American Bankruptcy Institute

Mid-Atlantic Bankruptcy Workshop

Ethics: The Many Faces of Inadvertent Disclosure

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PLENARY SESSION

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OOPS, I DID IT AGAIN

Inadvertent Disclosures in Bankruptcy Practice

Hypothetical

Debtor's counsel in a chapter 11 case produces a large document set to the official creditors' committee during expedited discovery in a contested plan confirmation proceeding. Buried in the production is a litigation hold memo prepared by outside counsel – clearly privileged. Committee counsel reviews it before recognizing the issue. Debtor's counsel sends a clawback demand. Committee counsel has already shared the memo with the committee's financial advisor.

The Governing Framework
What the Rules Actually Require

ABA Model Rule 1.6(c)

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment 18

- The sensitivity of the information
- The likelihood of disclosure if additional safeguards are not employed
- The cost of employing additional safeguards
- The difficulty of implementing the safeguards
- The extent to which the safeguards adversely affect the lawyer's ability to represent clients

ABA Model Rule 4.4(b)

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Federal Rule of Civil Procedure 26(b)(5)(B)

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Federal Rule of Evidence 502(b)

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B)

Bankruptcy-Specific Complications

The Volume-and-Speed Problem

- Compressed calendar, not a typical civil-case clock:
  - § 363 sales often must close within weeks of the petition date to preserve going-concern value
  - Confirmation hearings follow exclusivity deadlines and cash burn, not party convenience
  - Rule 9006(c)(1) lets the court shorten most notice and response periods to keep a case moving
- Volume outstrips page-by-page review:
  - A mid-size chapter 11 can generate ESI productions into the hundreds of thousands of documents once an avoidance action, a D&O or lender-liability suit, and ordinary contested-matter discovery all proceed at once
  - Manual review breaks down at that scale—fastest exactly when the calendar is tightest
- Rules 26(b)(5)(B) and 502(b) assume a fair opportunity to review for privilege before production. Bankruptcy practice rarely allows that assumption—technology-assisted review is the practice's answer to the math.

Technology-Assisted Review

The Quality-Control Lesson

- Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012)
  - Predictive coding is appropriate where the process includes real quality control: transparency about the training set, sampling to check the model's calls, senior-attorney involvement in seed coding
- Mt. Hawley Ins. Co. v. Felman Production, 271 F.R.D. 125 (S.D. W. Va. 2010)
  - Keyword hits reviewed with no sampling of discarded documents to test whether the terms worked—court found waiver
- The lesson travels beyond keyword search:
- A seed set that under-represents a privilege category—an atypical hold memo, a routine status report reflecting legal strategy—can cause confident, systematic misclassification across an entire production
- Practice Pointer: Build a post-production sampling check targeted at document types treated as a uniform category—board minutes, status reports, standard-form correspondence—not just a random sample of the whole.

Metadata and Cloud Sharing

- ABA Formal Op. 06-442 (Aug. 5, 2006): the sending lawyer bears the burden of scrubbing metadata—tracked changes, comments, revision history—not the receiving lawyer to look away
- Harleysville Ins. Co. v. Holding Funeral Home (W.D. Va. 2017):
  - Entire claims file uploaded to a Box.com link generated 7 months earlier for an unrelated video; opposing counsel obtained it via third-party subpoena
  - Magistrate judge: unprotected link = a file left on a park bench—waived
  - District judge: a 32-character random URL functions as a practical password—inadvertent and reasonably protected
- Same case: privilege governed by Virginia's 5-factor test (Walton); work product by the federal 3-factor test (Rule 502(b))—two standards, one disclosure. Under FRE 501, this split can recur wherever a state-law claim supplies the rule of decision
- ePlus Inc. v. Lawson Software, 280 F.R.D. 247 (E.D. Va. 2012): disclosing on purpose, in a form that reveals more than intended, is not automatically "inadvertent"—the mistake must be in the act of disclosure, not in hindsight

Multi-Party Dynamics

- **Bankruptcy is rarely a two-party dispute:**
  - Debtor, official committee, and the committee's financial advisor are already in the picture before a trustee even enters
  - Add secured lender's counsel, the U.S. Trustee's office, and possibly an equity committee or examiner
- **Rule 4.4(b) doesn't answer who owes what duty to whom:**
  - The rule is framed around one lawyer receiving a document from another lawyer
  - A committee's financial advisor (retained under 11 U.S.C. § 1103(a)) has document access but is not a lawyer and is not bound by the ethics rules at all
  - Committee counsel's own Rule 4.4(b) and Rule 26(b)(5)(B) duties extend to material shared onward—passing privileged material to the financial advisor before catching the issue compounds exposure rather than diluting it

Committee Access Is Not the Debtor's Privilege

- Courts have declined to extend Weintraub's trustee-controls-the-privilege holding to a committee automatically
- In re Teleglobe Communications, 493 F.3d 345 (3d Cir. 2007)
  - Fiduciary-exception access tied to a showing the debtor was insolvent or in the zone of insolvency at the time of the communication
- In re HH Liquidation, 571 B.R. 97 (Bankr. D. Del. 2017)
  - Committee denied access absent an insolvency showing—notwithstanding its derivative standing to pursue the underlying claims
- Practice Pointer: A committee's "significant document access" ordinarily comes from negotiated case protocols and ordinary discovery, not an automatic entitlement from its fiduciary role, and carries no pass around the ordinary privilege rules.

Rule 502(d) Orders in Multi-Party Cases

- A committee's financial advisor, a lender's consultant, and the U.S. Trustee's office are all non-parties in the Rule 502(e) sense—a 502(e) agreement binds only its signatories
- A 502(d) order can bind non-parties and reach other proceedings but only if drafted broadly enough to say so
- U.S. Home Corp. v. Settlers Crossing, 2012 WL 3025111 (D. Md. 2012)
  - Where a confidentiality order doesn't spell out what counts as inadvertence, what precautions are required, and post-disclosure obligations, the court defaults to Rule 502(b)'s ordinary 3-factor test: the more demanding standard a well-drafted 502(d) order is supposed to avoid
- Risk to Flag: A generic form order negotiated with a single committee in mind, and never updated as more professionals and parties gain document access, is not doing the work it looks like it is doing.

Trustee Succession Issues

- § 1107(a): a debtor in possession holds most of a trustee's rights, including control over the debtor's privilege
- § 1104(a): court may appoint a chapter 11 trustee for cause, or when appointment serves creditors' interests
- CFTC v. Weintraub, 471 U.S. 343 (1985)
  - Whoever occupies the role most analogous to management controls the corporate privilege—extended to a trustee stepping into the DIP's shoes (In re Hechinger)
- In re Black Diamond Min. Co., 507 B.R. 209 (E.D. Ky. 2014)
  - Debtor's own restructuring counsel ordered to turn over its entire file, including work product, to a newly appointed liquidating trustee

Practical points: Pre-petition counsel who inadvertently produces privileged material to a newly appointed trustee's counsel does not get to unilaterally decide whether to claw it back—that call belongs to the trustee. And until an order actually entered under § 1104(a)-(b) and Rule 2007.1, the DIP still controls the privilege, even with a trustee motion on the horizon.

Prevention

What Good Practice Looks Like

At the Outset of a Case

- **Negotiate and enter a clawback agreement and protective order**
  - NOTE: clawback agreements are only effective between or among the parties to the agreement and within the litigation
- **When drafting a clawback agreement, consider:**
  1. Establish that inadvertent production is not a waiver
  2. Incorporate the clawback agreement into a protective order
  3. Define your own steps
  4. Establish procedures for invoking the clawback
  5. Define how you'll handle disagreements
  6. Consider inadvertent disclosure in areas besides documents, and
  7. Consider confidentiality matters in addition to privileged matters

Document Review

- Dedicated privilege review lawyer
- Produce privilege logs contemporaneously while gathering and reviewing documents from clients
- Be sure to scrub metadata
- Educate your team

At the Production Stage *HIGH RISK*

- Ensure a clawback agreement or protective order governs the production
- Perform a last spot check
  - AI can help but NEVER rely on it
- Designate a point of contact
- Educate your team

After Receiving Party's Production

- Educate your team
- Ensure protocols are in place

When it Happens
Managing the Crisis

For Producing Counsel

- **ACT IMMEDIATELY**
  - FRE 502(b) requires attorneys to take "reasonable steps to rectify"
- Preserve the information until the claim is resolved, as required by FRCP 26(b)(5)(B)
- Send a written clawback demand
  - Identify the privileged documents
  - Identify the basis for the privilege
  - Refer to the clawback agreement or protective order that governs
- If receiving party refuses to comply, act quickly to seek a court order
- Consider whether and to what extent you need to inform the client

For Receiving Counsel

- Immediately STOP reviewing if you think something might be privileged
- Notify the sender and sequester the document
  - Do NOT notify your client or any third parties before resolving the dispute
- If the information has already been shared with you, preserve the record and seek guidance from the court

AUDIENCE Q&A

OOPS, I DID IT AGAIN: THE MANY FACES OF INADVERTENT DISCLOSURE

2026 ABI Mid-Atlantic Bankruptcy Workshop

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Inadvertent Disclosure of Privileged Materials in Bankruptcy Practice

The Governing Framework — What the Rules Actually Require

As a preliminary matter, it is important to keep in mind that the ABA Model Rules of Professional Conduct are just that: model rules. The states in the Third and Fourth Circuits have each adopted, but in some cases modified, the model rules. Delaware, for example, has adopted the model rules without modification, while Maryland has adopted a modified version. In some cases, the modifications are important. Typically local rules specify which set of rules applies in a given bankruptcy court. Again, for example, Delaware Local Rule 9010-1(f) provides that the ABA Model Rules of Professional Conduct apply in Delaware bankruptcy courts, while Maryland Local Rule 9011-5 provides that "the Rules of Professional Conduct as they have been adopted by the Supreme Court of Maryland" apply. For our purposes here, unless otherwise noted, we'll be referring to the ABA Model Rules of Professional Conduct. Turning to the requirements.

First, Rule 1.6. 1.6(a) provides the operative framework: information relating to the representation of the client "shall not" be revealed unless one of the limited, enumerated exceptions applies. Rule 1.6(c) requires the lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Comment 18 clarifies the scope of 1.6(c): the lawyer must act "competently" (in the Rule 1.1 sense) to safeguard the information. Moreover, the duty to prevent inadvertent or unauthorized disclosure applies to the lawyer and "other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." *See* Rules 5.1 and 5.3.

Again, Rule 1.6(c) requires "reasonable efforts . . . ." Comment 18 provides a nonexhaustive list of factors that go to reasonableness, including:

- the sensitivity of the information
- the likelihood of disclosure if additional safeguards are not employed
- the cost of employing additional safeguards
- the difficulty of implementing the safeguards
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)

Comment 19 deals specifically with the transmission of client information, requiring "reasonable precautions" to guard against information going to unintended recipients. If the method of communication used "affords a reasonable expectation of privacy," then special security measures are not required.

Comments 18 and 19 both strongly suggest that other applicable laws (i.e., state and federal laws) regarding data privacy operate alongside the Model Rules.

Practice Pointer: *Don't assume the Model Rule's text controls. Confirm the version of Rule 1.6(c) and Rule 4.4(b) actually adopted in the relevant jurisdiction before advising a client on what "reasonable efforts" or "prompt notification" requires — as the Maryland and New Jersey variations above show, the local rule can impose meaningfully more (or less) than the ABA's version.*

Second, Rule 4.4(b). 4.4(b) requires "[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent [to] promptly notify the sender."[1]

As mentioned previously, states have made changes in their adaptations. So, while the Model Rule concerns "a document or electronically stored information," Maryland's rule concerns "documents, electronically stored information, ***or other property***."

Comment 2 to Model Rule 4.4(b) limits the receiving attorney's responsibility to prompt notification, allowing the sender to take protective measures. However, Comment 2 leaves open the possibility that other rules are in play: "[w]hether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules . . . ." Thus, prompt notification may not be the extent of the lawyer's responsibility.

Importantly, New Jersey's rule is much broader than the Model Rule's "prompt notification." The New Jersey rule requires the lawyer to not read the document, to return it to the sender, and, if it is in electronic form, to "delete it and take reasonable measures to assure that the information is inaccessible." Similarly, Virginia requires that the lawyer "immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information."

In sum, under the Model Rules, the lawyer must take "reasonable efforts" to guard against inadvertent or unauthorized disclosure, and a lawyer receiving a document or electronically stored information, which she reasonably should know was inadvertently sent, must promptly notify the sender.

Turning to the procedural framework.

The Procedural Framework

First we'll consider the rules regarding clawback of material inadvertently produced in discovery. Added in 2006, Federal Rule of Civil Procedure 26(b)(5)(B), made applicable to adversary proceedings by Bankruptcy Rule 7026, provides a procedure for a party to assert a privilege or work-product claim after information has been produced in discovery. The rule was

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[1] Model Rule 4.4 reversed ABA Formal Opinion 92-368 (Inadvertent Disclosure of Confidential Materials), which required the attorney who inadvertently receives privileged information to refrain from examination, notify the sending lawyer, and abide by the sending lawyer's instructions for return. *See* Eileen Libby, "The 'Oops' Factor: Latest Model Rule Leaves Wiggle Room for Lawyers Receiving Misdirected Materials," 92 A.B.A.J. 26 (February 2006).

part of a package of amendments dealing with issues related to the discovery of electronically stored information.

The rule itself requires a party who asserts a claim of privilege or work-product protection over material produced in discovery to notify recipients "of the claim and the basis for it." The receiving parties "must promptly return, sequester, or destroy the specified information and any copies it has . . . ." Further, the receiving parties "must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim." Finally, the rule requires the producing party to "preserve the information until the claim is resolved."

Importantly, FRCP 26(b)(5)(B) does not address whether the privilege or work-product protection being asserted postproduction was waived by the production. The rule simply provides a procedure for presenting and addressing those issues.

26(b)(5)(B) is meant to work in tandem with FRCP 26(f). As is well known, the parties submit to the court a written report outlining their proposed discovery plan.[2] That plan must include the parties' views on any agreed-upon procedure for postproduction privilege and work-product assertions, including a proposed agreement under Federal Rule of Evidence 502.[3] Under FRCP 16(b)(3)(B)(iv), the court's scheduling order can include that 502 agreement. These agreements and orders typically control if they adopt procedures different from FRCP 26(b)(5)(B).

Turning to Federal Rule of Evidence 502, made applicable in bankruptcy pursuant to Bankruptcy Rule 9017. FRE 502 is critical for our purposes here with respect to inadvertent disclosure. First, importantly, the rule concerns material subject to claims of attorney-client privilege or work-product protection, not other protections. Second, FRE 502(b) provides the circumstances under which inadvertent disclosure does *not* constitute a waiver:

- when the disclosure was inadvertent
- the holder of the privilege or protection took reasonable steps to prevent disclosure
- the holder promptly took reasonable steps to rectify the error, including following FRCP 26(b)(5)(B)

The burden is on the producing party to show all three elements; failure to satisfy any one of them is sufficient to find waiver.[4] That waiver will apply with respect to the inadvertently disclosed communications; full subject matter waivers are intentional and addressed by Rule 502(a).[5]

Finally, FRE 502(d) protective orders. FRE 502(d) is designed to address inadvertent disclosures.[6] This rule allows a court to enter an order that, for example, contains clawback

[2] Fed. R. Civ. P. 26(f)(2).
[3] Fed. R. Civ. P. 26(f)(3)(D).
[4] Hominski v. Gusar, LLC, No. 24-CV-21590, 2026 WL 1261972, at *3 (S.D. Fla. May 7, 2026); *see also* Williams v. District of Columbia, 806 F. Supp. 2d 44 (D.D.C. 2011).
[5] *Hominski*, 2026 WL 1261972, at *7.
[6] Warner Bros. Records Inc. v. Charter Commc'ns, Inc., No. 19-cv-00874, 2020 WL 14012476, at *1 (D. Colo. Dec. 18, 2020).

procedures and displaces the default rule. FRE 502(d) allows litigants to "create their own guidelines to address inadvertent disclosure and to avoid waiver-related litigation under Rule 502(b)."[7] A 502(d) order allows for flexibility, and courts have considered the fact that the Advisory Committee Notes to 502(d) state that a protective order "may provide for return of documents without waiver irrespective of the care taken by the disclosing party."[8]

***Practice Pointer:** Raise the FRE 502(d) order at the Rule 26(f) conference, not after a disclosure happens. Getting the agreement into the scheduling order under FRCP 16(b)(3)(B)(iv) means the parties are working from a court order, not just an inter-party agreement of uncertain reach — and it is far easier to negotiate favorable terms before anyone has a stake in a particular document's privileged status.*

Bankruptcy-Specific Complications

The Volume-and-Speed Problem

Rule 26(b)(5)(B) and Rule 502(b) assume that a producing party has had a fair opportunity to review its production for privilege before it goes out the door. Bankruptcy practice frequently does not allow for that assumption. Contested matters and adversary proceedings run on a compressed clock that a typical civil case never faces. For example, a sale under section 363 often needs to close within weeks of the petition date to preserve going-concern value. Or a contested confirmation hearing arrives on a schedule set by exclusivity deadlines and cash burn rather than the parties' convenience. Bankruptcy Rule 9006(c)(1) allows the court to shorten most otherwise-applicable notice and response periods simply to keep a case moving. None of that leaves much room for a page-by-page privilege review conducted at a comfortable pace.

Layer volume on top of that speed. Even a mid-size chapter 11 case can generate an ESI production of thousands of documents. The traditional backstop against inadvertent disclosure breaks down well before a production reaches that scale, and it tends to break down fastest exactly when the time is a scarcity.

Technology-assisted review is one solution to that dilemma, and courts have approved its use. In *Da Silva Moore v. Publicis Groupe*, a magistrate judge held that predictive coding is an appropriate way to search for relevant ESI in the right case, so long as the process includes real quality control (e.g., transparency about the training set, sampling to check the model's calls, and senior-attorney involvement in coding the seed documents).[9] That qualifier matters, and *Mt. Hawley Ins. Co. v. Felman Production, Inc.* shows why.[10] In that case, the producing party ran keyword search terms and then reviewed only the documents that hit on those terms, without ever sampling the discarded documents to check whether the search terms were actually catching what they were supposed to catch. The court found a waiver. The lesson travels well beyond keyword search: a predictive-coding tool trained on a seed set that under-represents a particular privilege category can misclassify an entire category of documents as non-privileged, consistently and

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[7] Med. Mut. of Ohio v. AbbVie Inc. (In re Testosterone Replacement Therapy Prods.), 301 F. Supp. 3d 917, 925 (N.D. Ill. 2018).
[8] *Id.*
[9] 287 F.R.D. 182, 182–84, 191–92 (S.D.N.Y. 2012).
[10] 271 F.R.D. 125, 133–36 (S.D. W. Va. 2010).

confidently, across the whole production. Any review methodology, human, keyword-based, or model-driven, needs a quality-control step that actually tests whether the methodology is working.

Practice Pointer: *A human reviewer who misses one document behaves very differently from a model that systematically miscategorizes a document type. Build in a post-production sampling check targeted specifically at document types the review process treated as a uniform category, not just a random sample of the production as a whole.*

The same dynamic shows up wherever technology creates a channel that would not have existed for a paper file. Metadata is one example. A Word file or an email can carry tracked changes, comments, prior drafts, or revision history invisible on the printed page, and the ABA's ethics committee has placed the burden on the sending lawyer to scrub it, not on the receiving lawyer to look away.[11] Cloud file-sharing is another example of a technology-created channel. In *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, an investigator uploaded an insurer's entire claims file to a Box.com folder that was reachable through a "sharing" link the investigator had generated seven months earlier for an unrelated video.[12] Opposing counsel eventually obtained that same link (and, with it, the claims file) through a third-party subpoena. The magistrate judge found the privilege waived, reasoning that an unprotected link was no different than leaving the file on a park bench for anyone to find. The district judge disagreed on review, concluding that a randomly generated thirty-two-character URL functions as a practical password and that the disclosure was both inadvertent and reasonably protected under the circumstances. The two judges did not disagree about the law so much as about how much technological sophistication counts as a "reasonable precaution." This is exactly the judgment call a rushed production forces counsel to make in real time, without the benefit of full briefing and two evidentiary hearings.

That same case flags a wrinkle worth carrying into bankruptcy practice. Because the case arose in diversity, attorney-client privilege was governed by Virginia's five-factor test under *Walton v. Mid-Atl. Spine Specialists, P.C.*,[13] while the work-product doctrine was governed by the federal three-factor test under Rule 502(b)—two different standards applied to the very same disclosure. Under FRE 501, the same split can arise in bankruptcy litigation whenever a state-law cause of action supplies the rule of decision (e.g., a fraudulent-transfer or breach-of-fiduciary-duty claim) so it is worth confirming which test governs which protection before assuming that one clawback analysis covers both.

One more distinction: producing a document on purpose, in a form that turns out to reveal more than intended, is not automatically "inadvertent" just because counsel wishes afterward that it had been redacted or scrubbed.[14] The mistake has to be in the act of disclosure itself, not just in hindsight about its consequences.

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[11] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442, at 3–4 (Aug. 5, 2006).
[12] No. 1:15CV00057, 2017 WL 4368617 (W.D. Va. Oct. 2, 2017).
[13] 694 S.E.2d 545 (Va. 2010).
[14] *See* ePlus Inc. v. Lawson Software, Inc., 280 F.R.D. 247, 255 (E.D. Va. 2012).

The rules still work. They are just doing more work than they were designed for. As other courts applying Rule 502(b) have recognized, they still come down to the same three-factor reasonableness inquiry even when the technology looks new.[15]

Multi-Party Dynamics

Bankruptcy is rarely a two-party dispute. As is often the case, a debtor, an official committee, and the committee's financial advisor are already in the picture before a trustee enters at all. Add secured lender's counsel, the U.S. Trustee's office, and possibly an equity committee or examiner, and a single set of documents can move among half a dozen sets of counsel and professionals at once, often through productions and subpoenas proceeding on separate, uncoordinated tracks. Each of those channels is an independent opportunity for privileged material to reach the wrong recipient.

That structure raises a question Rule 4.4(b) does not answer: who owes what duty to whom? The rule is framed around a lawyer receiving a document from another lawyer. Committees, however, typically retain their own financial advisors under 11 U.S.C. § 1103(a), and a financial advisor with the kind of document access described in the hypothetical is not a lawyer and is not bound by the ethics rules at all. Committee counsel's own obligations under Rule 4.4(b) and Rule 26(b)(5)(B) extend to material committee counsel shares onward as part of the representation, so passing privileged material to the financial advisor before recognizing the issue compounds committee counsel's exposure rather than diluting it.

Committee document access is also not the same thing as the debtor's own privilege, and the two are easy to conflate. A committee is a fiduciary for its constituency, but its interests can diverge from the estate's, and courts have declined to extend *Weintraub*'s trustee-controls-the-privilege holding to a committee automatically. In *In re Teleglobe Communications Corp.*, the Third Circuit tied any fiduciary-exception access to a showing that the debtor was insolvent or in the zone of insolvency at the time of the communication.[16] A Delaware bankruptcy court applied the same reasoning to deny a committee access to privileged documents where the committee had not made an insolvency showing, notwithstanding the committee's derivative standing to pursue the underlying claims.[17]

Practice Pointer: *A committee's "significant document access" is ordinarily a function of negotiated case protocols and ordinary discovery, not an automatic entitlement flowing from the committee's fiduciary role. It does not carry a pass around the ordinary rules on privileged material.*

Multiple parties also raise the drafting stakes of a Rule 502(d) order. A committee's financial advisor, a secured lender's consultant, and the U.S. Trustee's office are all non-parties in the Rule 502(e) sense, and a 502(e) agreement binds only its signatories.[18] A 502(d) order can bind non-parties and reach other proceedings, but only if it is drafted broadly enough to say so. In *U.S.*

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[15] *See* Multiquip, Inc. v. Water Mgmt. Sys. LLC, No. CV 08-403-S-EJL-REB, 2009 WL 4261214 (D. Idaho Nov. 23, 2009).
[16] 493 F.3d 345, 385–86 (3d Cir. 2007).
[17] Off. Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Grp. Holdings, LLC (In re HH Liquidation, LLC), 571 B.R. 97, 104 (Bankr. D. Del. 2017).
[18] Fed. R. Evid. 502(d)–(e).

Home Corp. v. Settlers Crossing, LLC, the court held that where a confidentiality order does not spell out what counts as inadvertence, what precautions are required, and what the producing party must do afterward to avoid waiver, the court will simply default to Rule 502(b)'s ordinary three-factor reasonableness test to fill the gap, which is the more demanding standard a well-drafted 502(d) order is supposed to let the parties avoid.[19] A generic form order negotiated with a single committee in mind, and never updated as more professionals and parties gain access to the documents, is not doing the work it looks like it is doing.

Trustee Succession Issues

Layer a change in control on top of the multi-party problem and you get the third complication: succession. A chapter 11 debtor ordinarily administers its own case as a debtor in possession, and section 1107(a) gives the DIP most of the rights and powers of a trustee, including control over the debtor's own privilege.[20] However, that control is not permanent. Section 1104(a) permits the court to appoint a chapter 11 trustee for cause (fraud, dishonesty, gross mismanagement) or simply when appointment serves the interests of creditors, and a dispute in which debtor's counsel and the committee are already sparring over a privileged litigation hold memo, is exactly the kind of fact pattern that tends to generate a trustee motion.[21]

When a trustee is appointed, the Supreme Court's decision in *Commodity Futures Trading Comm'n v. Weintraub* is the starting point (even though *Weintraub* itself arose in chapter 7).[22] The Supreme Court's holding was functional: whoever occupies the role most analogous to management outside of bankruptcy controls the corporation's privilege, and a trustee who displaces the debtor's own management fits that description. Courts have extended that reasoning to a chapter 11 trustee stepping into a debtor-in-possession's shoes.[23] The practical reach of that rule can be considerable. For example, in *In re Black Diamond Min. Co., LLC*, the court ordered the debtor's own chapter 11 restructuring counsel to turn over its entire file to a newly appointed liquidating trustee, including work product and internal law firm communications about the representation.[24]

Practice Pointer: *Pre-petition or DIP-era counsel who assume their own file remains theirs once a trustee is appointed are assuming something the case law does not support.*

Pre-petition counsel who inadvertently produces privileged material to a newly appointed trustee's counsel does not get to unilaterally decide whether to claw it back. If the trustee now controls the privilege, the decision whether to demand return under Rule 26(b)(5)(B) and Rule 502(b), or instead to let the disclosure stand because it happens to support a fraudulent-transfer or breach-of-fiduciary-duty claim against former management, belongs to the trustee, not to pre-petition counsel.

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[19] No. DKC 08-1863, 2012 WL 3025111, at *5 (D. Md. July 23, 2012).
[20] 11 U.S.C. § 1107(a).
[21] 11 U.S.C. § 1104(a).
[22] 471 U.S. 343 (1985).
[23] *See In re Hechinger Inv. Co. of Del.*, 285 B.R. 601, 613 (D. Del. 2002) (post-confirmation liquidating trust, as successor to the debtor under the confirmed plan, controlled the privilege; former pre-petition officers and directors could not assert it).
[24] 507 B.R. 209 (E.D. Ky. 2014).

One further wrinkle is the gap between a motion to appoint a trustee and the trustee's actual appointment. Section 1104 does not operate automatically. Instead, a party must move for appointment, the court must hold a hearing, and an order must enter.[25] Until an order enters, the DIP still controls the privilege under section 1107(a), even where a trustee motion is clearly on the horizon. If a trustee motion follows a clawback dispute rather than precedes it, debtor's counsel should be candid with the client about whose privilege is actually being protected, and for how long that arrangement is likely to hold.

Prevention — What Good Practice Looks Like

There are a number of things parties can do at each stage of the case to protect against possible inadvertent disclosure. If an inadvertent disclosure does occur, the court will consider a number of factors to determine whether any privilege is waived, including the precautions taken to prevent inadvertent disclosure. Thus, even if you encounter an inadvertent disclosure, the caution and diligence you've taken to prevent inadvertent disclosures beforehand can still pay off. The following are best practices that parties should adopt in each case to ensure that they are protected in the event of an inadvertent disclosure.

At the Outset of the Case

At the outset of a case, parties should negotiate and enter a clawback agreement and protective order regarding inadvertent disclosure. Federal Rule of Evidence 502(d) permits clawback and court orders that can be effective against privilege waiver in the event of inadvertent disclosure.[26] Clawback agreements and protective orders can also act to limit the costs of privilege review and retention. Courts routinely encourage the entry of these agreements to prevent harm resulting from inadvertent disclosures.

Notably, clawback agreements pursuant to FRE 502(d) are only effective between or among parties to the agreement and within the litigation.[27] On the other hand, parties may request that a court enter a protective order pursuant to FRE 502(d) that would be effective against all parties, including those not involved in the litigation.

When drafting a clawback agreement or proposed protective order, parties should keep in mind the following best practices: 1) establish that inadvertent production is not a waiver, 2) incorporate the clawback agreement into a protective order, 3) define your own steps, 4) establish procedures for invoking the clawback, 5) define how you'll handle disagreements, 6) consider

[25] 11 U.S.C. § 1104(a)–(b); Fed. R. Bankr. P. 2007.1.
[26] Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) (finding the producing party waived its privilege in part because it voluntarily abandoned the clawback agreement with the receiving party before they had finalized it).
[27] Potomac Elec. Power Co. & Subsidiaries v. United States, 107 Fed. Cl. 725, 731 (2012) (an "agreement to limit the effect of a waiver by disclosure between or among" the parties of a litigation can, in the absence of a court order ratifying the agreement, "bind only the parties").

inadvertent disclosure in areas besides documents, and 7) consider confidentiality matters in addition to privileged matters.[28]

Practice Pointer: *A clawback agreement that never gets entered as a protective order is only a contract between the signatories. It won't bind a party who later intervenes, a committee that isn't yet constituted, or a non-party who obtains the material through a subpoena. Push to have it entered as an order whenever the case will involve more than two sides.*

Document Review

Attorneys can also be proactive about recognizing and maintaining privilege during the document review stage. If you devote time and energy to checking for privileged documents during this stage, the production stage will be more efficient, and you'll be less likely to experience inadvertent disclosures.

Attorneys should establish a dedicated privilege review layer during document review. Separating it as its own process ensures that team members give it the attention it needs to ensure appropriate protection.

Attorneys should also practice producing privilege logs contemporaneously while gathering and reviewing documents from their clients. Marking documents with the appropriate privilege early in the production process keeps the documents organized and adds another layer of protection against inadvertent disclosure.

In addition, attorneys should incorporate metadata scrubbing during document review so that they can ensure that any document produced has already been scrubbed of metadata.

Ensure that you educate your team on what privileged information may look like. It is unlikely that every team member will look at every document in a review, so you should make sure that whoever does review the documents knows what they are looking for. Plus, the more eyes that are properly trained to look for privilege, the less likely you are to inadvertently produce privileged material.

Practice Pointer: *Train reviewers to recognize privilege by document type, not just by keyword. Board minutes, status reports, and routine-looking correspondence are the categories most likely to get waved through as non-privileged precisely because they don't read like a traditional legal memo. Flag those categories for a second look rather than relying solely on a privileged/non-privileged tag applied on first pass.*

At the Production Stage

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[28] Scott J. Davis & Michael E. Lackey, *Best Practices for Preparing a Clawback Agreement*, Harv. L. Sch. F. on Corp. Governance (Nov. 21, 2012), https://corpgov.law.harvard.edu/2012/11/21/best-practices-for-preparing-a-clawback-agreement/.

When producing documents to an opposing party, attorneys must be especially careful to protect against inadvertent disclosure because of the high risk of inadvertent disclosure during the production stage.[29]

Before beginning production, attorneys should ensure a clawback agreement or protective order governs the matter and/or that the clawback language appears in the production request or order. Even following other best practices could amount to no use if you do not have the appropriate agreement, order, or language protecting you in the event of an inadvertent disclosure.

Immediately before producing the documents, attorneys should also always perform a last spot check for privileged material, even when they are under time pressure. While AI or other technology may assist with a privilege check, attorneys should **always** perform a privilege check themselves and **never** rely on the conclusions of an AI model.

Immediately after or contemporaneously with production, a team should designate a point of contact for clawback demands. That way, one person can gain expertise on the privileged material and can act fast to ensure a prompt response to any inadvertent disclosure if it does arise. Regardless of who that person is, however, attorneys should ensure that everyone on their team, including non-attorney staff like paralegals and litigation support professionals, are trained on privilege recognition. These staff members are often the last eyes on a production.

Practice Pointer: *Name the clawback point of contact, and confirm their availability, before production goes out, not after a clawback demand is already needed. A dispute over inadvertent disclosure often surfaces on a short fuse, and losing time locating the person who knows the production is the kind of delay that can undercut the "reasonable steps to rectify" prong of FRE 502(b).*

After Receiving Party's Production

Document review of an opposing party's production brings with it a different perspective, different concerns, and different best practices. When you receive a production from an opposing party, you should undertake checks to make sure the opposing party has not produced its own privileged information. Even if you are not the party at fault for producing the privileged information, attorneys should notify the party who has inadvertently produced the privileged information and follow the steps set out in FRCP 26(b)(5)(B) to respond to the inadvertent disclosure.

Ensuring your entire team is trained to recognize privileged information helps during document review as well. As soon as a team member recognizes a document may be privileged, they should notify the supervising attorney, who should reach out to the producing party.

You should also make sure your team and your firm have and understand the appropriate steps to take if they encounter privileged material in a production received from an opposing party. Ensuring your team is educated on the proper processes will help keep any future inadvertent

[29] Fed. Testimonial Privileges § 2:30, *Waiver by Inadvertent Disclosure* (Nov. 2025) ("Most cases involve inadvertence during compliance with large document discovery requests").

disclosures by receiving parties — and any disputes concerning them — efficient and cost-effective.

Practice Pointer: *Build the same instinct into your team for material you receive as for material you produce: the moment something looks like it might be privileged, stop, don't forward it internally beyond the person who needs to know, and notify the supervising attorney immediately. Waiting until after the document has circulated to ask the question is what turns an easy notify-and-return into a contested motion.*

When It Happens — Managing the Crisis

If an inadvertent disclosure does occur, attorneys should undertake the following steps. Additionally, attorneys should ensure that their team and firm have established best practices for dealing with inadvertent disclosures that include these steps.

For Producing Counsel

As soon as you think you've inadvertently produced privileged material, **act immediately**. Delay in asserting the clawback may undermine the prong of FRE 502(b) that requires attorneys take "reasonable steps to rectify" inadvertent disclosures.[30]

Upon confirming that you have inadvertently produced privileged material, you should preserve the information until the claim is resolved.[31]

Send a written clawback demand to the party to whom you produced the material. In the demand, you should identify the specific documents that are privileged and the basis for the privilege. You should also refer the receiving party to any clawback agreement or protective order that governs the matter.

If the receiving party refuses to comply, act quickly to seek a court order compelling compliance. If the parties do not reach a resolution, the court will determine whether the information is privileged and whether the producing party complied with any clawback agreement or protective order, and then enter an order accordingly.[32]

Lastly, you must consider whether and to what extent you should notify your client of the inadvertent disclosure.

Practice Pointer: *Document the timeline as you go. when the disclosure was discovered, when the clawback demand went out, and every step taken in between. If the dispute ends up before the court, FRE 502(b)'s "reasonable steps to rectify" element will turn on exactly that timeline, and a contemporaneous record is far more persuasive than a reconstruction after the fact.*

For Receiving Counsel

[30] United States v. Sensient Colors, Inc., No. CIV. 07-1275(JHR/JS), 2009 WL 2905474, at *6 (D.N.J. Sept. 9, 2009) (finding the producing party did not act quickly and diligently enough upon discovering the inadvertent disclosure).
[31] Fed. R. Civ. P. 26(b)(5)(B).
[32] *See, e.g.*, Kaneka Corp. v. Cocrystal Tech. (Jiaxing) Co., 801 F. Supp. 3d 164, 175 (E.D.N.Y. 2025) (finding the producing party had met its burden to show it took sufficient steps to preserve protection of privileged information).

If you discover privileged material or material that may be privileged in a production from another party, you should **immediately stop reviewing** the moment you think it might be privileged. Notify the sender immediately and sequester the document. However, do **NOT** notify your client or any third parties before resolving the dispute. If you inappropriately reveal the information to other parties, you could face sanctions or be disqualified from the case.[33]

If the information has already been shared with you, as in our hypothetical, you should preserve the record and seek guidance from the court on how to proceed.

Practice Pointer: *Resist the instinct to loop in the client for guidance before the privilege dispute is resolved. Confining the circle of people who have seen the material protects your own position if a disqualification or sanctions motion follows, and it avoids compounding the very disclosure problem you're trying to fix.*

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[33] *See, e.g.*, Fed. R. Civ. P. 37 ("Failure to Make Disclosures or to Cooperate in Discovery; Sanctions"); Simmions v. Pierless Fish Corp., 592 F. Supp. 3d 68 (E.D.N.Y. 2020) (holding that disqualification of employees' counsel who read an e-mail mistakenly sent by employer's counsel to an attorney with the same first name as the client-employer, inadvertently disclosing settlement strategy, was warranted).

Faculty

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Hon. Elizabeth L. Gunn is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." In 2022, she was recognized by the Bar Association of the District of Columbia as its Judicial Honoree and recipient of the BADC's Suzanne V. Richards Foundation Grant. Judge Gunn serves on the advisory board of the *American Bankruptcy Law Journal* and is a coordinating and associate editor of the *ABI Journal*. In addition, she sits on the boards of the Federal Bar Association's Bankruptcy Section, International Women's Insolvency & Restructuring Confederation, American Bar Association, National Conference of Federal Trial Judges and the Chesapeake Chapter of the Turnaround Management Association, and she hosts the popular American Bar Association Business Law Section Podcast "Bad Boys of Bankruptcy." She also is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification.

Judge Gunn received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

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