NONWAIVER AGREEMENTS AFTER FEDERAL RULE OF EVIDENCE 502: A GLANCE AT QUICK-PEEK AND CLAWBACK AGREEMENTS

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After decades of struggle with paper discovery rules in an age of electronic discovery, President George W. Bush signed Federal Rule of Evidence 502 into law on September 19, 2008. Rule 502 is aimed at reducing the costs associated with privilege review. More specifically, Rule 502 gives more judicial support for nonwaiver agreements, which are agreements between adversarial parties that preserve privilege when one party inadvertently discloses a privileged document to the other party in discovery. Rule 502 requires courts to uphold these agreements between parties who enter into them and to enforce them, even against third parties, if the agreement is incorporated into a court order. However, Rule 502 may be far too expansive, especially when its comments suggest that courts may support these agreements irrespective of the level of care taken in privilege review. This Comment urges courts to limit such agreements and justifies this conclusion through two central arguments and a suggested remedy. First, I explain why these agreements contravene public policy, particularly focusing on the ways in which a lack of privilege review may hurt clients. Courts therefore should have the power to render them unenforceable. Second, I argue that courts in particular are the best enforcement mechanism. As institutional controls, they have many more advantages over other forms of control; moreover, courts have refused to enforce nonwaiver agreements in the past. Finally, I set forth a potential guide that courts facing this question could follow. Rule 502 takes a step in the right direction in reducing the burdens of privilege review, but courts must take care to interpret the rule in a way that allows it to function as a strong tool for attorneys yet at the same time limit it so that it does not result in harm to clients.

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INTRODUCTION

"The inadvertent production of a privileged document is a specter that haunts every document intensive case."[1]

Since the birth of discovery in this country,[2] there has been the possibility that privileged[3] documents would be inadvertently produced to the opposing side. However, this possibility has taken on increasing reality in recent years with the explosive growth of electronic documents. According to one recent study, 247 billion messages will be sent every day in 2009, and that number is expected to almost double to 507 billion in 2013.[4] Discovery often involves the exchange of millions of documents, virtually guaranteeing that some privileged documents will be inadvertently disclosed to the other side despite all possible precautions in reviewing the documents for privilege.[5]

While inadvertent disclosure alone seems bad enough, the true reason why one court described it as a "specter that haunts every document intensive case" lies in the effects of such a disclosure.[6] Compounding the issue, federal courts, prior to the introduction of Rule 502, had a three-way split in their

1. FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 479–80 (E.D. Va. 1991).

2. Discovery in the United States was originally similar to England's, but starting in the nineteenth century, states began passing legislation that formed the basis of modern day discovery. *See* ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 204–05 (1952). For a more detailed discussion of America's reforms in discovery, see generally *id.* at 204–28.

3. For the purposes of this Comment, privileged documents refer only to documents protected by the attorney-client privilege or the work product doctrine. These are the most common privileges, and the newly passed Rule 502 only applies to these two protections. I will be referring to work product protection as a privilege, even though technically it is not a privilege, but rather a qualified immunity from discovery. FED. R. EVID. 502; *see also* Cont'l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 769 (D. Md. 2008).

4. *See* Press Release, The Radicati Group, Inc., The Radicati Group Releases "Email Statistics Report, 2009–2013" (May 6, 2009), http://www.radicati.com/?p=3237 (citing THE RADICATI GROUP, INC., EMAIL STATISTICS REPORT, 2009–2013 (2009)). To make this information explosion more concrete, consider that the amount of information in organizations has increased by "thousands if not tens of thousands of times" in the last twenty years. GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 4 (2006). For a more detailed discussion of the information explosion, see GEORGE L. PAUL, FOUNDATIONS OF DIGITAL EVIDENCE (2008).

5. For a more detailed discussion of the problems associated with electronic discovery, see THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 37 (2004) [hereinafter SEDONA PRINCIPLES], http://www.thesedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf.

6. *Marine Midland Realty Credit Corp.*, 138 F.R.D. at 479–80.

approaches to inadvertent disclosure.[7] Some courts held that disclosures not only waived privilege for the produced document, but also waived privilege to other nondisclosed documents referencing the same subject matter.[8] In other words, a moment's carelessness from a young associate or paralegal could result in a legal nightmare of frantic litigation over whether the document's privilege was waived, as well as potential subsequent malpractice suits from the affected client.

While the inefficient and costly response to preventing inadvertent disclosure was to spend an exorbitant amount on reviewing documents for privilege before producing them,[9] attorneys privately began developing their own solutions through nonwaiver agreements. These solutions often took the form of contracts between parties to a litigation that essentially stated that inadvertent disclosures would not waive privilege. If effective, these agreements could have cut a $13.5 million cost of doing privilege review by at least half,[10] because with the assurance that privilege will be preserved, parties can filter out documents that are less likely to be relevant using various techniques such as keyword searches instead of reviewing each document individually to determine if it is privileged.[11] However, case law again became a hindrance as courts did not act uniformly in upholding such agreements. This held true

7. *See* Hopson v. Baltimore, 232 F.R.D. 228, 235–36 (D. Md. 2005) (discussing the split in federal court approaches); John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2 FED. CTS. L. REV. 57, 60 (2007) (noting that the law of waivers "is muddled and differs radically from jurisdiction to jurisdiction" but that the approaches fall on a continuum from the rigid view that disclosure results in waiver to a more liberal view that disclosure does not result in waiver).

8. *See Hopson*, 232 F.R.D. at 234–44. The other two approaches were the lenient approach and the middle of the way approach. *See id.* at 235–36. The lenient approach rules that disclosure will only result in waiver in cases of knowing and intentional disclosure or inadvertent disclosure that is caused by gross negligence. *See* PAUL W. GRIMM, CHARLES S. FAX & PAUL MARK SANDLER, DISCOVERY PROBLEMS AND THEIR SOLUTIONS 67 (2005). The middle of the way approach generally looks to five factors aimed at determining whether the producing party had taken reasonable steps to prevent waiver. *See Hopson*, 232 F.R.D. at 235–36. This Comment does not discuss the approach of state law nor does it address anything about potential state and federal conflicts as both are outside this Comment's scope.

9. *See* Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 182–83 (2006), http://thepocketpart.org/2006/11/30/rosenthal.html (noting that the costs of privilege review are increasing, particularly because, despite technology improvements, there is still no substitute for manual human review).

10. *See Hearing of the Advisory Comm. on Evidence Rules*, 110th Cong. 89 (2007) [hereinafter *2007 Hearings New York*] (testimony of Anne Kershaw, Attorney, A. Kershaw P.C.), *available at* http://federalevidence.com/pdf/2007/WebPDFs/ERcommTranscript01-29-07.pdf; *id.* at 99–100 (testimony of Patrick Oot, Director of Electronic Discovery & Senior Counsel, Verizon).

11. *See id.* at 101 (testimony of Anne Kershaw, Attorney, A. Kershaw P.C.) (agreeing with Professor Capra that parties save costs by not having to review documents that were "not in the bucket" or documents that were irrelevant). For a more detailed discussion of various techniques that parties can use to cut on the costs of privilege review, see *id.* at 92–98.

even when a court had incorporated the language of the agreement into a protective order,[12] resulting in the enforcement of the nonwaiver agreement.[13] Change was clearly needed and came on September 19, 2008 when President George W. Bush signed Federal Rule of Evidence 502 (Rule 502) into law.[14]

Rule 502 standardizes federal privilege law for attorney-client privilege and work-product protection in inadvertent disclosures and nonwaiver agreements. First, it adopts a middle-of-the-way approach in inadvertent disclosure so that privilege is not waived if the producing party had taken reasonable steps to prevent disclosure.[15] More importantly, it states that nonwaiver agreements are binding between the parties and will be binding against third parties if incorporated in a court order.[16] However, a major problem that now confronts courts is whether they should uphold all nonwaiver agreements, including those that preserve privilege despite grossly negligent or nonexistent privilege review (hereinafter "irrespective-of-care nonwaiver agreements").[17] Doing so promotes the interest in reducing the costs of privilege review. Not doing so promotes the client's interest in conducting reasonable privilege review to prevent privileged material from being disclosed to the opposing side. After all, even if privilege is not waived, the opposing side has seen the information and could alter its strategy. Minor responses, such as deposing a different group of witnesses or inquiring about subjects, which an opposing party would not have thought to

12. *See* 2 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 1259 (5th ed. 2007) (discussing cases where courts did not uphold nonwaiver agreements).

13. *See Hopson*, 232 F.R.D. at 234–44. Protective orders are also sometimes called confidentiality orders, as in the comments to Rule 502. *See* 154 CONG. REC. S1317, S1318 (daily ed. Feb. 27, 2008). A court usually gives this order prior to discovery at the request of the parties. *See, e.g.*, Minebea Co. v. Papst, 370 F. Supp. 2d 297, 299 (D.D.C. 2005). This Comment refers solely to this type of protective order. However, in other circumstances, courts may also give this order when one party inadvertently discloses a privileged document and subsequently moves for the court to grant a protective order preserving privilege. *See, e.g.*, Marrero Hernandez v. Esso Standard Oil Co., No. 03-1485 (JAG/GAG), 2006 WL 1967364 (D.P.R. July 11, 2006). In some patent litigation, protective orders are granted immediately upon the filing of the suit without agreement from any of the parties. *2007 Hearings New York*, *supra* note 10, at 73–74 (testimony of Henry M. Sneath, Board Member, Defense Research Institute).

14. The new rule applies to "all proceedings commenced after [September 19, 2008] and, insofar as is just and practicable, in all proceedings pending on such date of enactment." FED. R. EVID. 502.

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

16. FED. R. EVID. 502(d)–(e).

17. The term "irrespective-of-care nonwaiver agreements" is a term I have coined for the purposes of this Comment based on the Advisory Committee's comments to subsection D of the rule, which states that a protective order "may provide for return of documents without waiver *irrespective of the care* taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and quick peek' arrangements . . . ." 154 CONG. REC. S1317, S1318 (daily ed., Feb. 27, 2008) (emphasis added). It is not used anywhere else to my knowledge, but writing "nonwaiver agreements that preserve privilege despite grossly negligent or no privilege review" is overly cumbersome.

address without having seen the privileged information, could trigger a chain of events that might ultimately even cost the client a victory.

This Comment proposes that courts should balance these interests by refusing to grant protective orders or to uphold irrespective-of-care nonwaiver agreements. My proposal has two central arguments and a suggested remedy. First, I argue that intervention is necessary because irrespective-of-care nonwaiver agreements are against public policy. Not only are they a concern from a monetary point of view, but they are also problematic on the normative levels of agency and ethics theories which aim to protect clients or, more specifically, prevent attorneys from acting in their own best interests to the detriment of the client's case. Second, I argue that courts are best situated to police these agreements because they have advantages over disciplinary, liability, and legislative forms of control and because of the prevailing case law. Finally, I detail the approach courts should follow and argue that courts should not grant protective orders when parties request that the orders encompass grossly negligent or no privilege review. Courts should specify that protective orders are meant to protect reasonable privilege review whenever they grant an order. In more difficult cases where courts suspect a party may have already conducted grossly negligent or no privilege review, courts should first take a brief glance at the inadvertent production through the lens of the "reasonable steps" test under Rule 502. If a court surmises that the party did reasonable or negligent privilege review, then the inquiry stops and the nonwaiver agreement protects privilege. On the other hand, if a court surmises that the party did grossly negligent or no privilege review, the court should refuse to enforce the nonwaiver agreement and rigorously apply the "reasonable steps" test.

Part I summarizes the responses to the inevitable problem of inadvertent production in an era of electronic discovery before focusing on the newly raised questions posed by Rule 502's nonwaiver-agreements provisions and the problem of lax privilege review hurting the interests of the client. Part II briefly outlines my proposal and argues that courts should take an active role in policing these types of nonwaiver agreements. Part II.A lays the foundations for my proposal by demonstrating why irrespective-of-care nonwaiver agreements are against public policy, Part II.B explains why courts should be the main enforcing mechanism, and Part II.C then details the approach that courts should follow when confronting these types of agreements.

I. BACKGROUND: PRIVILEGE LAW WAS A MESS AND RULE 502 AIMED TO CLEAN IT UP

A. Paper-Discovery Approaches Applied in an Era of Electronic Discovery: The Incompatibility of Explosive Information Growth and Federal Common Law on Inadvertent Disclosure

In traditional discovery where parties exchange paper documents, there has always been the possibility that some privileged documents would be inadvertently produced to the other side. However, this possibility has become increasingly problematic with the recent explosive growth of electronic documents.[18] When a case involves hundreds of thousands of documents, privileged documents are inevitably inadvertently produced even with the most stringent privilege review. Prior to Rule 502, which adopted a uniform approach to inadvertent disclosure, federal courts were split into three approaches for inadvertent disclosure.[19] Of these three approaches, the strictest courts held that inadvertent disclosures resulted in privilege waiver not only for the disclosed document, but also for nondisclosed documents that related to the same subject matter as the disclosed document.[20] To make matters worse, most courts agreed that third parties could also gain access to these documents in addition to the parties to the case.[21] This harsh subject-matter waiver rule meant that attorneys operated under the common-denominator assumption that all jurisdictions had the strict waiver approach,[22] which

18. According to one study, 247 billion messages will be sent every day in 2009, and that number is expected to almost double to 507 billion in 2013. *See* Press Release, The Radicati Group, Inc., *supra* note 4.

19. *See supra* text accompanying note 8; *see also* Hopson v. Baltimore, 232 F.R.D. 228, 234–44 (D. Md. 2005) (discussing the three approaches); Julie Cohen, Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 633–41 (2008) (same).

20. *See In re* Sealed Case, 877 F.2d 976, 980–81 (D.C. Cir. 1989) (citing *In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)). For a more detailed discussion of the strict approach, see GRIMM, FAX & SANDLER, *supra* note 8, at 65–66. The case law within strict approach jurisdictions is actually more nuanced than suggested because it makes distinctions based on whether the privilege is attorney-client or work product, but this Comment will not go into detail about this case law because it is preempted by Rule 502.

21. *See* Laura Catherine Daniel, Note, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 681 (2005).

22. *See 2007 Hearings New York*, *supra* note 10, at 127 (testimony of Phillip Sellinger, Manager, Greenberg Traurig) ("I assume in every case the broadest conceivable waiver, and I have to take steps to prevent against the broadest conceivable waiver.").

meant that law firms were spending millions of dollars on privilege review.[23] Paper discovery rules were being applied to electronic discovery with disastrous results, leading one magistrate judge to note, "It is hard to imagine a greater waste of money than paying a lawyer $250 an hour to look at [emailed] recipes, notices of the holiday party, and NCAA Final Four pool entries while doing a privilege review."[24]

B. Private Self-Help: The Rise of Nonwaiver Agreements and Their Unfulfilled Promise Deriving from Non-Uniform Application

Confronted with the rapidly escalating costs of privilege review, attorneys began to develop nonwaiver agreements or contracts aimed at preventing privilege waiver.[25] There are two major types of nonwaiver agreements: "clawback" and "quick-peek" agreements.[26] Under a clawback agreement, the parties agree that any privileged documents which are inadvertently produced during discovery will be returned, or clawed back, without waiver of privilege.[27] A typical clawback agreement states: "production of any of the documents presently in dispute shall not constitute a waiver of any privilege . . . ."[28] However, like all contracts, these basic terms can vary in specifying what types of privilege are covered,[29] how much time a party has to claim the privilege,[30]

23. *See id.* This Comment does not delve too deeply into the reasons why privilege review is so expensive, though numerous other sources have explained it. *See generally* SEDONA PRINCIPLES, *supra* note 5 (explicating the numerous facets of electronic discovery and illuminating why this type of privilege review is so burdensome).

24. Facciola, *supra* note 7, at 64.

25. "It has become increasingly common for parties to enter into [nonwaiver] agreements to disclose privileged materials provided the disclosure is not taken to entail waiver as to all privileged matters." EPSTEIN, *supra* note 12, at 1245. Indeed, several sources have advised parties to enter into such agreements. *See, e.g.*, Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("Indeed, many parties to document-intensive litigation enter into so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents."); MANUAL FOR COMPLEX LITIGATION § 11.446 (4th ed. 2004) (noting such agreements will protect parties from the most dire consequences of inadvertent disclosure); SEDONA PRINCIPLES, *supra* note 5, at 36 (recommending parties enter into nonwaiver agreements and seek court orders enforcing such agreements).

26. Facciola, *supra* note 8, at 60–61. The quick-peek agreement has many names including a "sneak a peek" agreement. *Id.* at 60. However, for the purposes of this Comment, I will be using the term "quick-peek" because that is the term Rule 502 uses in its comments. *See* 154 CONG. REC. S1317, S1318 (daily ed. Feb. 27, 2008).

27. *See* SEDONA PRINCIPLES, *supra* note 5, at 37.

28. Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269, 281 (D.D.C. 2002), *aff'd*, 64 F. App'x 783 (D.D.C. 2003).

29. *See, e.g.*, *id.* at 284 (citing Navajo Nation v. Peabody Coal Co., 7 F. App'x 951, 956 (Fed. Cir. 2001)) (noting that the protective order only covered proprietary information, not privileged documents).

30. *Compare* Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc., No. IP96-1718-C-H/G, 2001 WL 699850, at *1 (S.D. Ind. May 29, 2001) (stating that the producing party will not waive privilege if

and the procedures that both parties must follow when one side claims the privilege.[31] Most relevant for the purposes of this Comment, the agreement can specify varying levels of negligence in inadvertent production.[32] This means a party could have a clause covering grossly negligent or even no privilege review.[33] While this Comment does not address what constitutes grossly negligent privilege review, the existing case law on the middle-of-the-way approach to inadvertent disclosure is instructive, as is the developing case law after the advent of Rule 502.

Under a quick-peek agreement, the parties agree that the requesting party can initially review the producing party's documents without any waiver of privilege.[34] Although some scholarship suggests attorneys forego any document review prior to this initial review,[35] some attorneys do an initial quick removal of documents that are likely to be privileged.[36] Presumably

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he notifies the opposing party "within 30 days of the discovery of such inadvertent production"), *with* Minebea Co. v. Papst, 370 F. Supp. 2d 297, 299 (D.D.C. 2005) (stating that the producing party may claim privilege "within a reasonable time."). *Minebea* is also interesting because the D.C. District Court held that even "delays of a year or more from the time of production until the time of the return request" still satisfied the protective order's provision of "within a reasonable time" when the producing party notified the opposing party of the error as soon as it discovered the document was inadvertently produced. *Id.* at 300.

31. *Compare Cardiac Pacemakers, Inc.*, 2001 WL 699850, at *1 ("Upon written request by the inadvertently producing party, the Recipient Party shall (even if the Recipient Party disagrees that the document is privileged) return all copies of the document and not use the information in the document for any purpose until further order of the Court."), *with* Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 406 n.2 (D.N.J. 1995) ("Upon a claim of inadvertent production, the parties shall determine whether there is agreement as to the producing party's claim of privilege or other objection. If agreement cannot be reached, the burden shall be on the producing party to obtain a hearing before the court and to establish its claim of privilege."). Another variation is stating that disclosure will not waive privilege in present or future litigation, which was likely intended originally to address future third party litigation and is now not as relevant given Rule 502. *See, e.g.*, *Navajo Nation*, 209 F. Supp. 2d at 281 ("Production of documents for purposes of the present case shall no [sic] constitute a waiver of any right of Peabody to raise a claim of privilege as to these documents in any other present or future proceeding."). There are many more variations, though this Comment will not explore all of them.

32. *See infra* p. 1865 for a more detailed explanation of the varying levels of inadvertent production.

33. *See* Facciola, *supra* note 8, at 61 (noting that clawback agreements could occur in two situations: one without any privilege review, and another with privilege review).

34. Ashish Prasad & Vazantha Meyers, *The Practical Implications of Proposed Rule 502*, 8 SEDONA CONF. J. 133, 134 (2007).

35. *See, e.g.*, Daniel, *supra* note 21, at 667 (citing Kenneth J. Withers, *Electronic Discovery Disputes: Decisional Guidance*, CIV. ACTION, Summer 2004, at 4–5, *available at* http://www.ncsconline.org/Projects_Initiatives/Images/CivilActionSummer04.pdf).

36. *See, e.g.*, *2007 Hearings New York*, *supra* note 10, at 92–98 (testimony of Anne Kershaw, Attorney, A. Kershaw P.C.) (describing a quick-peek process where attorneys initially separate out privileged emails into a separate "bucket" and then being able to use technology to effectively filter out confidential information from this pile).

the opposing lawyers who are reviewing the documents do not have a copy of the files, but rather must review specific files jointly with the producing attorneys.[37] From these documents, the requesting party selects a portion that it wishes to be produced, and the producing party will subsequently review that portion and produce non-privileged documents.[38]

As this brief discussion of clawback and quick-peek agreements reveals, nonwaiver agreements clearly produce substantial benefits, such as saving on costs of privilege review and preserving privilege. Thus, although there have been no empirical studies about their rise, generally commentators agree they have become increasingly common.[39] Unfortunately, courts have not uniformly upheld nonwaiver agreements, even when the court had granted a protective order incorporating the language of the agreement,[40] particularly when a third party argued that there was a waiver of privilege.[41] Thus, parties could not truly rely on these nonwaiver agreements, and the problems with electronic discovery persisted.

C. Federal Intervention: The Ineffective 2006 Federal Rules of Civil Procedure Amendments, the Subsequent Rule 502, and the New Problem That Rule 502 Poses

Given the non-uniform approaches to both inadvertent disclosure and nonwaiver agreements, federal intervention was clearly needed. In response

37. *See* Facciola, *supra* note 8, at 60.

38. *See* Daniel, *supra* note 21, at 667.

39. *See supra* text accompanying note 25.

40. Some district courts have upheld nonwaiver agreements. *See* Hopson v. Baltimore, 232 F.R.D. 228, 234–35 (D. Md. 2005) (listing cases in which courts have approved nonwaiver agreements). However, others have not. *See, e.g.*, Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 118 (D.N.J. 2002) (refusing to uphold an agreement because such agreements "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, 577–78 (M.D. Tenn. 2000) (refusing to uphold an agreement with the government to produce documents without waiving privilege). Some courts have even refused to uphold the same agreement between the same parties in subsequent litigation. *See, e.g.*, Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269, 272 (D.D.C. 2002), *aff'd*, 64 F. App'x 783 (D.D.C. 2003) (refusing to uphold a protective order in a different jurisdiction even though same parties had been involved in prior litigation). As these cases demonstrate, courts have been mixed in their outcomes, with some courts approving nonwaiver agreements without a protective order, some approving nonwaiver agreements because their language was incorporated in a protective order, and some refusing to uphold nonwaiver agreements regardless of whether their language was incorporated into a protective order.

41. *See Hopson*, 232 F.R.D. at 235 (citing Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426–27 (3d Cir. 1991); Bowne v. AmBase Corp., 150 F.R.D. 465, 478 (S.D.N.Y. 1993)) (noting that "it is questionable whether [nonwaiver agreements] are effective against third-parties"); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2016.2 n.14 (3d ed. 2008). Courts are particularly prone to finding a waiver when a case is in multiple jurisdictions, as in mass tort or products liability cases. *See* SEDONA PRINCIPLES, *supra* note 5, at 37.

to this problem, the federal government stepped in with the 2006 Federal Rules of Civil Procedure (FRCP) Amendments, which aimed in part at reducing the costs and burdens imposed by electronic discovery.[42] Rule 26(f) made some progress by requiring parties to meet and confer before discovery to discuss, among other things, privilege waiver and entering into nonwaiver agreements.[43] However, the FRCP did not have the power to change substantive state privilege laws because the Rules Enabling Act dictates that the Supreme Court can only promulgate rules prescribing the "practice and procedure" of federal courts, but could not "abridge, enlarge, or modify any substantive right."[44] Thus, the Advisory Committee on Evidence Rules of Practice and Procedure (Advisory Committee), recognizing the need for uniformity in this area,[45] addressed the problem through Rule 502. After a period of public comment, the Advisory Committee submitted the revised Rule 502 to Congress on September 26, 2007, specifically noting that the new rule had two major purposes: (1) To resolve the "disputes involving inadvertent disclosure and subject matter waiver," and (2) To "respond[] to the widespread complaint" that the costs associated with discovery, particularly those involving electronic discovery, had become "prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information."[46] Congress subsequently passed the bill and President George W. Bush signed

42. *See* Jessica DeBono, Comment, *Preventing and Reducing Costs and Burdens Associated With E-Discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 MERCER L. REV. 963, 969–70 (2008).

43. *See* Rosenthal, *supra* note 9, at 168–70. Indeed, the rules explicitly reference quick-peek and clawback agreements as potential points of discussion. *See* FED. R. CIV. P. 26(f) advisory committee note (2006) ("On other occasions, parties enter agreements—sometimes called 'clawback agreements.'"); *see also* DeBono, *supra* note 42, at 974. For further guidance, Rule 26(b)(5) provides a procedure for asserting privilege absent a nonwaiver agreement. FED. R. CIV. P. 26(b)(5).

44. *See* 28 U.S.C. § 2074 (2006). Indeed, the comments to one of the 2006 FRCP Amendments explicitly note that it "does not address whether the privilege or protection that is asserted after production was waived by the production." FED. R. CIV. P. 26(b)(5) advisory committee note.

45. *See* Prasad & Meyers, *supra* note 34, at 135. Rule 502 was initially drafted in March 2006 and subsequently submitted for public comment until February 15, 2007. *Id.* at 135–36. The Advisory Committee is one of five committees appointed by the Judicial Conference to assist the Standing Committee. *See* 28 U.S.C. § 2073(a)(2) (2006). More specifically, it is the first government entity to consider public suggestions of new rules. *See* James C. Duff, The Rulemaking Process: A Summary for the Bench and Bar (Oct. 2007), http://www.uscourts.gov/rules/proceduresum.htm. It is comprised of "federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice." *Id.* After publishing the proposed new rule and soliciting public comments, the Advisory Committee subsequently makes its recommendations to the Standing Committee, which in turn recommends proposed rules changes to the Judicial Conference. *See id.* If the Judicial Conference approves the changes, the Supreme Court approves them next, followed finally by Congress. *See id.*

46. 154 CONG. REC. S1317, S1317 (daily ed. Feb. 27, 2008).

Rule 502 into law on September 19, 2008.[47] The new rule addressed monetary concerns in two ways: first, it adopted an approach whereby parties taking reasonable steps to prevent inadvertent disclosure would not waive any privilege;[48] second, it upheld nonwaiver agreements between parties and, in the case of a protective order incorporating the language of the agreement, against third parties as well.[49]

A new question that has emerged after Rule 502 is whether courts should uphold nonwaiver agreements irrespective of the level of care during review taken by the disclosing party. Subsections D and E of Rule 502 read:

> (d) Controlling effect of a court order.—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.
> (e) Controlling effect of a party agreement.—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.[50]

On the surface, the language of Rule 502 does not suggest that courts should impose any limitation on the level of privilege review. Indeed, the explanatory notes to subsection D actually state that the court orders "may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and 'quick-peek' arrangements as a way to avoid the excessive costs of preproduction review for privilege and work product."[51] However, balanced against the concern for decreasing privilege review costs is the client's interest in preserving privilege. With lax privilege review, there is a greater probability that a privileged document will be revealed, and even if the opposing party cannot use the document in litigation, it will have seen it, likely be unable to forget it,[52] and be able to use the information to strategize for its case.[53] Although there is little data on the concrete ways an inadvertent disclosure can benefit the other

47. Attorney-Client Privilege and Work Product; Limitations on Waiver, Pub. L. No. 110-322, 122 Stat. 3537 (2008) (codified at 28 U.S.C. § 2450 (2008)).

48. *See* FED. R. EVID. 502(b).

49. *See* FED. R. EVID. 502(d)–(e). The new Rule 502 makes other changes as well, but these changes are beyond the scope of this Comment.

50. *Id.*

51. 154 CONG. REC. S1317, S1318 (daily ed. Feb. 27, 2008).

52. *See* MICHELE C.S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW 49 (2004) ("You cannot erase that information from the memory or minds of counsel despite a court order to disregard the contents.").

53. *See* Daniel, *supra* note 21, at 684 (noting that regardless of whether the court enforces the nonwaiver agreement, the receiving attorney "may still be able to use it to further his client's case" and that the disclosing lawyer may effectively "assist his opponent in developing the latter's trial plan.").

side—perhaps because its effects are difficult to detect—logically the disclosed information could cause the opposing party to depose new witnesses, inquire about new subjects it did not consider before, research new arguments that it did not consider before, or reconsider and strengthen its own arguments.[54] Standing individually, these actions may not seem too disastrous, but taken together, they could set off a chain of events that perhaps ultimately lead to a lower settlement or a disastrous verdict.

II. PROPOSAL: COURTS SHOULD NOT UPHOLD IRRESPECTIVE-OF-CARE NONWAIVER AGREEMENTS

As the above discussion illustrates, nonwaiver agreements have to take into account the competing concerns of wasting money on privilege review and protecting the interests of the clients. Rule 502 may go too far by allowing monetary concerns to outweigh client concerns, further implicating principal-agent and ethical obligations. This Comment's proposal strikes a better balance than Rule 502 by urging courts to refuse to give protective orders or uphold nonwaiver agreements that allow grossly negligent privilege review or no privilege review at all.

This proposal has three main components. First, it argues that these types of nonwaiver agreements offend public policy, thereby giving courts the right to intervene and override the typical freedom to contract. One problem with irrespective-of-care nonwaiver agreements is that although Rule 502 clearly aims to reduce privilege-review costs, these agreements may become cost-shifting tools that ultimately do not save money so much as shift the costs to the receiving party. In addition, these types of nonwaiver agreements potentially conflict with agency and state ethical obligations. Second, given that these types of nonwaiver agreements pose significant policy concerns, courts are the proper enforcement mechanism because they are in the best position to police these agreements and because they have refused to enforce nonwaiver agreements in the past. Finally, when intervening, courts should follow the approach of prior cases by performing a preliminary inquiry into whether

54. *See* DAVID B. ALDEN & TED S. HISER, NEW FEDERAL RULE OF EVIDENCE 502 AND POSSIBLE LITIGATION DOCUMENT REVIEW COST SAVINGS 3 (2008), http://www.jonesday.com/files/Publication/294ec86e-99c5-4294-981c-4245b1633669/Presentation/PublicationAttachment/0853a611-d8d2-493a-ae26-e0c9939df216/New%20Federal%20Rule.pdf (noting that the adversary could use the disclosed information to "formulate questions, trial strategies, or challenges to privilege claims that are based on or informed by privileged or protected documents"). In addition, if the opposing side had "fact or expert witnesses review and rely on privileged or protected documents . . . it will be impossible to have them 'unlearn' that information and difficult to excise the resulting knowledge from their testimony or opinions." *Id.*

the party conducted reasonable privilege review, and if the facts suggest the party did not, the protective order or contract would be unenforceable and the court should apply the normal inadvertent-disclosure test.

A. Why Irrespective-of-Care Nonwaiver Agreements Offend Public Policy: Monetary, Agency, and Ethical Concerns

There are numerous ways in which irrespective-of-care nonwaiver agreements offend public policy. Judicial intervention is therefore possible because courts can override the typical freedom-to-contract theory with the argument that there are more important public-policy concerns at stake than the freedom to contract.[55] In this context, irrespective-of-care nonwaiver agreements are problematic from a monetary perspective as well as from agency and ethical perspectives.

1. Monetary Rationales: Saving on Costs of Privilege Review or Cost-Shifting Devices?

Rule 502 aims to reduce the costs of privilege review and nonwaiver agreements, which as a whole certainly makes sense for the reasons described in Part I. However, irrespective-of-care nonwaiver agreements actually hurt the stated goal of saving money. This is because these types of agreements may end up as cost-shifting tools where the producing party can save significant money, but the receiving party has to expend more resources reviewing the increased number of irrelevant documents and complying with the nonwaiver agreements.[56] Indeed, the Advisory Committee recognized this problem during its public hearings about Rule 502 when a speaker who was a member of the influential Sedona Electronic Discovery Working Group raised such concerns.[57] The speaker, Keith Altman, noted that nonwaiver agreements could potentially offload the cost to the other party because the receiving party must spend its time reviewing the produced documents and

55. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) ("A promise . . . is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy . . . .").

56. *See 2007 Hearings New York*, *supra* note 10, at 266–76 (testimony of Keith L. Altman, Attorney, Finkelstein & Partners) (discussing the possibility of lax privilege review offloading costs onto the receiving party and potential negative consequences).

57. *See id.* at 275–76.

also expend extra resources to return inadvertently produced documents.[58] The receiving party could also face additional costs in having to erase all potential traces of the inadvertently produced privileged documents,[59] particularly because it can be easy for the producing party to point to an exhibit and claim it was privileged but "a lot of trouble for the receiving party to comply with such a request."[60] Moreover, in the oft-cited *Zubulake v. UBS Warburg LLC*,[61] the court expressed the concern that "[courts] must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations."[62] Although *Zubulake* was about the problems of a producing corporation facing expensive retrieval costs of hard-to-access information and arguing that the private litigant should bear the costs,[63] the sentiment is similar to the concern in nonwaiver contexts: Large corporations could potentially use these agreements and effectively stifle private-party litigation by shifting significant costs to parties with fewer resources. This concern is especially apparent in quick-peek agreements because the receiving party must look through a huge volume of unorganized documents and determine which ones they want to be produced. Irrespective-of-care nonwaiver agreements can thus be used as cost-shifting tools, which seems to contradict the purpose of Rule 502.

Irrespective-of-care nonwaiver agreements probably do not even save money for society at large because the greatest overall cost-saving amount in any given case may be if parties conduct reasonable privilege review. This may seem counterintuitive at first because when the producing party does almost no privilege review, it saves significant money by not having to review large volumes of documents that are mostly irrelevant. Likewise, the receiving party may also not have to spend that much if the quick-peek has an effective initial cut. However, as the producing party becomes more negligent in privilege review, more receiving-party attorneys will be reviewing more of the information. The receiving-party attorneys may be more inefficient about reviewing the documents because they are not as familiar with them as the producing-party attorneys may be. This could mean that instead of the producing party spending a little more money brainstorming

58. *Id.* at 267. The speaker reiterates later, "This is not a one-sided thing. I'm just saying it can be very costly, and I think the cost is going to go up to comply with inadvertent production or claw backs." *Id.* at 271.

59. *See id.* at 269 ("[I]t would cost me $50,000 to comply with your inadvertent production, to literally do every possible thing that could be done to get rid of this stuff . . . .").

60. *See id.* at 271–72.

61. 217 F.R.D. 309 (S.D.N.Y. 2003).

62. *Id.* at 317.

63. *See id.* at 316–17.

keyword searches that would more effectively sort out the information,[64] the receiving party is spending significantly more time and money looking through a larger number of irrelevant documents. Moreover, there are alternatives to the quick-peek agreement that could achieve a similar result. For instance, the parties could cooperate and communicate exactly what they want prior to any privilege review, or the producing party could do a first round of privilege review on a subset of the documents and ask the receiving party whether those initial documents were what they were requesting. These and numerous other alternatives would result in monetary savings, and do not face the same cost-shifting concerns that plague irrespective-of-care nonwaiver agreements.

Finally, the argument that irrespective-of-care nonwaiver agreements are justified under a monetary theory because Rule 502 asserts that courts could enter protective orders without party agreement is flawed. The provision, which states that "[a] Federal court may order that the privilege or protection is not waived" and adds in the comments that courts may order this even if the parties do not have a nonwaiver agreement,[65] initially suggests that Congress has already made a determination that all nonwaiver agreements save money, and that courts should perhaps routinely impose them. However, a thorough reading of all the public hearings on Rule 502 reveals that this provision was likely meant to address two scenarios: patent litigation, where courts often automatically entered protective orders at the onset of litigation,[66] and situations where the plaintiff could refuse to enter into a nonwaiver agreement for tactical reasons by forcing the defendant to settle instead of undertaking the exorbitant costs of privilege review.[67] Neither scenario

64. *See 2007 Hearings New York*, *supra* note 10, at 261 (testimony of Keith L. Altman, Attorney, Finkelstein & Partners) (suggesting that attorneys can easily miss privileged documents because they did not think up the best keyword searches); *see also* H. Christopher Boehning & Daniel J. Toal, *Poorly Executed Privilege Review Can Lead to Waiver*, N.Y. L.J., June 17, 2008, at 5 (discussing the importance of search methodology). This article focuses on *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. May 29, 2008), a case before Magistrate Judge Grimm, author of the *Hopson* decision. In *Creative Pipe*, The court found that the defendant had not preserved its privilege because the defendants could not accurately describe the search or their reasons for their search methodology. *See id.* at 259–63.

65. FED. R. EVID. 502(d). The comments to this subdivision note that "[u]nder the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order." 154 CONG. REC. S1317, S1318 (daily ed. Feb. 27, 2008).

66. *See 2007 Hearings New York*, *supra* note 10, at 73–74 (testimony of Henry M. Sneath, Board Member, Defense Research Institute).

67. *See id.* at 250 (testimony of Peter Sullivan, Attorney, Hughes Hubbard & Reed LLP) (pointing out a situation where a private litigant has nothing to lose by refusing to enter into a nonwaiver

expresses a value judgment that irrespective-of-care nonwaiver agreements and their efforts to save privilege-review costs would always save money.

2. Agency Rationales: Increasing Agency Costs and Fiduciary Duties of the Attorney Agent

Irrespective-of-care nonwaiver agreements are also problematic when considering agency law. In general, the relationship between an attorney and his client is one in which the client is the principal and the attorney is the agent.[68] This relationship has two major implications for nonwaiver agreements. First, it is prone to agency costs, or the inevitable risks that agents will act for themselves instead of the principal.[69] Irrespective-of-care nonwaiver agreements are problematic because they may increase agency costs, primarily through opportunism and shirking. Second, attorneys, as agents, have fiduciary duties to the client,[70] requiring a duty of care and the duty to maintain client confidences, both of which could be compromised by irrespective-of-care nonwaiver agreements.

a. Agency Costs

Irrespective-of-care nonwaiver agreements are initially problematic because they may increase agency costs such as opportunism and shirking. Opportunism is the concern that agents will take advantage of a situation. This can be a problem in certain situations, such as when attorneys are hired on a contingent fee basis. Far from motivating an attorney to work harder, contingency fee arrangements may actually cause an attorney to enter into irrespective-of-

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agreement and suggesting that the new rule include a provision allowing courts to enter a protective order over the objections of another party).

68. "Lawyers therefore are recognized as agents for their clients in litigation and other legal matters." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt.b (2000). More specifically, lawyers are independent contractors who are agents. *See* RESTATEMENT (SECOND) OF AGENCY § 14N cmt.a (1958). In addition, most courts seem to assume that attorneys act with implied authority or perhaps apparent authority in inadvertent disclosure contexts. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.16, at 9–65 (3d ed. Supp. 2004-2).

69. *See* Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 275 (1998). Technically, agency costs are defined as the sum of the principal's monitoring cost, the agent's bonding cost, and any residual loss. *Id.* at 276. In this scenario, the residual loss is any further costs the principal incurs due to the agent's self-interest (such as opportunism and shirking). *Id.* However, for the sake of simplicity, this Comment will refer to only opportunism and shirking as agency costs because these are the primary concerns in nonwaiver agreements.

70. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS *supra* note 68, § 16. The Restatement defines a fiduciary as "a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary." *Id.* § 16 cmt.b.

care nonwaiver agreements to save money on privilege review. Moreover, although the client has the option of hiring a different attorney, if courts always allow irrespective-of-care nonwaiver agreements, attorneys would naturally want to enter into them. This in turn would mean that the entire competitive market could shift because if most attorneys typically entered into these agreements, it could become a standard practice in the industry. Clients would then be left with fewer alternatives because most attorneys that they approached would typically enter into irrespective-of-care nonwaiver agreements.

Irrespective-of-care nonwaiver agreements also increase the agency cost of shirking, which is the assumption that agents will slack in their responsibilities without sufficient oversight.[71] These agreements do so because they aggravate the "agency chain of command" problem in law firms.[72] Although this term was first used to describe the equivalent problem in corporations,[73] law firms face the same challenge of a downward chain of command where partners supervise associates who may supervise paralegals. Because of this downward chain, shirking naturally occurs when associates and paralegals conducting privilege review do not work as hard to filter out privileged documents because their immediate superior may not be watching them. Irrespective-of-care nonwaiver agreements aggravate this problem because the lower level employees may disregard their duties even more knowing full well that they will likely not suffer the consequences. Monitoring these reviewers, or perhaps even firing them,[74] does not fix this problem because monitoring also increases agency costs, and the replacement reviewer could just as easily continue slacking in their duties. Irrespective-of-care nonwaiver agreements could even encourage shirking among attorneys, including partners, because they may not feel as compelled to keep up with the latest technological developments in discovery or perhaps not spend as much time customizing privilege review to the particular case when they know privilege would not be waived.

b. Fiduciary Duties

Irrespective-of-care nonwaiver agreements also conflict with the fiduciary duties that lawyers, as agents, have toward their clients. First, these types of agreements may encourage attorneys to breach their duty of care toward

71. *See* Orts, *supra* note 69, at 276–77.
72. *Id.* at 315–16.
73. *Id.*
74. *Id.* at 316.

clients.[75] Lawyers may violate their duty of care if their shirking results in the disclosure of a privileged document that may actually affect the client's objectives such as the outcome of a case or settlement value. Although it seems unlikely that such an extreme result would occur, it is still a possibility, particularly if such agreements become more widespread. Furthermore, lawyers in similar circumstances may not necessarily enter into irrespective-of-care nonwaiver agreements. The multitude of best-practices guides advocating reasonable privilege review[76] and the adoption of the middle-of-the-way "reasonable steps" approach to inadvertent disclosure suggests that most practitioners would likely choose a clawback agreement with reasonable privilege review instead of one with grossly negligent or no privilege review at all. Although arguably a reasonable lawyer facing incredible volumes of documents (little of which is likely to be privileged or even wanted by the opposing party) may want to enter into a quick-peek agreement,[77] it is difficult to determine whether enough practitioners would support it to be deemed an option that satisfied the duty-of-care standard. This is true even though admittedly the duty-of-care standard is fairly liberal and does not even require "average" performance.[78] After all, numerous respected sources do not seem to fully embrace quick-peek agreements—the American Bar Association (ABA) referred to it as an "unconventional approach,"[79] while Judge Lee Rosenthal, who served on the Advisory Committee, called it a "nutty idea."[80] Second, irrespective-of-care

75. This duty of care is defined in the Restatement (Third) as the "duty to exercise care . . . in pursuing the client's lawful objectives." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS *supra* note 68, § 50. The standard of care is further defined as "the competence and diligence normally exercised by lawyers in similar circumstances." *Id.* § 52(1).

76. *See, e.g.*, SEDONA PRINCIPLES, *supra* note 5.

77. At least one practitioner has supported, albeit reluctantly, the quick-peek agreement under these described circumstances. *See Hearing of the Advisory Comm. on Evidence Rules*, 110th Cong. 7–8 (2007) [hereinafter *2007 Hearings Arizona*] (testimony of Thomas Y. Allman, Attorney, Mayer, Brown, Rowe & Maw LLP), *available at* http://www.uscourts.gov/rules/EV_Hearing_Transcript_011207.pdf. ("I used to think that [entering into a quick-peek agreement] was a truly nutty idea, but I must say . . . with the overwhelming amount of privileged information, including marginally privileged information, marginally work product information, I think it is now increasingly sensible for companies to take risks in the interests of getting the job done and moving on with litigation. So, I support, reluctantly, but I do support the 'quick-peek' concept.").

78. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS *supra* note 68, § 52(1) cmt.b ("The duty also does not require 'average' performance, which would imply that the less skillful part of the profession would automatically be committing malpractice.").

79. AM. BAR ASS'N, CIVIL DISCOVERY STANDARDS 74 (2004), *available at* http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf.

80. *2007 Hearings Arizona*, *supra* note 77, at 7 (testimony of Thomas Y. Allman, Attorney, Mayer Brown Rowe & Maw LLP) (stating that he saw Rule 502 as saying that court orders embodying party agreements should be respected "even if the parties chose to go to what Judge Rosenthal would call—called a 'nutty idea,' the idea that you let your opponent come in and look at your privileged information before you have."). Lee H. Rosenthal is intricately involved with

nonwaiver agreements are also problematic because they may lead attorneys to violate their duty of loyalty, which requires attorneys to put the client's interests before their own.[81] Among the different facets of this duty is the duty to maintain client confidences[82] and privacy, both of which are "fundamental principle[s]" of the attorney-client relationship.[83] However, irrespective-of-care nonwaiver agreements put the attorney in a position where he may choose to serve his own interests of saving money on privilege review instead of dutifully maintaining client confidences. Although with hourly billing this concern is lessened, under other types of fee arrangements this may become a greater concern. For instance, with contingency fee arrangements, an attorney may make the determination that he does not want to spend his own money on reasonable privilege review if he is worried he may not actually win the case and never be paid back for those costs. This concern is particularly relevant at small law firms, which are more likely to have contingent fee arrangements.[84] In addition, attorneys who enter into a flat fee arrangement may likewise believe that they have already received a set amount of money for a case, and decide to spend less money on reasonable privilege review in the hopes of keeping more for themselves. Even if the client gives his informed consent (a concept adopted in tort law and applied in several other fields including the closely related field of ethics[85]), this may not be enough to protect the client's interests because it is very difficult to fully inform clients of all the potential consequences of disclosure, particularly when factual and legal uncertainties can have a bearing on the outcome of the disclosure.[86] For all these reasons, irrespective-of-care nonwaiver agreements seem to contradict the fiduciary duty obligation.

Rule 502 because he is the chair of the Committee on Rules of Practice and Procedure which submitted the rule to Congress. *See* Letter From Lee H. Rosenthal, Chair, Comm. on Rules of Practice and Procedure, to Honorable John Conyers, Jr., Chairman, Comm. on the Judiciary and Honorable Lamar Smith, Ranking Member, Comm. on the Judiciary (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

81. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

82. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS *supra* note 68, § 16(3).

83. John M. Burman, *Ownership, Access, and Retention of Client Files*, 23 WYO. LAW 13, 13 (2000).

84. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 29 (2004) ("[M]ore lawyers who do contingency fee work are to be found in [solo practices] as compared to large firm settings.").

85. *See* Ría A. Tabacco, Note, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568, 589 (2008) (citing Barbara L. Atwell, *The Modern Age of Informed Consent*, 40 U. RICH. L. REV. 591 (2006)).

86. *See id.* at 588 ("Due to factual and legal uncertainty, lawyers can rarely, if ever, fully inform clients of the consequences of disclosure."). Although the author focused on criminal-defense informed consent, which dealt with lawyers disclosing confidential information told to them by a criminal defendant, the author based her analysis on Model Rule 1.0(e), which defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably

3. Ethical Rationales: In a Fight Between Rule 502 and Conflicting State Ethics Codes, State Codes Win

Irrespective-of-care nonwaiver agreements may contravene state ethics codes, which could lead to a possible conflict between state and federal law in which state ethics codes must necessarily prevail.[87] A good starting point for examining ethics codes and their interplay with nonwaiver agreements is to consider the ABA's Model Rules of Professional Conduct (MRPC) because while they are not binding, many states base their ethics code on them, and they are one of the most influential sources of professional norms.[88] One provision that essentially restates the duty-of-care doctrine in agency theory is MRPC 1.1, which states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[89] Nonwaiver agreements already encourage less thorough privilege review, and lawyers may not be competently representing their clients if their actions result in "waiving a client's privilege and materially damaging his case."[90] Indeed, the aforementioned Sedona Conference already raised this exact possibility when it noted that entering into nonwaiver agreements "could constitute a violation of Model Rules of Professional Conduct 1.1 (requiring a lawyer to use diligence and care in representation)," particularly "if the manner of the production results in later waivers of privileges and protections."[91]

A second and more pertinent rule that tracks the duty of confidentiality within the duty of loyalty in agency law is MRPC 1.6, which states that "[a]

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available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2007). Because this rule covers professional responsibility as a whole, the same concerns about the ability of lawyers to inform clients of future effects of disclosure logically also arises in the context of nonwaiver agreements.

87. *See* Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility With a Federal Stick*, 66 WASH. & LEE L. REV. 673, 742–43 (2009). Indeed, this concern was raised during the hearings as well with the speaker noting that federal evidence rules could not trump state ethics laws. *See 2007 Hearings Arizona*, *supra* note 77, at 29 (testimony of Douglas L. Christian, Attorney, Harper, Christian, Dichter, Graif, P.C.) ("While 502 will talk to me about rules of evidence and waiver, it will not regulate my ethical conduct. The states, presumably, will continue to do that.").

88. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 810 (1992).

89. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003). Competent handling includes the "use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake." *Id.* at R. 1.1 cmt. 5.

90. Daniel, *supra* note 21, at 681; *see also* SEDONA PRINCIPLES, *supra* note 5 (noting that clawback agreements may lead an attorney to risk violating the MRPC).

91. SEDONA PRINCIPLES, *supra* note 5, at 16.

lawyer shall not reveal information relating to the representation of a client."[92] This rule requires a lawyer to "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client . . . ."[93] Irrespective-of-care nonwaiver agreements can run counter to this rule because attorneys following lax standards of review may not be competently safeguarding the information against inadvertent disclosure, which might lead to the increased likelihood of privileged documents being disclosed. Compounding the problem is that attorneys using irrespective-of-care nonwaiver agreements may not get a protective order backing up the agreement, which means that third parties could gain access to the documents.[94]

Indeed, similar rules are listed in numerous state rules of professional responsibility, particularly rules dealing with the preservation of confidentiality.[95] A few state ethics bar opinions have even touched on some concerns involving nonwaiver agreements. For instance, the D.C. Ethics Bar released an opinion examining whether actions of attorneys involved in an inadvertent disclosure case violated the D.C. counterparts to these rules.[96] While the opinion does not directly address nonwaiver agreements, it does make two important conclusions. First, it noted that an attorney who disclosed confidences knowingly, but not negligently, would violate the rule.[97] Second, it added that an attorney could violate his duty of care either through his own inadvertence that affected his competence in representing a client,[98] or if he failed to use reasonable care in instructing an associate lawyer or nonlawyer employee about document production and a confidential document was inad-

92. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

93. *Id.* at R. 1.6 cmt.

94. SEDONA PRINCIPLES, *supra* note 5. For a more detailed discussion of this concept, see Daniel, *supra* note 21, though the article was written before the adoption of Rule 502.

95. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(e)(1) (West Supp. 2008) (noting that an attorney must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."); N.Y. DISCIPLINARY R. 4-101 (2007) ("[A] lawyer shall not knowingly: Reveal a confidence or secret of a client"); ILL. R.P. CONDUCT 1.6(a) (2007) (stating that unless otherwise permitted or required, "a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure").

96. D.C. Bar, Ethics Op. 256 (1995). These rules have been revised as of 2007, but the basic substance is still similar.

97. *See id.* This portion of the opinion examined District of Columbia Rule of Professional Conduct (DCRPC) 1.6(a) which states, "a lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person." DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT 1.6 (1991).

98. *See* D.C. Bar, Ethics Op. 256 (noting that the attorney's own inadvertence could also violate DCRPC 1.1, which requires competence in representing a client).

vertently produced.[99] Although the D.C. ethics code's counterpart to the duty of confidentiality[100] seems to require something more than mere negligence for a violation, arguably grossly negligent or no privilege review could result in an ethical violation because attorneys would certainly know that privileged documents were being disclosed to the other side. In addition, the language of reasonable care may imply that the District's Bar wishes to encourage reasonable privilege review and, by extension, that irrespective-of-care nonwaiver agreements may violate these ethics rules.

The Kentucky Bar has also written an ethics opinion recognizing that the disclosing lawyer's conduct could be sanctioned in similar circumstances.[101] Likewise, numerous other state bar opinions imply that the producing party has a duty to avoid revealing privileged information including using reasonable care to avoid disclosure to both the opposing and potential third parties.[102] Irrespective-of-care nonwaiver agreements potentially conflict with these abundant state ethics codes, which Rule 502 cannot constitutionally preempt because they are traditionally in the state's realm of responsibility.[103] Thus, ethical concerns also weigh in favor of finding that these agreements contravene public policy.

B. Why Courts Should Be the Enforcement Mechanism: Methods of Control and Prevailing Case Law

After exploring reasons why irrespective-of-care nonwaiver agreements contravene public policy and thus can be unenforceable under federal courts' freedom-of-contract powers, the next question to ask is whether courts should be the enforcement mechanism in policing these agreements. This part of the Comment explores different methods of control and prevailing case law, and concludes that courts are in the best position to police irrespective-of-care nonwaiver agreements.

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99. *See id.* The opinion also noted that such actions might violate DCRPC 5.1(b) and 5.3(b).

100. DCRPC 1.6(e) states, "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client. . . . " DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT 1.6.

101. *See* Ky. Bar Ass'n, Ethics Op. E-374 (1995).

102. *See, e.g.*, Colorado Bar Ass'n Formal Ethics Op. 119 (May 17, 2008); DC Ethics Op. 341 (2007); Maryland State Bar Ass'n Formal Ethics Op. 2007-09, "Ethics of Viewing and/or Using Metadata"; Arizona Ethics Op. 07-03, "Confidentiality; Electronic Communications; Inadvertent Disclosure" (2007); Alabama Ethics Op. RO-2007-02, "Disclosure and Mining of Metadata"; Florida Ethics Op. 06-2 (Sept. 15, 2006); New York State Bar Ass'n Comm. on Prof'l Ethics Op. 782 (2004).

103. *See supra* text accompanying note 87.

1. Disciplinary, Liability, and Legislative Controls: Their Shortcomings and Why Courts as Institutional Controls Are Better Enforcement Mechanisms

Courts should police irrespective-of-care nonwaiver agreements because judicial intervention is the most effective enforcement mechanism for policing nonwaiver agreements. More specifically, amongst the different types of potential controls—disciplinary, liability, legislative, and institutional—institutional controls, of which courts can be considered, offer more benefits as an enforcement mechanism than do the other modes of control.

a. Disciplinary Controls

Disciplinary controls, or the current disciplinary system of independent agencies prosecuting violations of professional conduct under the guidance of state supreme courts,[104] are not an ideal way to restrain nonwaiver agreements, for numerous reasons. Like the criminal system, their aim is punishment and deterrence rather than client compensation,[105] and so from the client's perspective, such prosecutions are small consolation for attorney misconduct. An even greater problem with this mode of control is that judges and lawyers rarely file complaints, thereby rendering this mode of enforcement somewhat ineffective.[106]

b. Liability Controls

Liability controls are client-initiated suits against lawyers for malpractice,[107] which are, similar to disciplinary controls, not very helpful as a means of policing nonwaiver agreements. These controls are focused on compensating the client and have essentially become a field where clients sue on agency theories while using professional responsibility codes as persuasive evidence that an attorney committed malpractice.[108] However, one problem is that clients may not realize they are victims of malpractice.[109] For instance, as explained earlier, inadvertent disclosure could potentially affect cases so that the client ends up with a slightly lower settlement amount, and in these instances, the client may not be aware of the chain of causation that led to this lower

104. Wilkins, *supra* note 88, at 805.
105. *Id.* at 806.
106. *Id.* at 822–23.
107. *Id.* at 806.
108. *See id.* at 831.
109. *See id.* at 830 (citing Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX L. REV. 639, 648 & n.55 (1981)).

amount. Another problem is that clients may be reluctant to sue attorneys because of the expense and time involved.[110] Moreover, these suits may be difficult to prove,[111] the process may take a very long time, and they would impose additional litigation costs and stress on the court docket.

c. Legislative Controls

Legislative controls are those whose authority ultimately rests in the hands of the executive or legislative branch instead of the courts.[112] This type of control may take the form of a regulatory agency overseeing lawyers, perhaps modeled after agencies that regulate doctors, or even the Securities and Exchange Commission.[113] The rationale underlying many proposals to transfer disciplinary oversight to a legislatively created enforcement agency is that regulators who are politically accountable may have a greater interest in protecting the public than bar officials or judges.[114] The problem with this type of control is that no nationwide[115] agency currently exists in the attorney context and creating one would incur large structural costs, especially because independent investigation can be time-consuming and expensive.[116] Moreover, while there may be some improvements in oversight, there is still the danger that the regulators might be captured by regulated interests.[117] Finally, even if such a system were put into place, it would suffer from the same basic problems as disciplinary and liability controls because, again, attorneys may not report misconduct to the agency and clients may still not recognize when they are being harmed.[118] This means that even assuming a nationwide legislatively created enforcement agency was put into place, it would probably not be very effective at policing irrespective-of-care nonwaiver agreements.

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110. *See id.* at 830–31 (citing Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982)).

111. *Id.* ("[L]itigation against lawyer-defendants is particularly difficult to win.").

112. *Id.* at 808.

113. *Id.*

114. *See id.* at 844.

115. Although there are currently no nationwide legislatively created enforcement agencies, California has taken some steps by creating a Bar Court and State Bar Discipline Monitor. *See id.* at 808 n.31.

116. *See id.* at 846–47 (discussing legislative controls and their corresponding structural change costs).

117. *Id.* at 845–46 ("[E]ven in public agencies, a danger always exists that enforcement officials will be captured by regulated interests.").

118. *See id.* at 845 ("[L]ittle reason exists to believe that lawyers and judges would be more willing to report misconduct to legislatively appointed officials or that such a system would make it more likely that injured clients would discover that they have been harmed.").

d. Institutional Controls

Judicial review falls under the category of institutional controls.[119] Because courts are located within the institution in which attorneys work, courts have several advantages over other methods of controls. These advantages can be broken up into two basic arguments: content arguments, which focus on the meaning of the rule, and compliance arguments, which focus on ability of the enforcing body to foster compliance at reasonable costs.[120]

From a content perspective, because many ethics rules are vague,[121] courts have greater leeway to interpret the meaning of these rules and consider the facts of each case when determining whether an attorney's conduct violates ethics rules.[122] Upon finding a violation, courts can then refuse to uphold nonwaiver agreements. A counterargument is that this approach has economic costs, as attorneys are uncertain about what conduct might violate these ethics rules.[123] However, attorney uncertainty may actually be good if it causes attorneys to tread carefully to avoid the possibility of violating these ethics rules.[124] In other words, if one assumes that attorneys should not be conducting grossly negligent or no privilege review, and courts agree, then attorneys would refrain from entering into those agreements and err on the side of caution by conducting reasonable privilege review to avoid the possibility of a court later refusing to uphold the agreement.

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119. Although Professor Wilkin's article largely refers to institutional controls such as court sanctions under FRCP 11 (which allows courts to impose sanctions for certain litigation-related misconduct), *id.* at 835, typical judicial enforcement shares the same common goal as these efforts: "to locate enforcement authority inside the institutions in which lawyers work." *See id.* at 808. In addition, while Professor Wilkin's article states that institutional controls generally ignore agency problems, *see id.* at 848, I contend that in the context of nonwaiver agreements, judicial intervention does address the agency problems discussed *supra* Part II.A.2.

120. *See* Wilkins, *supra* note 88, at 809. Professor Wilkin's article also refers to a third major argument, "independence arguments," which focuses on the relationship between the enforcement means and the independent attorney. *Id.* This Comment does not discuss that argument.

121. *See id.* at 810 ("As many commentators have noted, both the Model Code and the Model Rules are filled" with norms that are "ambiguous, incomplete, or in tension with other, plausibly applicable rules.").

122. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689–90 (1976) (noting that general rules are "an attempt to deal with as many as possible of the different imaginable fact situations in which a substantive issue may arise"). Indeed, as one judge stated, "It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules . . . the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it." Norway Plains Co. v. Boston & Maine R.R. Co., 67 Mass. (1 Gray) 263, 267 (1854).

123. *See* Wilkins, *supra* note 88, at 810–11.

124. Ultimately though, neither side is particularly persuasive on a content level because the dispute rests on one's assumption of what an attorney's obligation is. *See id.*

From a compliance perspective, courts should again be the primary enforcement mechanism because trial judges are in a position to see misconduct by attorneys as it occurs.[125] This means that when an attorney tries to obtain a protective order authorizing no privilege review, the presiding judge can refuse to grant it immediately, thereby staving off the possibility of future satellite litigation from a client suing the attorney for malpractice.

One could argue against the need for judicial intervention by arguing that protective orders would be sufficient to ensure that parties are not lax in privilege review because protective orders generally are granted with an implied good faith effort by the parties.[126] While this Comment does not delve into the intricacies of implied good faith, the border between negligent and grossly negligent privilege review may be somewhat unclear, and therefore the protections provided by this implied good faith effort may not necessarily be enough to prevent lax privilege review. In addition, at least one court in the past has interpreted protective orders to allow no privilege review when the party believed the documents were not privileged,[127] and Rule 502 may encourage courts to follow this example in the future, thereby rendering useless a good faith effort. Moreover, even if one party wishes to appeal from a protective order that allows grossly negligent privilege review, Rule 502 does not provide any assurance that this is possible,[128] nor does it give any standards for what might constitute an abuse of discretion by the trial court.[129]

Although institutional enforcement may have its costs, overall, its benefits outweigh such costs. Accordingly, judicial intervention of irrespective-of-care nonwaiver agreements seems the most appropriate means of enforcement.

2. Prevailing Case Law

Courts have limited nonwaiver agreement terms prior to the passage of Rule 502 and refused on a freedom of contract theory to interpret them to encompass grossly negligent or no privilege review.

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125. *Id.* at 812.

126. *See* Containment Techs. Group, Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 07 Civ. 997, 2008 WL 4545310, at *4 (S.D. Ind. Oct. 10, 2008) (noting that "even at the production stage, protective orders typically charge counsel with a duty to exercise good faith in affixing a 'confidential' or other similar designation to documents"); Noyes, *supra* note 87, at 755 (noting that such protective orders usually require "specific findings and a showing of good cause").

127. *See* Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc., No. IP96-118-C-H/G, 2001 WL 699850, at *1 (S.D. Ind. May 29, 2001).

128. *See* Noyes, *supra* note 87, at 755 (raising questions about whether aggrieved parties have a right to challenge a court's exercise of discretion in granting a protective order under Rule 502).

129. *See id.*

For instance, a New Jersey district court in *Ciba-Geigy Corp. v. Sandoz Ltd.*[130] rejected the producing party's interpretation of a protective order that all unintentional productions were inadvertent and therefore still privileged.[131] The court went on to state that protective orders should not be interpreted to "include a 'blanket' inadvertent disclosure provision which would permit the parties to turn over documents without a privilege review, and then assert claims of privilege after production."[132] Refusing to uphold a "blanket" provision was "consistent with controlling case law," and "to preserve a claim of privilege, [parties] must conduct a privilege review prior to any document production."[133]

Another court similarly refused to interpret the protective order's language of "inadvertent production" to encompass gross negligence in production.[134] It noted that in light of relevant case law, "inadvertent" could "mean that the parties intended to protect only negligent disclosures."[135] Still other courts have stated in dicta that confidentiality agreements only applied when the production of the privileged material was not "completely reckless."[136] While these cases do not explicitly state that they are utilizing their inherent power and limiting the contract due to public policy, this is in fact what the courts are doing. These cases are still persuasive, even after Rule 502, and demonstrate that courts should be the ones to interpret irrespective-of-care nonwaiver agreements under prevailing case law.

A serious counterargument that courts should not be rendering these agreements unenforceable is made in *Cardiac Pacemakers, Inc. v. St. Jude*

130. 916 F. Supp. 404 (D.N.J. 1995).
131. *Id.* at 412.
132. *Id.*
133. *Id.*
134. *See* VLT, Inc. v. Lucent Techs., Inc., No. Civ. A. 00-11049-PBS, 2003 WL 151399, at *2 (D. Mass. Jan. 21, 2003).
135. *Id.* (citing Amgen, Inc. v. Haechst Marion Roussel, Inc., 190 F.R.D. 287, 292 (D. Mass. 2000)).
136. Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., No. 96CIV.7590(DAB)(JCF), 1997 WL 736726, at *4 (S.D.N.Y. Nov. 26, 1997); *see also* Union Carbide Corp. v. Montell N.V., No. 95 Civ. 0134, 1997 U.S. Dist. LEXIS 14330, at *5 (S.D.N.Y. Aug. 15, 1997) (noting in dicta that "[p]erhaps a completely reckless production of privileged documents would result in waiver."). A district court in Massachusetts interpreted the former case to mean that grossly negligent privilege review would be acceptable, and that only completely recklessness, which was even beyond gross negligence, would be unacceptable. *See VLT, Inc.*, 2003 WL 151399, at *2. However, this interpretation is not binding and it creates an even more convoluted view of levels of privileged review. Although the *Prescient* court did state that to be completely reckless was to show "no regard for preserving the confidentiality of the privileged documents," it did not explicitly say that grossly negligent review should be upheld either. *See Prescient Partners, L.P.*, 1997 WL 736726, at *4. Indeed, the fact that this case subsequently analyzed the facts using the five-factor middle of the way approach test and concluded that the producing party had conducted reasonable privileged review indicates the court is very much preoccupied with reasonable privilege review. *Id.* at *4–8.

Medical, Inc.,[137] in which the court did interpret "inadvertent production" in a protective order to encompass negligent production of 3,500 privileged documents because parties had intended the order's terms to modify the prevailing case law.[138] More specifically, the parties were in a jurisdiction that applied a middle-of-the-way balancing approach to determine whether inadvertent production of privileged documents waived the privilege, but because they chose to enter into a protective order that prevented courts from applying that law, privilege was preserved even though the production failed the balancing test.[139] As the court put it, "[d]efendants have not shown any persuasive reason for not enforcing the clear terms of the agreed protective order. The protective order was the product of negotiations among able counsel who deliberately chose to modify the otherwise applicable law concerning inadvertent disclosure of privileged documents."[140] The language suggests this court believed parties had the freedom to contract however they wished, and that courts should not intervene. While this may be the approach that Rule 502 envisions, several courts have already made a value judgment and their willingness to render irrespective-of-care nonwaiver agreements unenforceable is the prevailing case law. Overall, public policy concerns explored in Part II, as well as case law where courts did police these agreements, support the idea that the courts have intervened before and have grounds to intervene in the future.

C. What Approach Should Courts Follow? A Glance at the "Reasonable Steps" Test

The final question that remains is which approach courts should follow when approaching irrespective-of-care nonwaiver agreements. Returning to my proposal, I argue that courts should not give protective orders or uphold irrespective-of-care nonwaiver agreements. First, if parties want a protective order to encompass grossly negligent or no privilege review prior to production, courts should refuse. Indeed, whenever a court grants a motion for a protective order, it should explain that the order does not purport to protect privilege when parties have conducted grossly negligent or no privilege review at all. This ensures that parties have notice to forestall future satellite litigation.

A more complex scenario that courts will face is a party requesting that a court uphold a prior protective order when a court did not give notice about the privilege-review limitation. Another complex scenario will arise if parties

137. No. IP96-118-C-H/G, 2001 WL 699850 (S.D. Ind. May 29, 2001).
138. *See id.* at *3.
139. *Id.* at *2.
140. *Id.* at *3.

request enforcement of a private contract that allows grossly negligent or no privilege review to preserve privilege. In these types of scenarios, the *Ciba-Geigy* court's approach is a helpful guide.[141]

The following proposal outlines the *Ciba-Geigy* court's approach to irrespective-of-care nonwaiver agreements. If the court suspects that the producing party has not conducted reasonable privilege review, it should begin by conducting a brief glance at the facts surrounding the inadvertent disclosure and generally ask whether the party took "reasonable steps"[142] to prevent inadvertent disclosure under Rule 502. Judging from case law after Rule 502, the "reasonable steps" test basically encompasses the previously mentioned, middle-of-the-way approach to inadvertent disclosure, which is a five factor test determining whether the disclosing party had taken reasonable precautions to prevent inadvertent disclosure.[143] These factors include:

> (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error.[144]

If the facts suggest that the producing party satisfied this test or was only negligent in its privilege review, then the court should end the inquiry and rule that privilege had not been waived pursuant to the protective order or nonwaiver

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141. *See* Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 412 (D.N.J. 1995) (listing the relatively small size of documents at issue, lack of time constraints, and lack of privilege review on two occasions as reasons why the producing party did not meet the burden of demonstrating reasonable privilege review to preserve privilege).

142. FED. R. EVID. 502(b)(2).

143. *See, e.g.*, Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216 (E.D. Pa. 2008) (applying the new Rule 502 and subsequently finding that there was no waiver based on the traditional five-factor test).

144. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.42[4] (2d ed. 2000) (citing Hydraflow, Inc. v. Enidine, Inc., 145 F.R.D. 626, 637 (W.D.N.Y. 1993)). One court noted that this articulation is one of the most elegant variations of the original articulated in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985). *See* United States *ex rel.* Bagley v. TRW, Inc., 204 F.R.D. 170, 178 n.12 (C.D.C.A. 2001) (noting that courts drifted away from the precise test articulated in *Lois Sportswear*, but that perhaps the most elegant phrasing was this one). Indeed, there are many variations of this test in different cases. *See, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008) (listing the factors as "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) overriding interests in justice."); Local 851 of the Int'l Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc., 36 F. Supp. 2d 127, 131 (E.D.N.Y. 1998) (listing only four factors because the court combined the second and third factors into one factor).

agreement. However, if the facts suggest that the producing party was actually grossly negligent in preventing inadvertent disclosure, then the court should hold that the protective order or nonwaiver agreement is unenforceable in the present situation, and then rigorously apply the normal test for determining whether there has been an inadvertent disclosure.

At this juncture it will be helpful to briefly explain how a court can distinguish among "reasonable," "negligent," and "grossly negligent" privilege review, though this Comment does not purport to explicate the details of the varying levels of privilege review. For the purposes of this Comment, privilege review is best conceived of as a spectrum. On the far right of the spectrum is stringent, manual privilege review, in the middle of the spectrum is reasonable privilege review, and on the far left of the spectrum is no review at all. Negligent review is just to the left of reasonable review and would likely be considered substandard, but not horrifically so. Grossly negligent review is to the left of negligent review, just a little bit to the right of no review at all. It is better than no review at all but would thoroughly fail the "reasonable steps" inquiry.[145] This method of distinguishing privilege review is a useful starting point for helping courts determine whether they should continue to use the existing case law in the absence of nonwaiver agreements because understanding the variations in privilege review is essential for making a determination about whether the nonwaiver agreement should cover these variations.

Arguably, this is a "putting the cart before the horse" approach to privilege law because the court seems to be engaging in the balancing test when the nonwaiver agreement was meant to prevent the court from balancing the five factors at all. However, one difference is that the brief glance is not the full inquiry and does not require the full balancing test that courts usually engage in when parties do not have a nonwaiver agreement. Because it is only a quick glance, it should not consume too many judicial resources, yet it does give an added incentive for parties to always conduct reasonable privilege review. A second difference is that courts only take a brief glance when they suspect a party has been lax in privilege review. Thus, much like a policeman following a lead, this approach gives courts the option of investigating general facts in suspicious cases. At the same time, this approach gives the producing party the benefit of the doubt by only rendering the nonwaiver agreement unenforceable if the producing party has truly failed in its duties and hurt its client.

145. *See Ciba-Geigy Corp.*, 916 F. Supp. 404, for an example of grossly negligent review.

CONCLUSION

This Comment advocates that courts treat Rule 502's comment on upholding all nonwaiver agreements irrespective of the level of care taken in privilege review as merely persuasive authority and refuse to grant protective orders or uphold those agreements that preserve privilege despite grossly negligent or no privilege review. Irrespective-of-care nonwaiver agreements arguably contravene public policy because they can function as cost-shifting tools instead of saving on the costs of privilege review. Moreover, these are also at odds with agency and ethics theories, which have a normative value of protecting client interests by preventing attorneys from being opportunistic and potentially hurting the client's case. From an agency perspective, these agreements could increase the agency costs of opportunism and shirking, while simultaneously giving incentives for attorneys to breach their fiduciary duties. Similar problems arise in the ethics context as the duty of care and confidentiality are encoded within state ethics codes that would prevail over Rule 502 in cases of conflict. Because these agreements are arguably in contravention of public policy, courts may render them unenforceable and override the typical freedom to contract. Indeed, courts should be the major enforcement mechanism for these agreements because they, as an institutional control, have several advantages over disciplinary, liability, and legislative controls, and because of prevailing case law. Finally, courts should follow the procedure outlined in Part II.C by refusing to grant protective orders encompassing these forms of privilege review and glancing at the "reasonable steps" approach if the court suspects the producing party has failed in its privilege obligations.

In a world of electronic discovery, Rule 502 takes the right step in embracing nonwaiver agreements. However, courts must balance the dual goals of privilege-review costs and client interests by allowing nonwaiver agreements to flourish as a strong tool in preventing privilege waiver, while at the same time ensuring that the agreements do not go too far and give incentives for lax privilege review that may in turn harm clients.