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Technology's Triple Threat to the Attorney-Client Privilege

Paula Schaefer

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I. Introduction

I grew up hearing my mom's stories about the inner workings of a small law firm where she worked as a legal secretary in the late 1960's. Attorneys met with clients behind closed doors, talked with them on the phone, and sometimes spoke with them on the steps of the courthouse in the town square. Secretaries were called into attorneys' offices to take shorthand on steno pads. They then sat down at typewriters and prepared letters and legal documents using carbon paper sandwiched between pieces of white paper. I picture something out of *Mad Men*, but with less drinking.

In law school in the mid-1990's, I remember one classmate with a cell phone and only a few others with laptops. While I was clerking in 1996, court employees were provided their first email accounts. Some of the judges resisted the change, though, and asked their secretaries to continue hand-delivering draft opinions to the other judges' chambers. In my first year at a multinational law firm in 1997, the firm did not have external email. That same year, I prepared my first privilege log, cataloging a two-inch stack of paper documents I had culled from several bankers' boxes of documents in my client's office.

As I type this article on a shiny MacBook Pro that is connected to the world, it is obvious that things have changed. Attorney-client conversations that were once in person or on the phone are now recorded in email, text message, online chat, Skype, and more. Our new technology makes it as simple as the push of a button to disseminate information to third parties, whether by forwarding an email or producing documents in discovery. While countless attorneys have embraced new technology, many of them lack the knowledge to protect the attorney-client privilege in the information age.

These issues—volume of recorded communications, ease of dissemination, and lack of knowledge—are today's primary technology-related threats to the attorney-client privilege. Generally speaking, attorney-client communications must be kept confidential to retain their privileged status. In the information age, the volume of recorded attorney-client communications and ease of their dissemination (no carbon paper required) make it more difficult than ever to protect

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against disclosure. Whether that disclosure is intentional or inadvertent, it can result in privilege waiver.

While some perceive that a gap in attorney knowledge about *technology* is a major threat to the privilege, that does not appear to be the case at this time. The perception is that attorneys who use technology without understanding it are putting the privilege at risk by unintentionally revealing confidential information to third parties such as cloud service providers or those who intercept unencrypted email.[1] In short, some fear that an attorney's unwitting compromise of confidentiality through use of technology is resulting in an increased incidence of privilege waiver. But this concern is not playing out in the privilege waiver case law.[2] Inadvertentent disclosures that result in privilege waiver are generally made directly to opposing counsel and can typically be traced to the volume of information and ease of dissemination rather than lawyer misunderstanding of technology and data privacy.[3]

That being said, a lack of knowledge is the third technology-related privilege threat identified in this article. But it is a *legal knowledge* deficit that most often jeopardizes privilege in the information age. Attorneys are not educating their clients regarding the need to avoid intentional disclosures of otherwise privileged information to preserve the privilege. With the growing use of email, blogs, and social media, lawyers must explain to clients the risks of disclosing privileged information in these fora. Further many lawyers do not understand the legal protections they can institute to prevent waiver following the inadvertent disclosures of privileged information that are seemingly unavoidable today. These "legal knowledge" threats to the privilege are reflected in the case law and should be the primary concern for attorneys worried about privilege waiver.

In this article, I explore this triple technology threat to the attorney-client privilege and consider how we can better protect the privilege in the future. Following this introduction, in Part II I consider scenarios in which technology-related factors put the privilege at risk. These situations include purposeful client disclosures with social media, client use of non-private modes of communication

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1. *See, e.g.*, Louise Lark Hill, *Cloud Nine or Cloud Nein? Cloud Computing and Its Impact on Lawyers' Ethical Obligations and Privileged Communications*, 109, 123 (2013) ("From the standpoint of privilege, at issue is whether turning confidential information over to a cloud service provider results in the waiver of attorney-client privilege."); Cindy Wolf, *Lawyers—Do You Encrypt Your Email?*, LAW BITES BLOG (Apr. 26, 2012), http://cindywolfdotcom.wordpress.com/2012/04/26/lawyers-do-you-encrypt-your-email/ (discussing whether email must be encrypted to preserve the attorney-client privilege); *Use Gmail—Waive Privilege?*, 3 GEEKS AND A LAW BLOG, (Aug. 19, 2009), http://www.geeklawblog.com/2009/08/use-gmail-waive-privilege.html.

2. This is not to say that attorneys need not be knowledgeable about technology in order to meet their confidentiality and competence obligations to clients and to fulfill their related professional conduct duties. My point is simply that my research does not reveal privilege waiver rulings based on attorneys' unwitting disclosure of confidences through use of cloud storage, unencrypted email, and the like.

3. *See infra* notes 76-81 and accompanying text.

in the workplace, and attorney inadvertent disclosures. In each setting, I explain how the three identified technology-related threats converge to jeopardize the privilege.

Then, in Part III, I consider the recent efforts by the American Bar Association to address technology and confidentiality. I discuss the August 2012 amendments to the Model Rules of Professional Conduct and examine the extent to which the amendments address the identified technology-related threats to the privilege. Then, in Part IV, I suggest measures that we might take to address the identified threats and analyze the efficacy of such measures. Finally, in Part V, I briefly conclude with thoughts on the keys to our protection of the privilege.

II. Technology's Triple Threat to the Attorney-Client Privilege

The legal definition of the attorney-client privilege has not changed in the technology age. A confidential communication between attorney and client for the purpose of seeking or giving legal advice is privileged information.[4] While privilege can be waived in various ways,[5] the technology-related cause of privilege waiver is disclosure.[6] Disclosure of otherwise privileged information compromises confidentiality, which can result in a judge ruling that the privilege has been waived.[7]

Technology is a cause of privilege waiver in the scenarios that follow. Digging deeper, I will show that volume of recorded attorney-client communications, ease of dissemination, and gaps in knowledge of the law combine to create a new risk of privilege waiver in these areas.

A. Clients, Social Media, and Purposeful Disclosures

A recent bankruptcy case, *In re West*, highlights how simple it is in the information age for clients to compromise the privilege through purposeful disclosures.[8] Sabrina Holme and her attorney, Thomas Ebel, exchanged email messages in which Ms. Holme requested and Mr. Ebel provided legal advice.[9] Ms. Holme later forwarded her attorney's email to Alexandria West with the note: "I'm

4. RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS § 68 (2000) (defining the attorney-client privilege); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (2d ed. 2010) (describing the five key elements of the privilege as: attorney; client; confidential; communication; primary purpose of legal advice or assistance).

5. RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS §§ 77-80 (2000) (attorney-client privilege can be waived by agreement; if disclaimed; by failure to object; through subsequent disclosure; or by putting the attorney's assistance or the communication in issue); RICE, *supra* note 4, at Chapter 9 (discussing privilege waiver).

6. RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS § 79 (2000) (describing waiver through disclosure); RICE, *supra* note 4 at Chapter 6 (describing the confidentiality component of attorney-client privilege).

7. *Id.*

8. *In re* West, No. 11-15594-BFK, 2012 WL 1344220 (E.D. Va. Bkr. Apr. 17, 2012).

9. *Id.* at *3.

doing everything I can—see e-mail from our Attorney."[10] When a third party argued that Ms. Holme's disclosure had waived the attorney-client privilege, the court agreed that the privilege can be waived by disclosure to third parties.[11] The court concluded that "there is no genuine dispute that the privilege was waived" when the client forwarded the email to Ms. West.[12]

All three "threats" to privilege converged in the *West* case—there was a recorded attorney-client communication, it was easily disseminated, and the client, in all likelihood, lacked knowledge of the legal consequences of her disclosure. In the past, when attorney and client communicated primarily in person and by phone, this situation would not have occurred. There would not have been a recorded conversation that could be forwarded in its entirety to a non-client, resulting in privilege waiver. Even when disclosures occurred (in the age of phones and no email) there was not a "paper trail" that so easily evidenced the disclosure and facilitated a third party's waiver argument.

The paper trail—or more accurately, the electronic trail—was long and visible in another recent privilege waiver case, *Lenz v. Universal Music Corporation*.[13] Stephanie Lenz hired counsel to represent her in a lawsuit against Universal Music Corporation and related companies (referred to collectively as "Universal").[14] The underlying dispute began when Ms. Lenz posted to YouTube a short video of her toddler dancing to Prince's song *Let's Go Crazy*.[15] Universal, as the copyright administrator for *Let's Go Crazy*, sent YouTube a notice that Ms. Lenz's use of the song was unauthorized. Following the notice, YouTube removed the video from its website.[16] After successfully seeking to have the video restored to YouTube, Ms. Lenz filed suit alleging that Universal knew or should have known the video was a "self-evident, non-infringing fair use,"[17] and that Universal's actions caused "harm to her free speech rights" and to her "sense of freedom to express herself."[18]

Citing Ms. Lenz's repeated disclosures of privileged information on her blog, in electronic chats, and in email messages to third parties, Universal moved to compel Ms. Lenz's production of documents and testimony withheld on the basis of attorney-client privilege.[19] Universal argued that Ms. Lenz had

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10. *Id.*

11. *Id.* at *5.

12. *Id.* The court concluded that the disclosure did not result in subject matter waiver, reasoning that when a partial disclosure is made for a tactical purpose, subject matter waiver would be appropriate. But the court found no such purpose under the facts of this case. *Id.* at *5-6.

13. Lenz v. Universal Music Corp., No. C 07-03783 JF (PVT), 2010 WL 4286329 (N.D. Cal. Oct. 22, 2010), *objections overruled by* 2010 WL 4789099 (N.D. Cal. Nov. 17, 2010).

14. *Id.* at *1.

15. *Id.*

16. *Id.*

17. 17 U.S.C. § 107 (2012).

18. *Lenz*, 2010 WL 4286329, at *1.

19. *Id.*

waived her privilege claim on the subject matter of these communications by breaching confidentiality.[20] Universal relied upon email messages Ms. Lenz sent to her friend and her mother, as well as a post to her blog regarding (otherwise) confidential communications with counsel about her motive in filing the lawsuit.[21] Defense counsel also cited Ms. Lenz's own words from several Gmail chats regarding legal strategies discussed with counsel.[22] Finally, Universal pointed to Ms. Lenz's disclosures in Gmail chats and in her blog regarding factual allegations in the case. In these communications, Ms. Lenz again shared specifics of conversations she had with counsel, including how counsel would portray Prince's role in the litigation.[23]

The court found that Ms. Lenz voluntarily waived the privilege as to her communications with counsel on these subjects.[24] The court ordered the production of responsive documents previously withheld on the basis of privilege and ordered an additional deposition of Ms. Lenz on these subjects.[25]

These cases highlight the need for counsel to educate clients that privilege waiver can occur through client disclosure of confidential communications.[26] This is true not only for individual clients but also for sophisticated business clients who may post confidential information on their business websites.[27] Voluntary disclosures that compromise confidentiality have always resulted in privilege waiver.[28] But today, given the plethora of easy and public avenues to make those disclosures, counsel must educate clients about the heightened risk to the privilege.

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20. *Id.*

21. *Id.* at *3. Universal argued that these communications revealed that Ms. Lenz was only pursuing the matter because the Electronic Frontier Foundation (EFF), a non-profit digital rights group, was funding the litigation. *Id.*

22. *Id.*

23. *Id.* at *4. For example, Universal cites one Gmail Chat in which Ms. Lenz tells her friend, "Now [my attorney's] kind of hinting that [Universal is] doing this [because] Prince bullied them into it and that there's been ample public proof that he wants everyone targeted, no matter whether they're actually guilty of anything. It's delicious." *Id.*

24. *Id.* at *3-5. In the case of legal strategies, the court found that some of the legal strategies disclosed by Ms. Lenz were irrelevant, and only granted the motion to compel as to certain relevant strategies. *Id.* at *4.

25. *Id.* at *5.

26. *See* John M. Barkett, *The Challenge of E-Communications: Privilege and Privacy*, 38 LITIG. 17, 19 (2011) (encouraging attorneys to "always counsel their clients about the discoverability of information posted on social networking sites.").

27. *See, e.g.*, Kintera, Inc. v. Convio, Inc., 219 F.R.D. 503, 510-13 (S.D. Cal. 2003) (court ruled that company waived work product protection by posting information from confidential affidavits on its website). Although this case addressed the issue of work product waiver rather than privilege waiver, the case turned on the same issue as the privilege waiver cases—client disclosure of confidential information.

28. RICE, *supra* note 4, § 9:28 ("The voluntary disclosure of privilege communications to third parties . . . by the client or the client's authorized agent destroys both the communication's confidentiality and the privilege that is premised upon it.").

Notably, these privilege waivers did not occur because attorneys or clients lacked understanding of the underlying technology; instead, the clients were fully aware that they were using email, Gmail chat, and a blog to communicate information to third parties. These were not Luddites; they were sophisticated consumers of technology. What these clients did not understand, however, was the legal repurcussions of communications, and it is that knowledge gap that led to these privilege waivers.

B. Privilege Waiver through Use of Employer Technology to Communicate with Counsel

The second setting in which privilege is at risk is at the client's workplace. The typical scenario is that a client communicates with counsel using an employer's email, computer, or network, and the employer (consistent with company policy) accesses those communications.[29] The privilege issue often arises when the employee sues the employer, and the employer seeks to use the attorney-client communication as evidence.[30] Though courts use slightly different tests, the existence of the privilege generally turns on whether the employee had a reasonable belief that he was having a confidential, private conversation with counsel in light of the company's computer use policies.[31]

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29. *See, e.g.*, Alamar Ranch, LLC v. Co. of Boise, No. CV-09-004-S-BLW, 2009 WL 36697641 (D. Idaho Nov. 2, 2009) (court found waiver where an employee regularly used her work email to correspond with her attorney, despite being on notice that all emails were stored on the company server and were subject to review by the company).

30. *See, e.g.*, Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010) (in underlying case, employee sues employer for discrimination); Scott v. Beth Israel Med. Ctr. Inc., 847 N.Y.S.2d 436 (2007) (underlying case was related to termination of physician's employment with hospital); Kaufman v. Sungard Invest. Sys, No. 05-CV-1236 (JLL); 2006 WL 1307882 (D.N.J. May 10, 2006) (dispute between employee and former employer). *But see In re* Royce Homes, L.P., 449 B.R. 709 (S.D. Tex. 2011) (trustee argued debtor's key employee could not assert communications were privileged because they were transmitted over debtor's computer and email servers); *In re* Asia Global Crossing, Ltd., 322 B.R. 247 (S.D.N.Y. 2005) (trustee argued that insiders waived privilege as to communications with counsel sent over employer's email system).

31. *See, e.g., Asia Global Crossing*, 322 B.R. at 257-58 (describing its four-factor test: (1) does company policy ban personal or other objectionable use; (2) does the company monitor computer or email use; (3) do third parties have a right of access to computer or emails; and (4) was the employee notified of the use and monitoring policies?); Degeer v. Gillis, No. 09 C 6974, 2010 WL 3732132, at *9 (N.D. Ill. Sept. 17, 2010) (describing its five-factor test: (1) does employer policy ban personal use of email; (2) does employer monitor computer or email use; (3) does employer have access to computer or emails; (4) was employee notified of policies; and (5) how did employer interpret its computer usage policy?); Leor Exploration & Prod. LLC v. Aguiar, Nos. 09-60136-CIV, 09-60683-CIV, 2009 WL 3097207, at *4-5 (S.D. Fla. Sept. 23, 2009) (after applying the *Asia Global Crossing* four-factor test to the facts, court concluded that Aguiar did not show a reasonable expectation of privacy in emails transmitted through Leor's server). *See also* RICE, *supra* note 4, § 6:6 (discussing factors considered in determining the objective reasonableness of the client's expectation of confidentiality).

The case *Holmes v. Petrovich Development Company, LLC* presents a common scenario.[32] From her workplace email account at Petrovich Development Company, Gina Holmes contacted an attorney about a possible claim of pregnancy discrimination.[33] When Ms. Holmes filed suit a year later, Petrovich Development wanted to use Ms. Holmes' communications with counsel to show that Ms. Holmes did not suffer severe emotional distress and that she only filed the action at the urging of her attorney.[34] The trial court found that the emails were not privileged and allowed them to be introduced as evidence at trial.[35] After Petrovich Development prevailed at trial, Ms. Holmes appealed.[36]

The appellate court agreed with the trial court that the communications between Ms. Holmes and her attorney were not confidential, as required for an attorney-client privileged communication under California law.[37] The appellate court found that the following three facts were key: (1) Ms. Holmes' knew that company policy prohibited employees using office computers to send or receive personal email; (2) the company warned Ms. Holmes that it would monitor computers for compliance with this policy; and (3) Ms. Holmes was advised that employees have "no right of privacy" in personal information and messages maintained on company computers.[38]

Although the *Holmes* case involved an employer-provided email account, these privilege arguments also arise in other circumstances. For example, documents created on an employer's computer[39] and even email exchanged with counsel through a password protected account (such as Gmail) accessed from the employer's network[40] may not be privileged depending upon the employer's policy and the other facts of the case.

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32. 191 Cal. App. 4th 1047 (2011).

33. *Id.* at 1056.

34. *Id.* at 1067.

35. *Id.* at 1073.

36. *Id.* at 1051.

37. *Id.*, citing CAL. EVID. CODE § 952 (providing that a "confidential communication between client and lawyer" is "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which . . . discloses the information to no third persons other than those who are present to further the interest of the client . . or those to whom disclosure is reasonably necessary for the transmission of the information. . . .").

38. *Id.* at 1051. The court described Ms. Holmes' emails to counsel as "akin to consulting her lawyer in her employer's conference room in a loud voice, with the door open, so that any reasonable person would expect that their discussion . . . would be overheard [by her employer]. *Id.*

39. Banks v. Mario Indus. of Virginia, Inc., 650 S.E.2d 687, 695-96 (Va. 2007) (privilege did not apply to memo employee prepared for his attorney on employer's computer in light of employee handbook's explanation that employee has no expectation of policy on workplace computers).

40. *See, e.g.*, Long v. Marubeni Am. Corp., No. 05-Civ.-639, 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (employees did not have a reasonable expectation of privacy in personal email account in light of employer's policy); National Econ. Research Assoc. v. Evans, No. 04-2618-BLS2, 2006 WL 2440008 (Mass. Super. Aug. 3, 2006) (determining that, based on the warnings furnished in the employer's manual, employee would have not reasonable expectation of privacy in his work

Once again, the three technology-related threats to privilege are present in these cases. First, the cases involve recorded attorney-client communications. If these clients had met with their attorneys in person or on the phone, this privilege waiver scenario would not exist. Second, through technology, the communications were easily disseminated to—or more precisely, accessed by—a third party. Here, the third party is the employer who uses technology to access the communications, consistent with a policy it has put in place. Finally, legal knowledge on the part of the client is key in creating this privilege problem. If the client knew that she was putting the privilege at risk, she likely would not have used her workplace computer to communicate with her lawyer.

Significantly, knowledge of the technology itself is not the pivotal issue in these cases. Most clients with a desk job understand that their employers have the technological ability to view the employee's email, see the websites they visited, and access documents they created on the job. The employees may doubt their employers would "snoop" in these ways,[41] but they almost certainly know that the employers have the ability to do so. The knowledge gap is about the law of privilege itself. Clients do not realize that they are putting the privilege at risk by talking to their attorneys in a forum that can be accessed by a third party—the employer. While some attorneys may make an attempt to educate their clients,[42] most cases are on the books because attorneys failed to instruct their clients about the hazards of the situation.

C. Attorneys and Inadvertent Disclosure

Attorneys, rather than clients, are most often the people behind inadvertent—or arguably inadvertent—disclosures that may result in privilege waiver. Sometimes these disclosures occur when an attorney meant to send a confidential email to her client but accidentally emailed it to opposing counsel.[43] Frequently, inadvertent disclosures occur in the context of discovery. Responding to a request for production of documents, attorneys make an effort to review for and withhold

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email, but would have a reasonable expectation of privacy with respect to his password-protected Yahoo email account).

41. *Holmes*, 191 Cal. App. 4th at 1069 (court explained Holmes' belief—that her emails were private because she utilized a private password and deleted the emails after they were sent—was unreasonable in light of the company's policy that it would monitor email to ensure compliance with company policy of no personal email use).

42. *Id.* at 887 (an hour after Holmes emailed her attorney from work, her attorney suggested in a return email that Holmes should delete their communications from her work computer and that they could talk on the phone or in person).

43. *See, e.g.*, Multiquip, Inc. v. Water Mgmt. Sys. LLC, No. CV 08-103-S-EJL-REB, 2009 WL 4261214 (D. Idaho Nov. 23, 2009); Cooper v. Se. Pa. Transp. Auth., No. 06-888, 2011 WL 3919743 (E.D. Pa. Sept. 6, 2011); Sun River Energy, Inc. v. Nelson, No. 11-CV-00198-MSK-MEH, 2011 WL 3648600 (D. Col. Aug. 18, 2011).

privileged documents.[44] Nonetheless, one or more (and sometimes many more) privileged documents are produced to opposing counsel, who may later argue that the disclosure waived the privilege.[45]

Even though professional conduct rules in most jurisdictions impose a duty on the receiving attorney to notify the sending attorney of an "inadvertent" disclosure, receiving attorneys often do not provide this notice.[46] We know this because of numerous cases in which the sending attorney first learned of the disclosure not through notice from opposing counsel, but at a deposition where the mistake was revealed for the first time.[47] These receiving attorneys likely thought notice was not required because—in the receiving attorneys' sole judgment—the disclosure was *so careless* that it was not "inadvertent" but something more

44. *See, e.g.*, D'Onofrio v. Borough of Seaside Park, No. 09-6220 (AET), 2012 WL 1949854 (D. N.J. May 30, 2012) (despite an extensive pre-production privilege review, defendant nevertheless produced privileged documents and failed to list many privileged documents on its privilege log).

45. *Id.*

46. Most jurisdictions have adopted a version of Model Rule of Professional Conduct 4.4(b), which requires a recipient of an inadvertent disclosure to promptly notify the sender. *See* chart comparing state rules to Model Rules at http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html. In August 2012, Model Rule 4.4(b) was amended to add the phrase "or electronically stored information;" the text of the Model Rule now reads: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2012).

47. *See, e.g.*, Roe v. St. Louis Univ., No. 4:08-CV-1474-JCH, 2010 WL 199948, *2-3 (E.D. Mo. Jan. 14, 2010) (court asserts defendant's first opportunity to learn of its inadvertent disclosure when the document was referenced in a deposition); Koch Foods of Ala., LLC v. Gen. Elec. Capital Corp., 303 F. App'x 841, 846 (11th Cir. 2008) (counsel learned of privileged document's production when opposing counsel revealed it in a deposition); Am. Coal Sales Co. v. Nova Scotia Power Inc., No. 2:06-cv-94, 2009 WL 467576, at *18 (S.D. Ohio Feb. 23, 2009) (counsel discovered the disclosure of a privileged document when receiving counsel attempted to use it at a deposition); B-Y Water Dist. v. City of Yankton, No. CIV. 07-4142, 2008 WL 5188837, at *1 (D.S.D. Dec. 10, 2008) (sending counsel learned he had disclosed privileged information when opposing counsel referenced documents in a deposition); Figueras v. P.R. Elec. Power Auth., 250 F.R.D. 94, 97 (D.P.R. 2008) (sending attorney learned of inadvertent disclosure a month later when receiving counsel used the privileged document in a deposition). *See also* Thomas LaPrade, *Can—Should—FDIC v. Singh Survive the Amendments to the Federal Rules of Civil Procedure*, 22 ME. B. J. 86, 88 (2007) ("If you've never experienced the sudden loss of the ability to inhale or exhale, if you've never felt your heart beat 120 times in a minute while sitting still . . . then you've never inadvertently disclosed privileged documents in a Maine federal court case that surface for the first time during your client's deposition."). *See also* Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 127 (S.D. W.Va. 2010) (Felman learned that it had inadvertently disclosed a privileged document when defendants attached it to a motion to amend the answer to add counterclaims based on the content of the email).

egregious;[48] and it is "inadvertence" that triggers the notice obligation under the vast majority of professional conduct rules.[49]

When the sending attorney learns of the (arguably) inadvertent disclosure, he or she has the power to protect the content of the document pending a waiver ruling. The Federal Rules of Civil Procedure (and equivalent rules in many states) give the sending attorney the right to demand temporary protection for the document pending any waiver ruling.[50] Under the procedural rule, the sending attorney does not have to prove inadvertence; instead, she only needs to ask for the document's return, destruction, or sequestration.[51]

The receiving attorney may only keep and use the document if the court determines that the privilege was waived. In federal court the waiver standard is found in Federal Rule of Evidence 502(b).[52] The rule provides that a disclosure does not result in waiver if it was inadvertent, the disclosing party took reasonable steps to prevent the disclosure, and the disclosing party promptly took rea-

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48. While we cannot know how attorneys analyze these issues in private, we do know that they often focus on care taken by an opponent in arguing that privilege is waived because a disclosure is not "inadvertent." *See, e.g.*, Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., No. 96Civ.7590(DAB)(JCF), 1997 WL 736726, at *1–2 (S.D.N.Y. Nov. 26, 1997) (receiving counsel argued that a paralegal's mistaken production of privileged documents that counsel had marked as privileged was not "inadvertent"); Memorandum in Opposition to Relion's Motion to Enforce Stipulated Protective Order Against Defendant ASRC at 2, Relion, Inc. v. Hydra Fuel Cell Corp., No. 06-cv-00607 HU, 2008 WL 5585058 (D. Or. Sept. 24, 2008) (receiving counsel argued production was not "inadvertent" because sending attorneys had reviewed the documents prior to production). This care-focused determination of what is and is not "inadvertence" is consistent with the approach taken by courts that consider the reasonableness of precautions taken by the sending attorney in deciding if a disclosure was "inadvertent." *See* Heriot v. Byrne, 257 F.R.D. 645, 658-59 (N.D. Ill. 2009) (considering five factors—including reasonableness of precautions taken by sending counsel—to be considered in determining inadvertence); VLT, Inc. v. Lucent Techs., Inc., 54 Fed. R. Serv. 3d (West) 1319, 1321-22 (D. Mass. 2003) (describing the disclosure of a document that had been produced in previous litigation as "reckless" but not "inadvertent").

49. *See supra* note 46.

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

51. *Id.* (with no showing of "inadvertence" required, a sending party can assert that she produced a privileged document and seek its return, destruction or sequestration pending a waiver ruling). *See, e.g., Roe*, 2010 WL 199948, at *2 (as soon as counsel learned of its inadvertent disclosure, counsel sought the document's return under Rule 26(b)(5)(B) and the court subsequently ruled on the waiver question).

52. FED. R. EVID. 502(b). This standard has been described as consistent with the five-factor balancing test that many courts used to determine waiver prior to Rule 502's adoption (factors considered were: reasonableness of precautions taken to prevent inadvertent disclosure; the number of documents to be reviewed/scope of discovery; the extent of the inadvertent production; the promptness of measures taken to remedy the disclosure; and fairness to the parties). FED. R. EVID. 502 advisory committee's note (explaining that 502(b) does not explicitly incorporate the five-factor balancing test, but describing 502(b) as "flexible enough to accommodate" any of the five factors from the balancing test). Accordingly, courts continue to rely upon case law that utilized the five-factor test. *See, e.g.*, Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill 2009); Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216 (E.D. Pa. Nov. 14, 2008).

sonable steps to rectify the error.[53] Given the flexibility of the test and the unique facts of each case, it can be difficult to predict how a court will resolve the waiver question in any given case.[54] The receiving attorney can potentially make an argument about each factor: that the disclosure was not inadvertent,[55] that the disclosing party did not take reasonable steps to prevent disclosure,[56] and that the disclosing party did not promptly take reasonable steps to rectify the error.[57] The result of this analysis is often a finding of privilege waiver.[58]

Some attorneys believe that they can eliminate the risk of privilege waiver in discovery by entering into clawback agreements and then seeking court orders incorporating the terms of these agreements.[59] Federal Rule of Evidence 502 provides that parties may enter agreements regarding the consequences of disclosure,[60] and that courts may order that privilege is not waived by disclosure connected with the case before it (and that such orders are binding in other federal and state proceedings).[61] Despite assertions that the 2008 enactment of this rule of evidence would allow attorneys in cases pending in federal court to

53. FED. R. EVID. 502(b).

54. Corey v. Norman, Hanson & Detroy, 742 A.2d 933, 942 (Me. 1999) (describing "an uncertain, unpredictable privilege, dependent on the proof of too many factors concerning the adequacy of the steps taken to prevent disclosure"); Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney-Client Privilege, and Federal Rule of Evidence 502*, 32 CAMPBELL L. REV. 467, 511 (2010) (arguing that Rule 502(b)'s standard results in an unpredictable privilege).

55. Sidney I. v. Focused Retail Prop. I, LLC, 274 F.R.D. 212, 216 (N.D. Ill. 2011) (describing two possible tests to determine "inadvertence" with one test considering reasonableness of precautions taken by sending attorney).

56. Amobi v. D.C. Dept. of Corr., 262 F.R.D. 45, 55 (D. D.C. 2009) (finding that defendant's failure to take reasonable steps to prevent the error "dooms their reliance on [Rule 502].").

57. N. Am. Rescue Prods., Inc. v. Bound Tree Med., LLC, No. 2:08-CV-101, 2009 WL 4110889, at *9 (S.D. Ohio Nov. 19, 2009) (concluding that sending party waived the privilege by failing to take reasonable steps to rectify the inadvertent production).

58. *See supra* notes 55-57. *See also* Kilopass Tech. Inc. v. Sidense Corp., No. C 10-02066SI, 2012 WL 1534065, at *3 (N.D. Cal. May 1, 2012) (finding waiver on the basis of plaintiff's review process); Ceglia v. Zuckerberg, No. 10-CV-00569A(F), 2012 WL 1392965, at *9 (W.D. N. Y. Apr. 19, 2012) (finding waiver based on delay in alerting receiving party of the mistake); *Cooper*, 2011 WL 3919743, at *6 (finding waiver for failure to make reasonable effort to protect email from being forwarded to opposing counsel); Kmart Corp. v. Footstar, Inc., No. 09-C-3607, 2010 WL 4512337, at *5 (N.D. Ill. Nov. 2, 2010) (ruling privilege waived where producing party waited twelve days to rectify its error).

59. Clawback agreements are not mentioned by name in the text of the Federal Rules of Civil Procedure or Federal Rules of Evidence, but they are referenced in the comments to both rules. *See* FED. R. CIV. P. 26 advisory committee's notes on 2006 amendment (describing clawback and quick peek agreements); FED. R. EVID. 502 advisory committee's note (discussing the use of "claw-back and quick peek arrangements").

60. FED. R. EVID. 502(e).

61. FED. R. EVID. 502(d).

avoid the risk of privilege waiver,[62] the risk of waiver remains even with a clawback.

The continuing risk of privilege waiver is found in the terms of the clawback itself. A court often finds that the producing party waived the privilege by failing to satisfy some requirement of the clawback.[63] This was the situation in the case *Mt. Hawley Insurance Company v. Felman Production, Inc.*[64] In that case, the parties entered into a lengthy stipulated clawback order that provided in pertinent part:

> A party may request through counsel the return of any . . . Inadvertently Produced Document[65]. . . by [taking defined steps] within ten (10) business days of discovery of the inadvertent disclosure. [The clawback then describes actions of receiving counsel to return the document and of sending counsel to list the document on a privilege log and possibly take other steps]. The return of an Inadvertently Produced Document does not preclude the receiving party from disagreeing with the designation of the document as privileged . . . and bringing a Motion to Compel its production pursuant to the Federal Rules of Civil Procedure. [The clawback then describes special procedures when a document is recalled during preparation from a deposition]. *Compliance by the producing party with the steps required by this [clawback] to retrieve an Inadvertently Produced Document shall be sufficient, notwithstanding any argument by a party to the contrary to satisfy the reasonableness requirement of Federal Rule of Evidence 502(b)(3).*[66]

When Defendants received Felman's document production containing a privileged document, Defendants argued that the document's disclosure waived privilege.[67] The court noted that the clawback prohibited consideration of whether a producing party satisfied Rule 502(b)(3), so that factor could not be considered in deciding waiver.[68] Accordingly, Defendants turned to another argument, asserting that Felman waived privilege by failing to satisfy Rule 502(b)(1) in that Felman

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62. FED. R. EVID. 502 advisory committee's note (describing the rule as seeking to provide a "predictable, uniform set of standards" under which litigants can know the consequences of a inadvertent disclosure, such as under the terms of a clawback agreement).

63. *See, e.g.*, Comrie v. Ipsco, Inc., No. 08 C 3060, 2009 WL 4403364, at *2 (N.D. Ill. Nov. 30, 2009) (finding waiver for party's failure to satisfy terms of clawback); Callan v. Christian Audigier, Inc., 263 F.R.D. 564, 566 (C.D. Cal. 2009) (finding privilege waived under terms of clawback).

64. Mt. Hawley Ins. Co. v. Felman Prod. Inc., 271 F.R.D. 125 (S.D. W.Va. 2010).

65. This phrase was defined as "any document produced in response to discovery requests in this action that the party later claims should have been withheld on grounds of a privilege including the work product doctrine." *Id.* at 129.

66. *Id.* (emphasis added).

67. *Id.* at 133 ("The next issue is whether Felman waived the privilege when it produced the May 14 email.").

68. *Id.*

did not take "reasonable precautions" to avoid disclosure of the privileged email.[69] Defendants compiled a list of defects in Felman's document review processes, and the court reviewed the process in detail in its written decision.[70] The detailed two-page description explains the large document production, the use of an e-discovery vendor and review software, keyword searches and "eyes-on" review. Ultimately, the court found that the numerous precautions taken were not reasonable. The court cited factors such as the number of total inadvertent disclosures, the failure to test the reliability of certain keyword searches, and Felman's failure to point to any "overriding interests in justice that would excuse them from the consequences of producing privileged/protected materials."[71]

The *Mt. Hawley* case provides an important lesson for all attorneys: having a clawback does not prevent privilege waiver.[72] The recipient of an inadvertent disclosure will argue that disclosure waived privilege *under the terms of the clawback.*[73] Any clawback agreement that permits waiver if some subjective standard is not satisfied—proof of "inadvertent" disclosure, "reasonable steps" taken to prevent disclosure, or "prompt" action taken to rectify the error—can lead to a battle over waiver.[74] Even when the receiving attorney does not prevail in making this argument, the sending attorney and client still suffer a loss. They put the privilege at risk, and they spent time and money fighting about an issue that they likely thought they had resolved when they entered the clawback.[75]

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69. *Id.*

70. *Id.* at 135-36.

71. *Id.* at 136. Paul W. Grimm et al., *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH J.L. & TECH. 8, *50 (2011) (discussing the *Mt. Hawley* court's analysis and concluding that Rule 502 will not meet its potential if courts "demand near-perfection in preproduction precautions.").

72. *See* Ann M. Murphy, *Federal Rule of Evidence 502: The "Get Out of Jail Free" Provision—or Is It?*, 41 N.M. L. REV. 193, 231 (2011) (noting the differing—often negative—treatment of clawback agreements by courts).

73. *See, e.g.*, *Comrie*, 2009 WL 4403364, at *2 (receiving attorney argued that sending party did not satisfy the requirements of Rule 502, which was required by the parties' clawback); *Callan*, 263 F.R.D. at 566 (receiving attorney argued that the disclosure was not "inadvertent" as required under the clawback).

74. It is puzzling that clawback agreements often include terms that are identical to or substantially similar to the terms of Rule 502(b). *See, e.g.*, Lefta Assocs. v. Hurley, No. 1:09-CV-2487, 2011 WL 2456616, at *3 (M.D. Pa. 2011) (clawback provided that "inadvertent" disclosure of privileged document does not waive privilege if producing party took "reasonable care" to prevent disclosure and "promptly requests" the return of the document); Kandel v. Brother Intern. Corp., 683 F. Supp. 2d 1076, 1079-80 (C.D. Cal. 2010) (clawback order provided that an inadvertent disclosure would not result in waiver and that the "legal definition" of the term inadvertent would be applied so as not to "reduce or diminish" the showing required to establish inadvertence). Because Rule 502 (b) is the standard that would be applied in absence of a clawback agreement, nothing is gained by incorporating those standards into a clawback agreement or order; the clawback should override these standards.

75. *See, e.g.*, Zivali v. AT&T Mobility, LLC, No. 08 Civ. 10310 (JSR), 2010 WL 5065963, at *1 (S.D.N.Y. Dec. 6, 2010) (plaintiff argued that defendant failed to take reasonable steps to

The bar is concerned that lawyers may jeopardize the privilege with their use of technologies that they do not understand.[76] The fear is that lawyers will unwittingly reveal confidential information to third parties when they use new technologies and the privilege will be waived as a consequence. Even though knowledge of how a given technology protects (or fails to protect) confidential information is a legitimate concern for attorneys, so far this does not appear to be a significant cause of privilege waiver.[77] The cases reveal that privilege is put at risk by simple human error dealing with the volume of information and its ease of dissemination—typing the wrong name in an email,[78] misidentifying documents as not privileged and producing them,[79] or identifying and segregating privileged documents but sending them anyway.[80] While problems with docu-

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prevent disclosure, but the court enforced the clawback agreement and ordered the return of the privileged documents); Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2010 WL 3905936, at *4 (E.D. Mich. Sept. 30, 2010) (because the stipulated protective order merely recited the elements of Fed. R Civ. P. 26(b), the court analyzed waiver under Fed. R. Evid. 502); Rodriguez-Monguio v. Ohio State Univ., No. 2:08-cv-00139, 2009 WL 1575277, at *2 (S.D. Ohio June 3, 2009) (court ultimately concluded that defendant did not waive privilege when counsel requested the return of an inadvertently disclosed document within ten days from the date that counsel learned of the disclosure, as provided for in the parties' clawback agreement); Alcon Mfg., Ltd. v. Apotex, Inc., No. 1:06-cv-1642-RLY, 2008 WL 5070465, at *4-5 (S.D. Ind. Nov. 26, 2008) (despite clawback in protective order, receiving party asserted that privilege disclosure resulted in waiver because sending party did not prove that the disclosure was "truly inadvertent" and did not take "prompt remedial action" to address the inadvertent disclosure).

76. *See supra* note 1 and accompanying text.

77. In her well-known desk book on the attorney-client privilege, Edna Selan Epstein states that *future litigation* can be expected regarding cloud security necessary to avoid waiver. She cites no case in which privilege was waived based on cloud security. EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 340 (5th ed. Supp 2012). I find no such case in my research. The desk book notes a case in which storing information on "shared servers" resulted in privilege waiver. *Id.*, citing Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., No. 05-1251-MLB and 07-1043-MLB, 2010 WL 3083536 (D. Kan. 2010). However, review of the case reveals that waiver did not result because of a misunderstanding about technology that lead to disclosure of privileged data on a server. Rather, the court found privilege waiver because Boeing intentionally gave the buyer (Spirit AeroSystems) of its Wichita manufacturing facilities access to Boeing email messages, including privileged email messages, following the sale. When Spirit went on to disclose those privileged documents to plaintiffs, the court concluded that the original disclosure from Boeing to Spirit had waived the privilege. *Boeing*, 2010 WL 3083536 at *4. *See also* Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., No. 05-1251-MLB and 07-1043-MLB 2010 WL 1141269, at *5 (explaining that Boeing's disclosure to Spirit was not inadvertent but "was intentionally done for reasons of business continuity and economic convenience."). In short, an intentional disclosure caused this waiver, not some misunderstanding about server technology.

78. *See supra* note 43.

79. *See, e.g.*, HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 69 (S.D. N.Y. 2009) (after reviewing millions of documents and producing 250,000, counsel determined that nine documents were inadvertently produced and requested their return).

80. *See, e.g.*, *In re* Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig., No. 08-1967-MD-W-ODS, 2011 WL 1136440, at *2 (W.D. Mo. Mar. 25, 2011) (2,000 documents were

ment review technology—and even lawyer and vendor mistakes in using it—can ultimately lead to a privilege waiver battle,[81] the heart of the issue is still the volume of information that must be reviewed in the limited time frame of discovery and the ease of its disclosure to opposing counsel.

A lack of legal knowledge has been a significant cause of privilege waiver in the inadvertent disclosure cases discussed in this Part. The risk of waiver is heightened when lawyers misunderstand the steps they must take and arguments they must make to avoid waiver under Rule 502(b).[82] Further, when clawback agreements and orders are poorly conceived and drafted, they provide nothing more than a false sense of security.[83] Lawyers must learn to draft clawbacks that provide maximum protection for the content of a disclosed document in the short term and eliminate—as much as possible—the risk of privilege waiver.

III. The ABA's 2012 Model Rule Amendments Addressing Technology & Confidentiality

In this section, I discuss the American Bar Association's recent actions to address technology and confidentiality. Because its focus was confidentiality, the ABA intended to address a broader issue than the privilege waiver issue considered in this article. Nonetheless, the issues are related because the technology-related threats to privilege identified in this article turn on the disclosure of confidences. Accordingly, developments in professional conduct rules that promote confidentiality protection may also prevent privilege waiver.

On August 6, 2012, the ABA House of Delegates approved the Commission on Ethics 20/20's Revised Report 105A on Technology & Confidentiality ["the Report"].[84] The Report explains the Commission's objective to develop guidance for lawyers about protecting information when using technology.[85] The Commission recommended specific amendments to the Model Rules of Professional Conduct and made plans for a centralized website that would provide attorneys with updated information on "confidentiality-related ethics issues arising from lawyers' use of technology."[86] The plan for the website is to include

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provided to counsel for his review, and even though privileged documents were segregated in a folder bearing counsel's name, the folder was produced to opposing counsel).

81. *See, e.g.*, Datel Holdings Ltd. v. Microsoft Corp., No. C-09-05535 EDL, 2011 WL 866993, at *4 (N.D. Cal. Mar. 11, 2011) (case involved mistaken production due to an unexpected software glitch that produced non-truncated messages containing privileged information). *See also supra* text accompanying note 72 (discussing disclosing party's failure to test the reliability of keyword searches prior to production that contained privileged documents).

82. *See supra* notes 52-58 and accompanying text.

83. *See supra* notes 63-75 and accompanying text.

84. American Bar Association Commission on Ethics 20/20, Revised Report 105A, [hereinafter "Report"], *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

85. *Id.* at 1.

86. *Id.*

technology-related information such as safeguards that should be employed when using technology, as well as regularly updated information on security standards (and standards-setting organizations), thus allowing attorneys to identify compliant technology.[87]

The Commission identified six broad areas in which the Model Rules of Professional Conduct ("Model Rules") should be amended in order to "make lawyers aware of their confidentiality-related obligations when taking advantage of technology's many benefits."[88]

A new subsection (c) was added to the rule governing confidentiality of information, providing "A lawyer shall make a reasonable effort to prevent the inadvertent or unauthorized disclosure of, or access to, information relating to the representation of the client."[89] In its Report, the Commission explained that lawyers already have this obligation, but the Commission "concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly" in the rule.[90] While the rule already prohibited disclosure of client confidences, the Commission wanted to emphasize in the black letter of the rule the duty to "*prevent*" disclosure of client confidences.[91]

Through amended comments, the Commission endeavored to provide lawyers with more guidance regarding how to fulfill this obligation.[92] The amended Comment 16 to Rule 1.6 clarifies that in addition to guarding against inadvertent or unauthorized disclosure of client information, a lawyer must also safeguard against "unauthorized access by third parties."[93] Further, Comment 16 clarifies that even when there is disclosure, subsection (c) is not violated so long as a reasonable effort was made to prevent access or disclosure, and that reasonableness depends on factors such as: sensitivity of the information, likelihood of disclosure if additional safeguards are not used, cost of additional safeguards, difficulty of implementing safeguards, and extent to which additional safeguards would adversely affect the lawyer's ability to represent clients ("e.g., by making a device or important piece of software excessively difficult to use)."[94] Comment 16 also provides that a client could require additional security measures or "may give

87. *Id.*

88. *Id.* at 2.

89. MODEL RULES OF PROF'L CONDUCT, R. 1.6(c) (2012).

90. Report 105A, *supra* note 84, at 2.

91. *Id.* at 4.

92. *Id.* at 2.

93. MODEL RULES OF PROF'L CONDUCT, R. 1.6(c), cmt. 16 (2012).

94. *Id.* In its report, the Commission noted that disclosures can occur despite reasonable precautions, but that lawyers have an obligation to take reasonable precautions even if doing so does not guaranty that confidentiality will be protected. Report, *supra* note 84, at 5. The Commission also noted that technology changes too rapidly to provide more specific guidance about the specific measures that should be taken to protect confidentiality. *Id.*

informed consent to forgo security measures that would otherwise be required by this Rule."[95]

Portions of Model Rule 1.6's Comment 17 remain unchanged. The comment continues to direct attorneys to take reasonable precautions when transmitting a communication to prevent the information "coming into the hands of unintended recipients" and that the reasonableness of a lawyer's expectation of privacy includes "the sensitivity of the information and the extent to which privacy of the communication is protected by law or by a confidentiality agreement."[96] Finally, amendments to both Comments 16 and 17 note that additional security measures may be required by other sources of law governing data privacy.[97]

The only amendment to the competence Model Rule was to a single comment. The comment, which previously stated that a lawyer must keep abreast of law and its practices, now provides that this obligation includes staying informed of "the benefits and risks associated with relevant technology."[98] The Commission explained that the comment emphasizes the importance of technology in modern law practice and is meant to clarify the lawyer's existing obligation to understand the "basic features of technology."[99] The Commission opined that it would be difficult to provide competent legal services today without knowledge of email or how to create an electronic document.[100]

The amendment to the "communication" Model Rule's Comment 4 acknowledges that attorneys and clients communicate in ways other than telephone in the electronic age. The comment that formerly provided "Client telephone calls should be promptly returned or acknowledged" now states "A lawyer should promptly respond to or acknowledge client communications.[101] Finally, a number of the amendments address minor definitional issues related to technology.[102]

Model Rule 4.4(b) continues to provide that a recipient of information that the lawyer "knows or reasonably should know . . . was inadvertently sent shall promptly notify the sender."[103] The only rule revision was to change receipt of a "document" to "document or electronically stored information."[104] Comment 2

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95. MODEL RULES OF PROF'L CONDUCT, R. 1.6(c), cmt. 16 (2012).

96. *Id.* at cmt. 17.

97. *Id.* at cmt. 16, 17.

98. MODEL RULES OF PROF'L CONDUCT, R. 1.1, cmt. 6 (2012).

99. Report, *supra* note 84, at 3.

100. *Id.*

101. MODEL RULES OF PROF'L CONDUCT, R. 1.4, cmt. 4 (2012).

102. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.0(k), cmt. 9 (explaining that screening should include prohibiting access to electronic information); 1.0 (defining writing to include electronic communications) (2012).

103. MODEL RULES OF PROF'L CONDUCT, R. 4.4(b) (2012).

104. *Id.* Related references to electronically stored information were made in the comments, including defining the phrase to encompass "email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata")." *Id.* at cmt. 2, 3. The comment further provides that "Metadata in electronic documents creates an obligation under this Rule

to Model Rule 4.4(b) was amended to give guidance about when a document is inadvertently sent. The new language states: "A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted."[105] In its Report, the Commission explained this revision was intended to address the potentially ambiguous and misleading nature of the phrase "inadvertently sent."[106] The Commission said that the phrase could be read, for example, "to exclude information that is intentionally sent but to the wrong person."[107] The new comment is meant to clarify such a misinterpretation of the phrase.[108]

IV. Responding to Technology's Three Threats to the Attorney-Client Privilege

Having reviewed the technology-related threats to attorney-client privilege and the measures adopted by the ABA to address technology and confidentiality, I now turn to a discussion of solutions. In this Part, I consider how attorneys might address the volume of information subject to privilege, the ease of its dissemination, and legal knowledge essential to protect the privilege. In this discussion, I will consider the impact that the ABA's August 2012 amendments could have on privilege. Beyond that, privilege waiver cases suggest other solutions that may lead to better protection of the privilege in the future. I consider the practicability of solutions that range from reining in use of email to drafting a better clawback agreement.

A. Volume of Information and Ease of Dissemination

Two of the identified threats to the privilege are ones that it might seem impossible to address without a time machine. In the 2010's, technology is central to lawyer-client communication. The ABA's Commission on Ethics 20/20 does not suggest that we should protect confidentiality by eliminating our use of email or other forms of communication technology. Its advice is just the opposite: the Commission suggests that today's competent lawyers must use technology, including email.[109] There are certainly benefits to recorded communications. Attorneys and clients alike can return to a string of emails or notes written to one another in a document and recall a legal question, the facts that were considered, and the resolution of the issue. Further, email and text messaging give

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only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer." *Id.* cmt. 2

105. *Id.*

106. Report, *supra* note 84, at 6.

107. *Id.*

108. *Id.*

109. *See supra* note 100 and accompanying text.

clients easy access to their attorneys, which may make it more likely that they will consider the advice of counsel in their decision-making.

While acknowledging the benefits of technology, we can also recognize the advantages of taking a more thoughtful approach to recorded communications with clients. Fewer recorded communications would mean fewer opportunities for disclosure and privilege waiver. For example, lawyers and clients might consider the possible efficiencies of using the phone or meeting in person rather than engaging in a daylong back and forth by email. If attorneys and clients make more thoughtful and less frequent use of electronic communication, they can reduce some of the volume and make a corresponding impact on the ease of dissemination of that information.

B. Filling the Knowledge Gap for Clients regarding Protecting the Privilege

Even if attorneys and clients make some effort to address volume of information and ease of dissemination, the privilege waiver challenge remains. Knowledge of the law—for attorney and client—is probably the most important issue that must be addressed to protect privilege in the information age. First, I address the issue of client education.

Lawyers cannot assume that clients understand the attorney-client privilege or know that disclosure of otherwise confidential communications compromises the privilege.[110] The cases discussed in this article provide evidence that clients do not appreciate these issues. Many clients share their lives on the Internet, including the privileged communications they have with counsel.[111] They simply do not comprehend the consequences of these disclosures. Further, clients use their employers' computers, email accounts, and Internet connection for all of their communications, including communications with counsel. Clients have these communications at work even when their employers have warned them that the company may monitor their computer usage.[112]

As a threshold matter, lawyers should educate their clients about the definition of the attorney-client privilege.[113] They should explain which communications are privileged and which communications are not.[114] Attorneys must also make clear that a client's disclosure of privileged information usually waives the privilege.[115] This education is necessary not just for individual

110. *See* Barkett, *supra* note 26, at 19.

111. *See supra* Part II, A.

112. *See supra* Part II, B.

113. *See supra* note 4 and accompanying text.

114. One benefit of this conversation is that clients may gain an understanding that not every communication with an attorney is privileged. For example, in the information age, clients would benefit from being told that simply copying an attorney on a scandalous email does not transform the communication into one that will be protected by the attorney-client privilege.

115. *See supra* note 6 and accompanying text.

clients, but also for the constituents who speak on behalf of a lawyer's organizational clients.

Attorneys should talk with each client about how the client uses email and social media such as Facebook, Twitter, and blogs. In this discussion, attorneys can explain how the client's preferred form of communication may be misused to jeopardize the privilege. Attorneys might tell their clients a memorable story (such as from one of the cases discussed in this article) about a similar client—individual or business—that waived privilege or work product protection by sharing too much information online.[116]

In addressing workplace waiver, it is not necessary for attorneys to research the intricacies of the client's employer's computer or Internet usage policy or the specific factors the jurisdiction considers in determining if the employee's expectation of workplace privacy is reasonable.[117] Regardless of the policy or the specifics of the law, attorneys should make it simple for clients: never communicate with counsel using equipment, software, email, or even Internet access provided by an employer. Again, examples from real cases of how the privilege was lost can be used to clarify the risk for clients.[118] Attorneys have an additional tool to combat this problem: when you receive communications with clients during the workday, pick up the phone to provide your response.[119]

Attorneys can reinforce the importance of protecting privilege by adding a conspicuous line "attorney-client privileged" to emails (and other communications) with clients and by encouraging clients to do the same when they communicate with counsel. For example, an attorney might tell a client, "If you write to ask me a question or to provide me with information about this matter, put the phrase 'Attorney-Client Privileged' in the subject line or at the beginning of your email."

Lawyers should then explain to clients the advantages of both attorneys and clients annotating documents with the phrase "attorney-client privileged." First, the privileged designation is a reminder that the information in the documents must be kept confidential and not shared with others. Second, if the document is accidentally sent to someone else, the "privileged" designation may put the recipient on notice that the document was inadvertently disclosed.[120] Third, even if a client is not involved in litigation during the current representation, litigation may arise in the future (a contract dispute for example). If a lawsuit is ever filed, the "attorney-client privilege" annotations would help litigation counsel

116. *See, e.g., supra* notes 8, 13, 27 and accompanying text.

117. *See supra* notes 30-31.

118. *See, e.g., supra* note 32 and accompanying text.

119. *Cf. supra* note 42 and accompanying text.

120. *See supra* note 46 and accompanying text (regarding obligations at receipt of inadvertent disclosure). *See, e.g., St. Louis Univ.*, 2010 WL 199948, at *2 (court notes that chronology prepared by client for counsel was not marked in any way to indicate to opposing counsel or others that it was privileged).

locate privileged documents in a pre-production privilege review and might alert opposing counsel if such documents are disclosed in error in discovery.[121]

C. What Attorneys Need to Know in Order to Protect the Privilege

Attorneys can protect against privilege waiver caused by disclosure in two ways. First, attorneys can reduce—but not eliminate—the risk of disclosure by acting reasonably to protect client confidences. The ABA's recent amendments to Model Rule 1.6 and accompanying comments make this point and highlight the numerous factors that may influence reasonableness of attorney efforts.[122] Based on recent cases, it is the inadvertent disclosures (rather than unauthorized disclosures or access) that are usually the basis of a privilege waiver argument and more often it is human error rather than technology that leads to the disclosure.[123] The ABA acknowledges that despite reasonable efforts, a client's confidences may be disclosed.[124]

Understanding the challenges to preventing disclosure is critical. Attorneys should recognize that some inadvertent disclosures are inevitable, no matter how cautious they are in storing and transmitting confidential client information.[125] There are simply too many privileged documents and too many opportunities to disclose them to avoid the problem altogether. Rather than putting all of their worry and effort into preventing disclosure, attorneys also must be prepared for inadvertent disclosure.

Legal preparation for inadvertent disclosure is something that lawyers can control. This is the second of the two lines of defense against privilege waiver. Understanding the law allows lawyers to protect the content of a privileged document pending a waiver ruling.[126] Further, it may help lawyers avoid the privilege waiver ruling.

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121. Protecting confidences from inadvertent disclosure and identifying an opponent's inadvertent disclosure are both issues tackled by the Commission's amendments to Rules 1.6 and 4.4, as well as accompanying comments. *See* Report 105A, *supra* note 84, at 4-6.

122. *See supra* notes 89-97 and accompanying text.

123. *See supra* notes 78-81 and accompanying text.

124. *See supra* note 94 and accompanying text.

125. Mformation Techs., Inc. v. Research in Motion Ltd., No. C08-04990 JW (HRL), 2010 WL 3154441, at *2 (N.D. Cal. Aug. 9, 2010) (plaintiff made an inadvertent disclosure even though it "took pains" to review 3.6 million pages to identify privileged documents).

126. If the disclosure occurs in discovery, Federal Rule of Civil Procedure (and the equivalent rules in many states) require that the document is deleted, returned, or sequestered pending a privilege ruling. FED. R. CIV. P. 26(b)(5)(B). Further, some jurisdictions have adopted professional conduct rules that require the receiving attorney to take steps to protect the content of an opponent's inadvertently disclosed document. *See, e.g.*, TENN. R. PROF'L CONDUCT R. 4.4. Attorneys should research whether applicable state or federal court's professional conduct rules provide such protection.

Attorneys must act immediately to seek a ruling that privilege was not waived by an inadvertent disclosure.[127] Once a lawyer learns of a mistaken disclosure, the attorney must act quickly to reassert the privilege (such as by objecting to the document's use in a deposition) and seek the document's return.[128] A delay in attempting to rectify an inadvertent disclosure is often the basis of the court's waiver ruling.[129] Attorneys must also be prepared to introduce evidence that they took reasonable steps to prevent the inadvertent disclosure; failing to introduce such evidence will result in privilege waiver.[130] Further, attorneys should be prepared to argue that their disclosure was indeed "inadvertent" as required by Rule 502(b); this argument requires counsel to be prepared for different courts' interpretations of the term.[131]

Clawback agreements and orders should be adopted to substantially lessen the risk of privilege waiver through disclosure.[132] Two primary lessons can be drawn from the inadvertent disclosure case law that may help attorneys draft better clawback provisions. First, clawback orders should protect the content of a document unless and until a court finds it is not privileged. We know that receiving attorneys often ignore professional conduct rules' obligation to provide notice of an inadvertent disclosure; they unilaterally analyze the carelessness of an opponent's disclosure and often determine it was not "inadvertent" so no notice is required.[133] The ABA's new amendment to Model Rule 4.4(b) acknowledges the slipperiness of the "inadvertence" issue and attempts to broaden the term to include privileged information accidentally included with information intentionally transmitted.[134] Even with this tweak to the definition, it is likely receiving attorneys will continue to read the term "inadvertent" narrowly. Parties can avoid this issue in their clawbacks by imposing a notice obligation on receiving counsel without reference to "inadvertence." For example, the clawback could provide that a recipient of any privileged document will notify the sending party.

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127. FED. R. EVID. 502(b).

128. FED. R. EVID. 502(b)(3).

129. *See, e.g.*, Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06CV2804-BTM (WMC), 2010 WL 275083, at *3-6 (S.D. Cal. Jan. 13, 2010) (privilege was waived when party did not object to the use of the document in a deposition); David v. Signal Intern., LLC, No. 08-1220, 2009 WL 5215326, at *7 (E.D. La. Dec. 28, 2009) (court found privilege waived where disclosing party still had not sought to rectify its error by seeking the document's return at the time of the privilege waiver motion).

130. *In re* Basler, No. BK10-43471-TJM, 2011 WL 3236079, at *5 (D. Neb. July 26, 2011) (court found waiver when counsel failed to introduce evidence that reasonable steps were taken to avoid inadvertent disclosure).

131. *See supra* note 55 and accompanying text (discussing two approaches to determining inadvertence).

132. *See* CAROLE BASRI & MARY MACK, EDISCOVERY FOR CORPORATE COUNSEL, §14:3 (2011) (noting a number of emerging issues in e-discovery, and advocating for the use of effective clawbacks or quick peeks as a means of providing some stability).

133. *See supra* note 47 and accompanying text.

134. *See supra* notes 105-108 and accompanying text.

In turn, the sending attorney's only obligation should be to request the return or destruction of such a document; there should be no obligation to prove that the disclosure was inadvertent to reclaim the document.

Second, a clawback order should provide broad and certain protection against waiver based on disclosure. When entering a clawback, attorneys should plan for and implement reasonable precautions to avoid inadvertent disclosure,[135] but the clawback should never make *proof* that reasonable precautions (or any other subjective steps) were taken a prerequisite to finding no waiver. These are the provisions that introduce uncertainty and encourage motion practice—the very things the parties are attempting to avoid with their clawback orders.[136] In order for a clawback to provide protection against privilege waiver it should clearly provide: disclosure of a privileged document in this case shall not be the basis of a privilege waiver determination by this court.[137] If the parties do not want that level of certainty—and they want the option of arguing about reasonableness, inadvertence, and timeliness—they should not have a clawback. In making this decision, attorneys should recognize that it could be their own clients' privilege that is made uncertain by the lack of negotiated protection.

V. Conclusion

Technology threatens the attorney-client privilege today. But that does not mean attorneys and clients must choose between modern forms of communication and maintaining the privilege. Recognizing the aspects of the problem that we can control—and those that we cannot—is key to the solution. While the volume of attorney client communications and the ease of their dissemination make it difficult to avoid completely the disclosure of client confidences, we can still protect the privilege. Education of lawyers and clients is the key. The American

135. Comments 16 and 17 to Model Rule 1.6 provide that attorneys should determine which confidentiality protection efforts are reasonable and whether a confidentiality agreement (such as a clawback agreement) provides reasonable protection for client confidences. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 16, 17 (2012). These comments provide that consulting clients is only required when the plan is to do something more or less than what is "reasonable." *Id.* Nonetheless, I would assert that client informed consent should be sought regarding planned pre-production privilege protection and post-disclosure protection provided by a proposed clawback. There is a spectrum of care that can be exercised in conducting a pre-production privilege review. While some efforts may be clearly deficient, more often lawyers will not know whether their planned efforts will protect against disclosure. In light of Model Rule 1.6's requirement that lawyers protect client confidences absent client consent (MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012)) and the uncertainties involved in preventing inadvertent disclosure and privilege waiver, I think attorneys should err on the side of seeking client consent.

136. *See supra* note 75 and accompanying text (describing motion practice in cases with clawbacks).

137. Parties could provide even more protection by including a provision that requires any party who files a motion seeking a waiver ruling based on a document's disclosure to pay the costs incurred by the responding party.

Bar Association's recent amendment to the Model Rules of Professional Conduct provides attorneys with some guidance about the efforts we must make to competently protect confidences, and thus the privilege. Recent cases help complete the picture. The cases reflect a lack of understanding by clients about the consequences of privilege disclosure; they also reveal the gaps in attorney knowledge about how to control the adverse consequences of inadvertent disclosure. With an understanding of this legal knowledge gap, we can educate our clients and ourselves to better protect the privilege in the information age.