the document, citing ABA Formal Opinion regarding handling of inadvertently disclosed documents); cf. Resolution Trust Corp. v. First Am. Bank, 868 F. Supp. 217, 220 (W.D. Mich. 1994) (“In this Court’s judgment, common sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the plaintiff’s attorneys to notify defendant’s counsel of his office’s mistake.... While lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel’s office where something so important as the attorney-client privilege is involved.”).


\textsuperscript{95} Attorneys in every state are obligated to preserve client confidences irrespective of whether a particular confidence is relevant to the resolution of a dispute. Rule 1.6(a) of the ABA’s Model Rules of Professional Conduct broadly prohibits attorneys from revealing “information relating to the representation of a client unless the client gives informed consent.” MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007), available at http://www.abanet.org/cpr/mrpc/rule_1_6.html. The Comment reiterates that a “fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” Id. cmt. 2, available at http://www.abanet.org/cpr/mrpc/rule_1_6_comm.html. Internet links to the various state rules of professional conduct are available at http://www.abanet.org/cpr/links.html.
fashion prior to production to preserve the information edge that every attorney seeks with respect to the facts and underlying evidence.

But, even if a lesser standard would cause some attorneys to be less vigilant then they otherwise might (perhaps because the client cannot afford, or more likely does not want to pay, the high price of pre-production review) the question arises—"so what?" If the admonition contained in Rule 1 of the Federal Rules of Civil Procedure is to be taken seriously, and the courts are truly interested in promoting the "just, speedy, and inexpensive determination of every action," they must be willing to consider the cost-impact to clients from litigation activities that require significantly more effort than perhaps is justified given the relation of the activity to the resolution of the case. While document discovery may occasionally unearth a "smoking gun" that tips the balance at trial, more typically the parties will slog through thousands of documents at great expense when perhaps only a few hundred will see the light of day during any stage of the litigation and only a handful will make a difference at trial.

The real defect in the lenient approach is that it is entirely open-ended and permits the producing party to raise the privilege long after production and incorporation into the fabric of the case. The rule does not provide any safety valve for situations in which the producing party failed to interpose the privilege within a reasonable time after learning of its mistake. Indeed, the lenient approach would permit the producing party to raise the privilege at trial as the pertinent document is being handed to a witness—leading to concerns of tactical "disclosure" with the full expectation of reclaiming the document after an adversary has digested its contents.

III. LATCHING ONTO LACHES—A SIMPLE TEST FOR WAIVER

The harshness of the strict approach, the vagaries of the middle approach, and the open-endedness of the lenient approach suggest that alternative solutions should be considered. One that eliminates several of these problems is a rules-based standard that focuses on the time taken by the producing party to assert the privilege upon learning of a mistake. Such a rule would be consistent with the maxim that one who is slow to assert her rights should be precluded from doing so when it would prejudice another and the common sense notion that, until a document has been

96. The extent to which the lenient approach might justify assertions of privilege long after production (such as at trial) is difficult to know because there are not any cases involving this precise procedural posture. On its face, the approach would apply and would allow the producing party to reclaim the document when it is literally being handed to a witness during cross examination. The outcome in such a scenario is difficult to predict because, ironically, the lenient approach cases typically involve parties that attempted to avoid production and that would likely have satisfied the requirements of the middle approach if the pertinent court applied that standard. See Lazar v. Maune, 192 F.R.D. 324 (N.D. Ga. 2000) (attorney reviewed documents prior to production but missed a three-page privileged document in production totaling 996 pages; attorney sought return of the document on same day she discovered the mistake); Berg Elecs., Inc. v. Molex, Inc., 875 F. Supp. 261 (D. Del. 1995) (attorney reviewed documents prior to production and demanded their return when recipient sought to use a document at deposition).

97. Laches is an affirmative defense that may be interposed to preclude the assertion of a claim. It is generally defined as slackness or carelessness toward duty or opportunity. It is defined as the neglect or delay in bringing suit to remedy an alleged wrong that, taken together with lapse of time and other circumstances, causes prejudice to an adverse party and operates as an equitable bar." 27A AM. JUR. 2d Equity § 140, at 618 (1996). Laches ordinarily requires "an unreasonable lack of diligence by the party against whom the defense is asserted'
worked into the fabric of a case, there is not any principled reason to prohibit the producing party from reclaiming it. Moreover, such a rule would promote uniformity and predictability and would also lead to the same outcome in nearly all the cases in which the fact-intensive middle approach is currently used—thus implying that the same outcome can be reached through a far simpler method.

A. The Text for a Suggested Rule

The text for a rule along these lines, which would logically follow the general rule regarding claims of privilege or immunity in Rule 26(b)(5), would provide:

A party or nonparty does not lose a privilege or protection for trial-preparation material with respect to documents disclosed or produced pursuant to Rules 26, 33, 34 or 45 so long as the party or nonparty asserts the privilege or protection within ten days of actual notice of such disclosure or production, except that:

(i) A party or nonparty that receives actual notice in connection with a motion must assert the privilege or protection not later than two days after the last brief directed to the motion is filed with the court; or

(ii) A party or nonparty that receives actual notice in connection with a proceeding (including depositions, hearings or trial) must assert the privilege or protection before the document is used in any material way.

If a party or nonparty asserts a privilege or protection within the time prescribed in this rule, the document and all copies shall be returned to the party or nonparty asserting such privilege or protection. This rule does not prohibit a party from objecting to a claim of privilege or protection on the ground that it is untimely under this rule.

The suggested rule would permit parties and nonparties to reclaim inadvertently produced documents in most circumstances so long as the pertinent privilege or immunity is raised within ten days of actual notice of the mistake. For example, a producing party that learns of a mistake while reviewing its own documents in preparation for a deposition would have ten days to inform the other parties of the mistake and formally assert the privilege or immunity. The other parties would then be required to return the document. Likewise, a producing party that is notified by another party regarding a potential mistake would have ten days from receipt of such notice to assert the privilege. If another party believes the producing party failed to assert the privilege or immunity in a timely fashion, the suggested rule preserves the ability to challenge the continued application of the privilege.

A ten-day window for asserting a privilege or immunity is consistent with the time allowed for asserting such claims in an analogous state rule and should be sufficient to accommodate the producing party’s interest in having enough time to investigate the situation after receiving notice of a potential problem. Indeed, ten

and ‘prejudice arising therefrom.’” Roberts & Schaefer Co. v. Dir., Office of Workers’ Comp. Programs, 400 F.3d 992, 997 (7th Cir. 2005) (quoting Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999)).

98. The producing party would not have any incentive to delay notification because such delay would increase the potential that the pertinent document had been read, analyzed, and distributed to others.

99. Texas adopted a similar rule for asserting after-the-fact claims of privilege and immunity with respect to inadvertently produced documents. See Tex. R. Civ. P. 193.3(d) (party may assert claim of privilege within ten days of discovery of mistaken production).
days appears to be more than adequate given the speed with which the producing party typically raises the privilege upon learning of a mistake, as reflected in the cases reviewing this factor under the middle approach. Moreover, the ten-day period should accommodate the receiving party’s interest in obtaining a prompt decision so that it can continue preparing its case for trial knowing—one way or the other—whether the pertinent document will be available for future use. A receiving party that notifies a producing party of a mistake should be able to assume, after two weeks pass without any response, that the document was either intentionally produced or that the producing party is indifferent to confidentiality. The suggested rule thus presumes prejudice to other parties when the producing party fails to assert the privilege within ten days.

The time in which the producing party must assert the privilege is different, however, when failure to act promptly could make corrective action difficult if not impossible. For example, a prompt assertion of the privilege is appropriate when the producing party receives a motion or responsive brief that relies in some way upon the content of a privileged document. The producing party should be expected to act quickly because, at a minimum, the document is contained in the clerk’s file and thus available to the public. Delay in this circumstance increases the likelihood that the document will be reviewed by a member of the public before an order sealing the document can be entered, thus undermining the effectiveness of relief. Perhaps more importantly, the suggested rule recognizes that increasing numbers of motions are decided without oral argument and are therefore ready for consideration immediately after the moving party files its reply brief. Although most courts cannot (and plainly do not) decide motions instantaneously, a ten-day window may prove too long in those situations in which the court can decide, and is prepared to decide, quickly. In this circumstance, the court may rely, directly or indirectly, on an otherwise privileged document in reaching a decision before the ten-day period expires. To avoid the problems that would arise if the privilege were thereafter asserted, the suggested rule requires the producing party to act within two days of the filing of the last brief. Given the intense focus litigants place on motions and responsive filings, the two-day period should be entirely workable.

A more immediate claim of privilege is also appropriate when the producing party learns of its mistake in “real time,” such as at a deposition or hearing or at trial. The producing party should be expected to act immediately because, in the absence of action, the document will be used as evidence or as a springboard for other evidence. If the producing party fails to act, and thus allows a document to be used in either of these fashions, it would be extremely difficult (if not impossible) to undo the effects on the evidentiary record. The situations in which this would apply are modest, however. A witness who is permitted to testify at a deposition

100. See supra notes 81-82.

101. Because the time for asserting the privilege is ten days, any intervening Saturday, Sunday or national holiday would be excluded for counting purposes and a ten-day period for taking action becomes, in effect, a two-week period. See Fed. R. Civ. P. 6(a).

102. Although an actual prejudice standard could be used, such a standard is inherently fact-intensive and would unnecessarily increase the time and effort necessary to resolve the waiver issue. Moreover, the receiving party would frequently have difficulty demonstrating prejudice except when a document has been used in some material way at a deposition or hearing or at trial.
regarding the content of a privileged document would cause waiver under existing principles and so the requirement that the producing party assert the privilege immediately does not impose any greater obligation than that which already exists.

Nor is there any likelihood that this rule would have a significant impact on trial proceedings. The requirement in most judicial districts that the parties prepare pretrial statements identifying the documents they may use during their respective cases-in-chief means that most privileged documents will be identified before trial and reclaimed consistently with the time requirements of the suggested rule. Thus, the ten-day period should be adequate in all but the unusual situation in which (a) a privileged document is used for impeachment purposes, (b) the document was never used for any purpose at any earlier stage of the case, and (c) the document was not identified on the party’s exhibit list because it did not anticipate using it during its case-in-chief. The number of cases in which these three circumstances coalesce should be few.

The phrase “used in a material way” is intended to distinguish the situation in which a witness is asked substantive questions regarding the content of a document (why did you say this, what were you trying to accomplish in saying that) as opposed to predicate questions regarding the applicability of the privilege (who wrote the document, to whom was it sent). Any rule or standard necessarily requires some sort of materiality threshold to ensure that the mere marking of a document as an exhibit, without more, does not result in a loss of the privilege.

An “actual notice” requirement is used to avoid potential arguments that the producing party possessed constructive notice of its mistake by virtue of the continuing opportunity to review its documents during the litigation process. Such a requirement would also motivate the other parties to inform the producing party of a mistake because, in the absence of such notice, the receiving party will be unable to use the document without concern that the producing party will assert the privilege once its availability comes to light. And, perhaps most importantly, an actual notice requirement eliminates the potential for arguments that notice as to one mistake constitutes constructive notice as to all others. As such, a producing party would not be required, upon learning of one mistake, to review the remainder of its production to determine whether there are other, similar mistakes.

The rule provides expressly that the receiving parties can challenge the timeliness of the claim (although this would be implicit in the absence of such language). The actual notice requirement should limit the number of situations in which there is a credible claim that the producing party failed to act within the required period. An actual notice requirement should result in the creation of a clean paper record regarding (a) the unprompted assertion of the privilege by the producing party or (b) notice of a mistake from a receiving party followed by assertion of the privilege by the producing party, such that any factual disputes regarding these matters will be few and easily resolved.\textsuperscript{103}

103. The suggested rule does not address whether a producing party that reclaims a privileged document can preclude a receiving party from pursuing evidence or making arguments on the ground that the receiving party is exploiting the content of the reclaimed document—\textit{in effect}, a civil analogue to the fruit of the poisonous tree doctrine.

On the one hand, reclaiming a document is hollow relief if the receiving party can subsequently use the
B. The Advantages of a Rules-Based Standard for Waiver

A rules-based standard is preferable to a common law standard for two reasons: it provides a uniform standard for use by the various district courts (thus eliminating the three competing approaches currently used in federal question cases) and it permits a common standard for use by the district courts in federal question and diversity cases (thus eliminating the potential for confusion regarding the applicable law when evaluating waiver claims). These alone justify a single standard.

First, a rules-based standard may be the only means to a unified standard. The common law experience demonstrates that there is not an obvious solution for questions of waiver arising out of document discovery, as evidenced by the three approaches embraced by the federal courts. The three approaches implicitly acknowledge that a choice must be made regarding competing alternatives that promote different interests and values. Indeed, the common law experience demonstrates that the selection of a standard frequently varies among judges within the same locality. Three district courts have applied all three approaches at one time or another; two other district courts have applied two of the approaches at one time or another; and district courts within nine circuits have applied different approaches at one time or another.

content to advance a claim or defense. On the other hand, having reclaimed the document (rather than losing the privilege) the producing party should not be allowed to leverage its mistake and argue that an adversary should be prevented from seeking evidence or making arguments in the absence of truly compelling evidence of a causal connection between the mistaken disclosure and the receiving party’s subsequent conduct. Put another way, the receiving party should not be placed in a worse position because of a mistake made by her adversary than she would have been absent the mistake—and all benefits of the doubt should be made in favor of the receiving party. In any event, the producing party’s ability to assert the privilege at subsequent points in the litigation (such as at deposition or trial) should severely limit (if not eliminate) the receiving party’s ability to exploit that which she may have learned from the mistakenly produced document. For an overview of existing case law regarding this “fruits” question, see Robert P. Mosteller, Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity, 81 WASH. U. L.Q. 961 (2003).

104. See supra text accompanying notes 37–96.


107. The district courts in the First Circuit have used the strict and middle approaches; the district courts in the Second Circuit have used the strict, middle, and lenient approaches; the district courts in the Third Circuit have used the strict, middle, and lenient approaches; the district courts in the Fourth Circuit have used the strict and
Moreover, the absence of a uniform rule among the judicial districts is inconsistent with the preference for uniform standards in the Federal Rules of Civil Procedure and can lead to forum shopping. A litigant asserting a federal claim in a two-way document-intensive case in which both parties possess substantial quantities of discovery documents (and for which venue is proper in more than one judicial district, as is frequently the case with respect to entity-litigants), would rationally initiate the lawsuit in a judicial district with common law precedent favoring the lenient approach or, next in line, the middle approach, but, in any event, avoiding any district that is obligated to follow, or which previously followed, the strict approach. In contrast, a litigant asserting such a claim in a one-way document-intensive case would rationally initiate the lawsuit in a judicial district with common law precedent favoring the strict approach.

Second, a rules-based standard would create a uniform standard for resolving waiver issues in federal question and diversity cases. Although state law governs privilege issues in diversity actions,108 district courts frequently rely on federal common law rather than state law to resolve whether there has been any waiver and, if so, the scope of that waiver.109 In fact, the diversity cases in which the district court missed the issue and incorrectly applied federal common law regarding waiver of the privilege outnumber those in which the district court spotted the issue and correctly applied state law.110 This, of course, may or may not affect the ultimate middle approaches; the district courts in the Sixth Circuit have used the middle and lenient approaches; the district courts in the Seventh Circuit have used the strict, middle, and lenient approaches; the district courts in the Eighth Circuit have used the middle and lenient approaches; the district courts in the Tenth Circuit have used the middle and lenient approaches; and the district courts in the Eleventh Circuit have used the strict, middle, and lenient approaches.

108. FED. R. EVID. 501 ("[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."); cf. Gray v. Bicknell, 86 F.3d 1472, 1482 (8th Cir. 1996) (district court committed reversible error in failing to apply Missouri law in diversity action with respect to the issue of whether inadvertent production of privilege document waived the privilege).


resolution of the waiver issue depending on whether the federal common law rule is consistent with (or different from) the pertinent state rule but a uniform federal rule would prevent these sorts of mistakes from occurring.

Moreover, a uniform federal rule would not undermine the policy choice contained in the Federal Rules of Evidence with respect to the application of state privilege law in diversity cases. Congress rejected the privilege rules initially proposed by the Supreme Court for many reasons, but a recurring criticism was the elimination of certain state-created privileges in favor of a limited number of specifically identified federal privileges. The proposed rules did not include, for example, a physician-patient privilege or a newsmen's privilege, and they severely limited the marital communications privilege—all of which were longstanding privileges in many states. The absence of these privileges drew fire from all quarters and ultimately led to Rule 501's deference to state privilege law in diversity cases. Congress concluded that a departure from state law could not be justified and recognized that different privilege rules in state courts and geographically proximate federal courts could lead to substantial forum shopping. Although the suggested rule would displace state privilege law to some extent, the impact would be slight. In fact, the suggested rule would lead to a different outcome in only two situations. The suggested rule would affect those cases in which (a) the pertinent state court applies the middle approach, (b) the producing party did not conduct any pre-production review, (c) the producing party produced a substantial

hand is diversity of citizenship, the Court applies New York privilege law.


See Federal Rules of Evidence: Hearing on H.R. 5463 Before the S. Comm. on the Judiciary, 93rd Cong., 2d Sess., 2 (1974) (opening statement of Sen. Sam J. Ervin) ("I am particularly pleased that the rules on privileges have been deleted because, as submitted by the Supreme Court, they would have substantially and, in many cases, unwisely altered important privileges presently recognized in many jurisdictions.").

S. REP. NO. 93-1277, at 6 (1974) ("The husband-wife privilege drew fire as a result of the conscious decision of the Court to narrow its scope from that recognized under present federal court decisions. The partial doctor-patient privilege seemed to satisfy no one....Much controversy also attended the failure to include a newsmen's privilege.").

See Federal Rules of Evidence: Hearing on H.R. 5463, supra note 112, at 6 (testimony of Rep. William J. Hungate) ("I would say 50 percent of the complaints in our committee related to the section on privileges. It has been the effort of the committee to draw this bill so that the law of privileges is left where we found it."); see also S. REP. NO. 93-1277, supra note 113 ("From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial....Since it was clear that no agreement was likely to be possible....and since the inability to agree threatened to forestall....passage of an entire rules package, the determination was made that the specific privilege rules...should be eliminated...leaving the law in its current condition....").


number of privileged documents, but (d) the producing party asserted the privilege within ten days of receiving notice of its mistake. 117 The suggested rule would also affect those cases in which (a) the pertinent state court applies the lenient approach, but (b) the producing party failed to assert the privilege within ten days of receiving notice of a mistake. 118 Given the variables that must line up before there is a

117 Twelve states have at least one published appellate decision embracing the middle approach. These states are Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, New Mexico, New York, Oregon, and West Virginia. See Floyd v. Coors Brewing Co., 952 P.2d 797, 809 (Colo. Ct. App. 1997), rev'd, 978 P.2d 663 (Colo. 1999) ("We conclude that [the] so-called 'ad hoc' approach is the most appropriate means to determine whether an alleged inadvertent disclosure should be considered a waiver of the privilege...."); Harp v. King, 835 A.2d 953, 967 (Conn. 2003) ("We conclude that the 'middle of the road' or moderate approach strikes the fairest balance between the competing policy interests of preserving confidential attorney-client communications and encouraging the party seeking the benefit of the attorney-client privilege to take care in handling of otherwise privileged material." (footnote omitted)); Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Décor, Inc., 698 So. 2d 276, 279 (Fla. Dist. Ct. App. 1997) ("Believing the better-reasoned rule to be the 'relevant circumstances test,'...we conclude that petitioners did not waive the privilege."); Save Sunset Beach Coal. v. City & County of Honolulu, 78 P.3d 1, 21–23 (Haw. 2003) (formally adopting middle approach and holding that attorney-client privilege was waived due to inadvertent provision of privileged memorandum to expert witness who thereafter listed it as a reference in an environmental impact statement when there was no indication that party took any effort to protect memorandum and, when it learned of the mistake, waited for two months to assert privilege); Dalen v. Ozite Corp., 594 N.E.2d 1365, 1371 (Ill. App. Ct. 1992) (adopting middle approach to resolving question of waiver of work product immunity); JWP Zack, Inc. v. Hoosier Energy Rural Elec. Cooper., Inc., 709 N.E.2d 336, 342 (Ind. Ct. App. 1999) ("We believe the better approach is one that allows the trial court to consider all the relevant circumstances in determining whether the protection of the privilege is to be forfeited because of an accidental disclosure."); Elkton Care Ctr. Assocs. L.P. v. Quality Care Mgmt., Inc., 805 A.2d 1177, 1184 (Md. Ct. Spec. App. 2002) (agreeing "with those courts that have adopted an 'intermediate' (or 'middle') test, under which the court makes a fact specific case-by-case analysis to determine whether the privilege has been waived" and holding that the attorney-client privilege was waived due to inadvertent disclosure of privileged memorandum in production of one-half box of documents when document contained legend indicating its privileged status and attorney failed to assert privilege both before inspection and after it was designated for production); In re Reorg. of Elec. Mut. Liab. Ins. Co., 681 N.E.2d 838, 841 (Mass. 1997) ("[A] client may be deemed to have met the burden of establishing that a privileged document exists and no waiver has occurred if adequate steps have been taken to ensure a document's confidentiality....Where it can be shown...that reasonable precautionary steps were taken, the presumption will be that the disclosure was not voluntary and therefore unlikely that there has been a waiver."); Hartman v. El Paso Natural Gas Co., 763 P.2d 1144, 1152 (N.M. 1988) (adopter middle approach to resolving question of waiver following the inadvertent production of documents during discovery); N.Y. Times Newspaper Div. of the N.Y. Times Co. v. Lehrer McGovern Bovis, Inc., 752 N.Y.S.2d 642, 645–46 (N.Y. App. Div. 2002) ("Disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued."); Goldsborough v. Eagle Crest Partners, Ltd., 838 P.2d 1069, 1073 (Or. 1992) ("A court need not necessarily conclude that the lawyer-client privilege has been waived when a document has been produced during discovery. Factors to be considered by the court may be whether the disclosure was inadvertent, whether any attempt was made to remedy any error promptly, and whether preservation of the privilege will occasion unfairness to the opponent."); State ex rel. Allstate Ins. Co. v. Gaughan, 508 S.E.2d 75, 95 (W.Va. 1998) ("We, too, believe that the... 'middle test' strikes the proper balance in determining on a case-by-case basis whether or not the inadvertent disclosure of attorney-client privileged communication constitutes a waiver of the privilege.").

118 Ten states have at least one appellate decision, court rule, or evidence rule embracing the lenient approach. These states are California, Louisiana, Maine, Michigan, Montana, New Jersey, North Dakota, Texas, Wisconsin, and Utah. See State Comp. Ins. Fund v. WPS, Inc., 82 Cal. Rptr.2d 799, 805 (Cal. Ct. App. 1999) ("[W]e hold that 'waiver' does not include accidental, inadvertent disclosure of privileged information by an attorney."); Hebert v. Anderson, 681 So. 2d 29, 31–32 (La. Ct. App. 1996) ("The letter from counsel to the doctors is subject to the attorney-client privilege....The inadvertent disclosure of this communication by defendants' counsel does not constitute a waiver of that privilege."); Corey v. Norman, Hanson & Detroy, 742 A.2d 933, 941 (Me. 1999) ("We agree with the Superior Court and its adoption of the common sense rule set out in Mendenhall. Underlying this rule is the notion that the client holds the privilege, and that only the client, or the client's attorney..."
difference in the outcome between the application of state privilege law and the application of the suggested rule, no principled basis exists to reject the suggested rule simply because it can displace state law in some limited situations. The state-created privilege (whether attorney-client, husband-wife, doctor-patient) would still be recognized, but with only a modest difference in application of waiver principles in the event of a mistake during document discovery.\(^\text{119}\)

C. The Advantages of the Particular Rule Suggested in This Article

The rule suggested in this Article possesses several advantages, many of which are present in one but not all of the existing approaches. First, the suggested rule would be simple to apply and lead to predictable results. It is similar in this regard to the strict and lenient approaches that focus on the objective fact of disclosure and the client’s subjective intent to waive the privilege, respectively. The suggested rule requires resolution of only two factual issues: the date on which the producing party received actual notice of a mistake and the date on which it asserted the privilege. The parties should rarely disagree about these easily verified facts, but—when they do—the district court will be able to resolve the dispute promptly following the receipt of fairly truncated evidentiary submissions.

acting with the client’s express authority, can waive the privilege. The rule focuses on the intent of the parties to determine whether the disclosure was indeed inadvertent.’”); Leibel v. Gen. Motors Corp., 646 N.W.2d 179, 186 (Mich. Ct. App. 2002) (“[T]o constitute a valid waiver, there must be an intentional, voluntary act or ‘true waiver.’ Thus, a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected.”) (quoting Franzel v. Kerr Mfg. Co., 600 N.W.2d 66 (1999))); PacifiCorp v. Dep’t of Revenue, 838 P.2d 914, 919 (Mont. 1992) (“[T]he mere inadvertent production itself is not enough to establish voluntary relinquishment of a known right....Because PacifiCorp did not voluntarily relinquish a known right, an implied intention to waive the privilege cannot be found.”) (citations omitted)); Schillaci v. First Fid. Bank, 709 A.2d 1375, 1381 (N.J. Super. Ct. App. Div. 1998) (release of privileged memorandum results in waiver only when it is “knowing and intentional rather than inadvertent”); Farm Credit Bank of St. Paul v. Huether, 454 N.W.2d 710, 719 (N.D. 1990) (construing North Dakota evidence rule as precluding finding of waiver due to inadvertent production of documents because client did not have an “opportunity to claim the privilege”); Warrantech Corp. v. Computer Adapters Servs., Inc., 134 S.W.3d 516, 525 (Tex. App. 2004) (holding that because Texas Rule of Civil Procedure 193.3(d) authorizes producing party to claim privilege and retrieve document so long as it does so within ten days of becoming aware of mistake, “a party who fails to diligently screen documents before producing them does not waive a claim of privilege.”); Harold Sampson Children’s Trust v. Linda Gale Sampson 1979 Trust, 679 N.W.2d 794, 803 (Wis. 2004) (“[A] lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request. We hold that only the client can waive the attorney-client privilege....”)

\(^{119}\) A related issue involves the procedure for promulgating such a rule. The Rules Enabling Act authorizes the Supreme Court to prescribe rules of practice and procedure and rules of evidence for use in the district courts but requires the Supreme Court to submit any such rules to Congress for its consideration. 28 U.S.C. §§ 2072(a), 2074(a) (2000). Any such rule becomes effective seven months later unless Congress formally acts to amend or abolish it. Id. § 2074(a). The Rules Enabling Act alters this procedure slightly when a rule creates, abolishes or modifies an evidentiary privilege, in which circumstance the rule does not become effective unless formally approved by Congress through legislation. Id. § 2074(b). The amendment to Rule 26(b)(5) suggested in this Article would probably not require formal approval by Congress as it does not alter the privilege but rather establishes a standard for resolving the issue of waiver. Moreover, the suggested rule is not more invasive than an earlier, 1993 amendment to the rule requiring the producing party to prepare a log identifying documents withheld on the ground of privilege or immunity and indicating, in the Advisory Committee Notes, that failure to do so “may be viewed as a waiver of the privilege or protection”—an amendment implemented without formal congressional approval and for which there has not been any objection or concern. For a description of the rule-making process, see Thomas E. Baker, An Introduction to Federal Court Rule Making Procedure, 22 TEX. TECH. L. REV. 323 (1991).
Second, the suggested rule would promote equitable results by reducing the number of instances in which the receiving party will be able to claim—credibly and fairly—that it would be prejudiced from the loss of a document. A producing party that discovers a mistake and seeks to reclaim a document before it has been worked into the fabric of a case cannot, as a consequence of doing so, cause any hardship for the receiving party. Similarly, a receiving party that recognizes a mistake but fails to alert the producing party of the problem cannot fairly complain when the producing party ultimately seeks to reclaim the document because any “prejudice” would be entirely of its own making. The suggested rule should reduce (if not eliminate) situations in which the receiving party will be prejudiced by the producing party’s ability to reclaim a document.

Third, the suggested rule would generate the same outcome regarding waiver as that generated by the fact-intensive middle approach—thus permitting substantial cost savings without sacrificing any accuracy in decision making. In fact, the suggested rule would have generated the same outcome in most of the cases in which the district court utilized the middle approach. The significance of this cannot be overstated: the suggested rule would generate substantial cost savings to the parties with respect to pre-production review, as well as post-production motion practice, without sacrificing any accuracy in decision making in the event of a mistake.

Fourth, the suggested rule would harmonize the emerging ethical standard regarding the handling of inadvertently produced documents with the evidentiary rules regarding waiver of the privilege. An attorney should not feel whipsawed between an obligation imposed by a state bar association and an opportunity for tactical gain that is implicitly authorized by the evidentiary rules. The suggested rule makes the evidentiary rule consistent with the ethical standard and thus better ensures that attorneys can fulfill their obligation of fair play as well as their obligation of zealous representation.

CONCLUSION

The potential loss of a privilege or immunity due to the inadvertent production of a document is a problem that haunts litigants in nearly all civil cases—and which will haunt increasing numbers of litigants as information is more easily stored in computers and related devices. The drafters of the federal rules plainly envisioned that document discovery would play an integral role in investigating claims and defenses and, ultimately, preparing cases for trial. They could not have anticipated (much less desired) that litigants would become bogged down by the time-consuming and expensive process of reviewing documents for privilege—a task that frequently dwarfs the time and expense associated with the actual trial of a case. The rule suggested in this Article does not solve all the problems associated with document discovery in civil cases, but it does address a recurring problem for which a fix is available and should be implemented.
By focusing on the time taken by the producing party to seek corrective action upon learning of a mistake, litigants would be liberated from the obligation to review documents before production and given the flexibility to review them (or not) in relation to the stakes involved and their ability to pay.

This could prove useful in those cases in which there are extraordinary quantities of documents that are within the universe of potentially relevant documents but little concern that privileged documents might be lurking in them. This could prove equally useful in those cases in which the parties simply cannot afford to pay lawyers to review documents prior to production solely for the purpose of culling the limited number that may be privileged.

Moreover, the courts would be liberated from the burdensome responsibility of deciding motions regarding waiver in the context of a motion to compel or a motion for a protective order. The courts would simply be required to resolve two factual issues: when the producing party learned of the mistake and when the producing party asked to have the document returned. These factual issues could be resolved quickly and efficiently following the submission of straightforward memoranda from the parties.