



## ***Panel 2: Protecting Privilege and Confidentiality in Civil Litigation, Part 1***

The 13th Annual Sedona Conference Institute:  
Protecting Privacy, Confidentiality, and Privilege in Civil Litigation  
March 7–8, 2019  
The Ballantyne Hotel & Lodge, Charlotte, NC

# Dialogue leaders

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- ❖ Corey Lee
  - ❖ Hunton Andrews Kurth, Miami, FL
- ❖ Hon. Andrew J. Peck (ret.)
  - ❖ DLA Piper LLP, New York, NY
- ❖ Matthew Prewitt
  - ❖ Schiff Hardin LLP, Chicago, IL
- ❖ Jonathan Redgrave
  - ❖ Redgrave LLP, Chantilly, VA
- ❖ Hon. Leda Dunn Wettre
  - ❖ U.S. District Court, District of New Jersey, Newark, NJ



# Roadmap

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- ❖ Remember the basics
    - ❖ Attorney-Client Privilege
    - ❖ Attorney Work Product Doctrine
    - ❖ Special Circumstances
    - ❖ Privacy Interests
  - ❖ And now it gets more complicated
    - ❖ Speed of business combined with dual roles of in-house counsel
    - ❖ Rapidly evolving laws addressing privacy rights
    - ❖ Massive volumes of ESI
    - ❖ ESI of types far different from paper
  - ❖ More and more disputes are arising in cases, large and small – why?
  - ❖ Solutions?
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# Attorney Client Privilege

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- ❖ To establish the attorney-client privilege, there must be:
    - ❖ a communication
    - ❖ between an attorney
    - ❖ and a client
    - ❖ that was confidential and remained confidential
    - ❖ For the purpose of seeking or giving legal advice of any kind from the attorney (not business advice)
  - ❖ Extends to employees who are in a position to control decisions or have a need to know the legal advice
  - ❖ Waiver occurs when third or fourth bullet is compromised
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# Attorney Work Product

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- ❖ **Attorney Work Product comprises:**
    - ❖ Material prepared or mental impressions developed in anticipation of litigation for trial by or for a party or a party's representatives, including the party's attorneys, consultants, employees, agents, etc.; or
    - ❖ A communication made in anticipation of litigation or for trial between a party and the party's representatives, including the party's attorneys, consultants, employees, agents, etc.
  - ❖ **Federal – Must be involved in or anticipating litigation**
    - ❖ Can include work done by non-attorneys
  - ❖ **State – Can include all attorney work**
    - ❖ E.g., California
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# Protection of Work Product

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- ❖ Core Work Product – The work produce of an attorney or an attorney’s representatives that contains the attorney’s mental impressions, opinions, conclusions, or legal theories **is not discoverable**.
- ❖ Other Work Product – Any other work product is discoverable only upon a showing that the party seeking the discovery has a substantial need of the materials in the preparation of that party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by any other means.
- ❖ Waiver occurs when there is indifference to protecting litigation strategy = a significant likelihood that an adversary will obtain it.

# Special Circumstances where Privilege or Protection May Apply

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- ❖ Consultants or Agents
    - ❖ Functional equivalent test (A/C Priv)
    - ❖ Necessary to attorney giving legal advice (translator)
    - ❖ WP typically will be maintained
  - ❖ Internal Investigations
  - ❖ Expert Reports
  - ❖ Self-Critical Analysis
    - ❖ High level of public interest in improving the business operations (hospitals)
  - ❖ Subsidiaries
  - ❖ Joint Defense/Common Interest
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And now the complications...

# Consider...

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- ❖ The speed at which businesses operate, including the permutations of joint ventures and other collaborative structures, creates significant challenges for privilege and privacy protections in litigation.
- ❖ The roles of lawyers within organizations continues to morph, and many lawyers routinely straddle between business and legal advice modes.
- ❖ The speed at which ESI is generated and transmitted creates enormous volumes of potentially privileged and protected materials that must be identified and appropriately treated.
- ❖ The variety of ESI creates enormous challenges to identify the appropriate context to enable accurate and defensible determinations of privileges and protections.
- ❖ The task of preparing privilege logs has been routinely delegated to junior associates and staff counsel at vendors.

# Expected vs. Realistic Communication

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- ❖ How much must an attorney be involved for the privilege to attach?
  - ❖ Cc'd on email
  - ❖ Attendance at committee meeting or member of a committee
  - ❖ Mention of the attorney's advice amongst non-attorneys
  - ❖ Slides labeled with "A/C Priv" in a presentation sent to the Board of Directors
  - ❖ Business vs. Legal Purpose
- ❖ Application to real world
  - ❖ How do business personnel really communicate to in-house counsel?
  - ❖ What does cc: mean within a company?
  - ❖ Is the request for legal advice made on every subsequent communication – what is the short-hand lingo?

# Making Determinations of Privilege in Document Reviews



- ❖ Young Associates +
- ❖ Managed Review Attorneys
- ❖ = Attorneys who often lack:
  - ❖ Training on the correct scope of privileges
  - ❖ A direct line of communication to client to answer questions or raise issues
  - ❖ The ability to make independent decisions when it does not fall into a bright-line rule
  - ❖ Courage to make a decision that document is not privileged
  - ❖ Authorization to vary (slow down) their rate of review to give enough time to make a solid privilege analysis

# Additional Issues in Large Document Reviews

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- ❖ Rolling productions = rolling privilege logs?
  - ❖ Inconsistent coding across duplicates and email threads
  - ❖ More reviewers – done quicker but with increased inconsistency
  - ❖ Short deadlines lead to overbroad assertions – privilege review takes time
  - ❖ Transparency – too much or too little
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# Disputes?

# Disputes are proliferating...

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- ❖ Metadata logs easily challenged as insufficient
- ❖ Automatic coding of claims leads to rote descriptions that often fail to provide sufficient basis for claims asserted
- ❖ Withholding of documents simply due to labelling subject to challenge and arguments of abuse/waiver
- ❖ Inconsistent treatment of “family” members leads to arguments of abuse/waiver
- ❖ High volume of total productions leading to high volume of withheld documents, raising questions as well as multiplying opportunities for error, including the failure to log documents in a timely manner

# Disputes are proliferating...

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- ❖ Traditional logging by junior associates/contract lawyers leads to overly-conservative calls that are exacerbated in impact due to volume
- ❖ Process is usually set up to frame disputes about the contours of privilege claims at the end of discovery, leaving little room for error
- ❖ The notion of in-camera review by a court of thousands of documents is not feasible
- ❖ Sanctions sought include fee awards, monetary sanctions, and waiver of privilege claims

# Solutions?

# Identifying privileged material pre-litigation



- ❖ Starts at the company
  - ❖ Proper labeling of documents that are privileged or protected
  - ❖ Clearly state that legal advice is being requested “For the Purpose of Legal Advice” or “Created at the Direction of Legal Counsel”
  - ❖ Add attorney to the To/From line of memorandum containing legal advice
  - ❖ Limit circulation to those with the “need to know”
  - ❖ Be smart about how you write
  - ❖ Do not “over-label” documents as privileged or work product
- ❖ Develop a privilege playbook
- ❖ Leverage prior privilege reviews of documents common between matters
- ❖ Know how to conduct pre-litigation investigations and interviews

# Technical tips to segregate privilege documents from production

- ❖ Use technology to help sift/sort/identify potentially privileged documents and contextual materials.
- ❖ BUT remember that technological tools are only a starting point and not a complete solution or substitution for human judgment. Do not agree to a linear review after such a tool is applied as the results can be vastly overbroad.
- ❖ Use email threading to provide critical relationships between documents, and batch documents for review (even back at the responsiveness review stage) by threads so that a single attorney is reviewing and making a decision about the entire conversation.
- ❖ Consideration of exact and near duplicates is a must. Different privilege assertions can be maintained for the same document in different situations, but careful consideration needs to be made to the evolution of the document/communication.

# 502(d)!!!!

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- ❖ Ensure that in federal court cases that you have the court enter an appropriate Fed. R. Evid. 502(d) Order to protect against any waiver of privilege claims in the event of an inadvertent production as well as in the event of any other type of production.
- ❖ What happens if you don't have a 502(d) Order?
- ❖ What is case law telling us?

# Fed. R. Evid. 502(b)

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- ❖ **(b) Inadvertent Disclosure.** 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).

# Fed. R. Evid. 502(d) & 502(e)

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- ❖ **(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.

# Basic 502(d) Order

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- ❖ 1. The production of privileged or work-product protected documents, electronically stored information (“ESI”) or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).
  - ❖ 2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.
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# Recent Cases

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- ❖ *Irth Solutions, LLC v. Windstream Communications LLC*, No. 2:16-CV-219, 2017 WL 3276021 (S.D. Ohio Aug. 2, 2017).
- ❖ *Fairholme Funds, Inc. v. United States*, 134 Fed. Cl. 680 (Fed. Cir. 2017).
- ❖ *Winfield v. City of New York*, 15-cv-05236, 2018 WL 2148435 (S.D.N.Y. May 10, 2018).

# Where Does Fed. R. Civ. P. 29 Fit In?

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- ❖ Early discussion and agreement
  - ❖ Submission of sample privilege logs early in the case
  - ❖ Format of logs should be searchable and sortable allowing for analysis
  - ❖ Create process to address data and documents subject to privacy protections, including international documents
  - ❖ Iterative process
  - ❖ Cost effective yet still workable for the parties
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# Options for privilege logs: traditional, metadata, categorical

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- ❖ Traditional logs are counterproductive and often useless
- ❖ Metadata logs can be beneficial ... to an extent
- ❖ Categorical logging is catching on, but not always the best way to handle
- ❖ Privilege review and logging should be iterative – never linear from the get-go
- ❖ Avoid separately logging each of the documents in an email thread
- ❖ Leverage technology tools for efficiency and accuracy

# Options for guidance and challenges

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- ❖ Consider seeking early guidance on substantive issue affecting privilege assessments
  - ❖ Could involve court rulings on exemplar documents, including consideration of supplemental materials for context
- ❖ Consider sampling as a potential way to assess validity of claimed privileges
  - ❖ Not a substitute for proper descriptions/explanations for withholding (whether categorical or document-by-document)
  - ❖ Need for random sampling, not biased selection

# More Privilege Log Considerations

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- ❖ When to call in special counsel to help get privilege logs right from the get-go or to help fix logs that are deficient
    - ❖ TIP: Get it right the first time – revised logs are more expensive
  - ❖ When to call in a special master for privilege determinations
  - ❖ When is an ‘in camera’ review appropriate
  - ❖ Certification of log by trial counsel or the party
    - ❖ What does it mean?
    - ❖ When should it happen?
  - ❖ Rolling privilege logs – yea or nay
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# Questions and comments?

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